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* It is wrongly printed as 17 Cr L J 265.

† At Col. 139 read Ma Sein v. Emperor for Ambica Tewary.

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Account Books.

(1) *Entries in account books—Books not proved to be kept in regular course of business—Objection as to admissibility, when to be taken.*

Any objection to the admissibility of entries in account books on the ground that they were not proved to have been kept in the regular course of business ought to be taken at the time of the trial. If the objection were then taken the matter could be very easily rectified by formal evidence being given that they were kept in the regular course of business. *In re Madu Chinnagi Reddi*, 17 Cr. L.J. 73=32 Ind. Cas. 665.

ABDUR RAHIM and PHILLIPS, JJ.

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(2) Right to re-call prosecution witnesses for cross-examination. See CRIM. PRO. CODE, No. 264, U.B.R. (1916), 2nd Qr., p. 108.

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(1) *Acquittal—Appeal—Duty of Court in dealing with—Circumstances not justifying interference—Ss. 417 and 439, Crim. Pro. Code—Making preparations or assembling for the purposes of committing dacoity—Ss. 399 and 402, Penal Code, Ingredients of these offences defined—Assembly for the purpose of breaching Railway lines or damaging telegraphs, distinct offences—Value of an approver's evidence to be seen in each particular case—Corroboration—Evidence Act, S. 114, cl. (b)—High Court's power of acquitting a prisoner without appeal.*

1. An acquittal cannot be set aside in appeal simply on the ground that the appellate Court might have taken a different view of the evidence for the prosecution had it tried the accused person as a Court of Original Jurisdiction, where a Criminal Court which has the advantage, not possessed by the appellate Court, of hearing the statements of and seeing the demeanour of the witnesses, has acquitted an accused person after fully and carefully considering the whole evidence in the case and has given reasonable grounds for arriving at the various conclusions.

It is also no ground for setting aside an acquittal that it is based at most on a doubtful weighing of facts (a).

2. An assemblage of 5 or more persons for the purpose of concealing plans for committing a dacoity yet remote or contingent or for discussing the possibility of committing it is not

Acquittal—(Concluded).

within the meaning of S. 402, Penal Code, which postulates a determination to commit a dacoity.

3. Assembling for the purpose of adopting measures, making preparations or even unsuccessfully attempting to break a Railway line, to damage telegraph posts, or to cut telegraph wires in order to cause trouble and injury to the Government, but without expecting any illegal gain therefrom, is not at all sufficient to prove either an offence under Ss. 399 or 402 of the Penal Code, or to corroborate an approver's evidence to establish commission of the crimes under the aforesaid two sections, although the above-mentioned acts constitute serious offences punishable under other Laws.

4. No hard and fast rule can be laid down either that in no case should an approver's evidence be rejected as regards a particular incident simply because on that point it happens to be uncorroborated, or that, in every case, regardless of all other facts and considerations, an approver's evidence must be thrown aside as worthless unless it is corroborated by independent evidence of a trustworthy character.

The question of the value to be attached to the statements of an accomplice or approver must be decided in every case upon the particular and peculiar circumstances of that case.

5. Under S. 439, Crim. Pro. Code, High Court can acquit a prisoner even if he has not appealed against his conviction. *Blehinta v. The Crown*, 7 P.W.R. 1916 (Cr.)=82 Ind. Cas. 833=17 Cr. L.J. 97.

JOHNSTONE, C.J. and RATTIGAN, J.

References:—(a) 27 P.W.R. 1914 (Cr.) ; 7 P. 11, 1904 (Cr.) ; 22 Ind. Cas. 736, F.

(2) *Revision—Criminal cases—Burden of proof—Benefit of doubt—Evidence for the prosecution found to be weak and biased.*

The Magistrate convicted the accused of the offence of theft and the conviction was upheld on appeal. On revision the Chief Court set aside the conviction on the ground that the Magistrate having found that the evidence for the prosecution was weak and biased and it was possible that the accused removed the property stolen (grass) under the impression that he had the right to do so, it was his duty to acquit the accused. *Ram Jas v. The Crown*, 66 P. L.R. 1916=27 P.W.R. 1916 (Cr.)=17 Cr. L.J. 303=35 Ind. Cas. 175.

RATTIGAN, J.

(3) Appeal from—Appellate Court, position of—Practice as to interference by appellate Court. See APPEAL, No. 4, 17 Cr. L.J. 540.

(4) Order of discharge amounting to acquittal—Sessions Judge has no jurisdiction to order further enquiry. See CRIM. PRO. CODE, No. 317, 17 Cr. L.J. 96.

(5) Interference with acquittal in revision when justifiable and when not. See CRIM. PRO. CODE, No. 290, 9 Bur. L.T. 47.

(6) Acquittal—Interference in revision—Practice. See PENAL CODE, No. 40, 30 C.W. N. 832.

Acts.

- 1.—IMPERIAL ACTS.
- 2.—BENGAL ACTS.
- 3.—BOMBAY ACTS.
- 4.—BURMA ACTS.
- 5.—MADRAS ACTS.
- 6.—U. P. ACTS.
- 7.—PUNJAB ACTS.

1.—Imperial Acts.

Act XVIII of 1880 (Judicial Officers' Protection).

See **ACT I OF 1910 (PRESS)**, No. 3, (1916) 2 M.W.N. 497.

Act XIII of 1859 (Workmen's Breach of Contract).

(1) *Musician in a band whether a 'workman' within the meaning of the Act. Re Rosario Quadros*, 88 M. 551=16 Cr. L.J. 629=30 Ind. Cas. 453. See Final Part, 1915, Col. 4.

(2) *S. 1—Agreement to pay off advance by delivering ballast—Inapplicability of the Act.*

Where the accused received an advance of money from the complainant and contracted to pay it off by delivering ballast.

Held, that there was no relationship of labourer and employer between the parties and that the provisions of Act XIII of 1859 were inapplicable to the case. *Crown, through Nadar Din v. Kazal Lahli*, 2 P.R. 1916 (Cr.)=3 P.W.B. 1916 (Cr.)=32 Ind. Cas. 578=17 Cr. L.J. 86.

SHADI LAL, J.

(3) *Ss. 1 and 5—Breach of contract—Jurisdiction of Magistrate where employer resides or carries on business.*

When the Workmen's Breach of Contract Act has been extended under S. 5 to an area outside a Presidency town, residence or earning on business by the employer within that area confers a right to prefer the complaint to the nearest Magistrate empowered in that area.

Under S. 1 of the Act it is clear that what gives jurisdiction is the fact of the employer residing or carrying on business within a Presidency town. If the employer resides or carries on business within a Presidency town he can prefer his complaint to the Magistrate or Police irrespective of the place where the work was to be performed or where the breach was committed (a). *All Mohamed v. The Crown*, 10 S.L.R. 56=17 Cr. L.J. 308=35 Ind. Cas. 494.

PRATT, J.C. and CROUCH, A.J.C.

Reference:—25 O. 637, F.

(4) *S. 2—Applicability of Act—Contractor not artificer, labourer or workman.*

The Workmen's Breach of Contract Act applies only to persons falling within the definition of "artificer, labourer or workman." To make the Act applicable the relation between the parties to the contract must be that of labourer and employer of labour. A contractor is not ordinarily an artificer, labourer, or workman, and the Act does not apply to a contractor of labour or an agent for the supply of goods

1.—Imperial Acts—(Continued).

Act XIII of 1859 (Workmen's Breach of Contract)—(Concluded).

unless such person has contracted to supply his personal labour. *Baba Khan v. Maung Ba Naing*, 9 Bur. L.T. 108=17 Cr. L.J. 398=35 Ind. Cas. 830.

U KIN, J.

(5) *S. 5. See No. 3, supra.*

Act XLY of 1860.

See **PENAL CODE**.

Act V of 1861 (Police).

(1) *Ss. 7, 36—Police constable punished departmentally for taking bribe—Whether can be punished again under S. 163, Penal Code—Scope of S. 7, Police Act. The Crown v. Gul Muhammad*, 26 P.R. 1915 (Cr.)=16 Cr. L.J. 788=31 Ind. Cas. 644. See Final Part, 1915, Col. 5.

(2) *Ss. 17, 19—Ferry dispute—Object of appointing special constables—Prosecution under S. 19, when illegal.*

The only legitimate object of appointing special constables is to strengthen the ordinary Police force by the addition of suitable persons. When such appointments are not made with the object above stated, proceedings under S. 19 of the Police Act will not be permitted.

So where the members of one party to a ferry dispute were appointed as special constables, but no instructions for the performance of any kind of Police duty were issued to them and the circumstances showed that it was never really intended to employ them as Police officers, *held*, their prosecution under S. 19 of the Act for refusing to serve as special constables was illegal. *Fardip Singh v. Emperor*, 43 O. 277=20 O.W.N. 855=17 Cr. L.J. 197=34 Ind. Cas. 309.

SHARFUDDIN and CHAPMAN, JJ.

(3) *S. 19. See No. 2, supra.*

(4) *S. 23—Preventive powers of Police officers—S. 149, Crim. Pro. Code—Power to stop pws held without license.*

There is no authority for the proposition that the Police are empowered to prevent only cognizable offences. Some colour is given to this proposition by S. 149, Code of Criminal Procedure, which provides only for the prevention of cognizable offences by the Police. But S. 23 of the Police Act, 1861, appears to give wider powers for preventing offences in general.

The word "offences" in that section is not defined in the Police Act, and it does not appear to be governed by the definition of "offence" in S. 40 of the Penal Code (enacted in the previous year 1860). The Police Act was clearly intended to give the Police force, then newly formed, extensive powers of preventing breaches of the law, and it is not outside their powers to stop a pws which is being held, without a license. *King-Emperor v. Nga Kala*, 3 L.B. 829=17 Cr. L.J. 347=35 Ind. Cas. 528.

TWOMEY, J.

I.—Imperial Acts—(Continued).**Act V of 1861 (Police)—(Concluded).**

(5) S. 32—*Order forbidding jattrawls to frequent railway stations—Order illegal.*

An order was issued by the Superintendent of Police forbidding persons known as *jattrawls* to frequent the railway station, thoroughfares and other public places at Moghal Sarai without having first obtained a license. The accused was a *Gangputra* and he was convicted under S. 32 of the Police Act of having acted as a *jattrawal* without a license:

Held, that having regard to S. 32 and the three preceding sections a general order like the one in question was *ultra vires* and the conviction was illegal. *Krishna Lal v. Emperor*, 14 A.L.J. 1072=17 Cr. L.J. 448=35 Ind. Cas. 1008.

LINDSAY, J.

(6) S. 34, (6) (1)—*'Riotous'—Quarrelling in a public street—Interference of Chief Court.*

Where the Magistrate convicted the accused of an offence under sub-S. 6 (1) of S. 34 of the Police Act for quarrelling in the Bazaar at Dalhousie and awarded sentences of simple imprisonment, and the convictions and sentences were affirmed on appeal, the Chief Court refused to interfere on the ground that a finding of fact could not be impeached on revision and the decision was not contrary to law, for the word 'riotous' is sufficiently wide to cover the case of a person who creates a row in a thoroughfare. *Jagat Ram v. The Crown*, 52 P.L.R. 1916=29 P.W.R. 1916 (Cr.)=36 P. R. 1916 (Cr.)=17 Cr. L.J. 273=34 Ind. Cas. 993.

SHADI LAL, J.

(7) S. 36. See No. 1, *supra*.

Act III of 1867 (Public Gambling).

Ss. 1 and 3—*'Place'—Interpretation—Space enclosed by a low wall of loose bricks.* *Emperor v. Mian Din*, 13 A.L.J. 1070=38 A. 47=16 Cr. L.J. 826=31 Ind. Cas. 1002. See Final Part, 1916, Col. 5.

Act I of 1871 (Cattle Trespass).

(1) S. 10—*Seizure of cattle by watchman or servant—Legality*

Under S. 10 of the Act, the cultivator or occupier is entitled to give general instructions to his watchman watching the crops or other servants to seize all trespassing cattle, and the watchman or servant so instructed is entitled to seize cattle trespassing on land under his charge. *In re Subbraya Pillai*, 16 Cr. L.J. 772=31 Ind. Cas. 372.

AYLING and PHILLIPS, JJ.

(2) Ss. 10, 24—*Person in possession of land—Right to seize cattle—Question of title whether affects the rights.*

A person in exclusive possession of a piece of land is the occupier of the land within the meaning of S. 10, Cattle Trespass Act, and he, as such occupier, is entitled to seize or cause to be seized any cattle trespassing on the land in his possession.

The question of title does not affect the right of the occupier to seize the cattle trespassing

I.—Imperial Acts—(Continued).**Act I of 1871 (Cattle Trespass)—(Concluded).**

on the land in his possession. *The Crown v. Sandagar*, 3 P.R. 1916 (Cr.)=32 Ind. Cas. 655=17 Cr. L.J. 63.

SHADI LAL, J.

Reference:—(a) 23 W.R. (Cr.) 2, R.

(3) S. 24. See No. 2, *supra*.

Act I of 1872.

See EVIDENCE ACT.

Act X of 1873 (Oaths).

(1) S. 4—*False statement in the course of a non-judicial inquiry—Indian Penal Code*, S. 193—Reg. VIII of 1827.

Hayward, A.J.C.—The appellant has been convicted of giving false evidence in a proceeding before the Additional City Magistrate, under S. 193, Indian Penal Code.

The appellant's false statement was made in proceedings held by the Additional City Magistrate upon an enquiry made as to the true heir of a deceased driver by the North-Western Railway. It did not appear, however, that the Magistrate had any authority to hold any proceedings in such a matter.

Held, (i) that the proper course would have been to have referred the parties to the District Court for an enquiry under Reg. VIII of 1827, or other special Act.

(ii) There was no authority for such proceedings by a Magistrate under the Railways Act.

(iii) That the Magistrate in holding those proceedings was not a person authorized to administer an oath or affirmation in the exercise of powers conferred upon him by law within the meaning of S. 4 of the Oaths Act X of 1873.

(iv) The appellant was not legally bound by an oath or by an express provision of law to state the truth in those proceedings within the meaning of S. 191 of the Indian Penal Code.

(v) That he could not be legally convicted of having given false evidence under S. 193 of the Indian Penal Code (a). *Allahwarayo v. The Crown*, 10 S.L.R. 64=17 Cr. L.J. 368=35 Ind. Cas. 672.

HAYWARD, A.J.C.

Reference:—(a) 6 A. 103, F.

(2) Ss. 4, 5, 12—*Inquiry prior to issue of search warrant under S. 100, Crim. Pro. Code—Judicial proceeding—Duty to speak truth—Court.* See CRIM. PRO. CODE, No. 2, 34 P. R. 1916 (Cr.).

(3) S. 5. See No. 2, *supra*.

(4) Ss. 6, 13—*Evidence—Competency of person of tender years—Evidence Act*, S. 118—*Omission to administer oath to a child witness.* *Dhan Ram v. Emperor*, 13 A.L.J. 1072=38 A. 49=16 Cr. L.J. 829=31 Ind. Cas. 1005. See Final Part, 1915, Col. 6.

(5) Ss. 6, 13—*Affirmation by Hindu witness—Deliberate omission to administer oath.* See CRIM. PRO. CODE, No. 281, 9 Bur. L.T. 183.

(6) S. 12. See No. 2, *supra*.

(7) S. 13. See Nos. 4 and 5, *supra*.

I.—Imperial Acts—(Continued).**Act XIV of 1875 (Scheduled Districts).**

S. 6—Act XI of 1846, S. 4—Rules made under the Act—Offence committed at Boripanda in Nala State—Jurisdiction of Agent for the Mewas Estate to try the accused—High Court, power of, to call for additional evidence, on appeal by accused—Crim. Pro. Code (Act V of 1898), S. 429.

The Agent for the Mewas Estates has jurisdiction to try the case of a murder committed at the village of Boripanda in the Nala State.

The High Court of Bombay has power to entertain the appeal of an accused person convicted by the Agent (S. 4 of Act XI of 1846 and r. 44 made thereunder): and if necessary, to resort to the provisions of S. 428 of the Crim. Pro. Code for the purpose of obtaining any additional evidence that may be necessary. *Emperor v. Khalpa Ranchod*, 18 Bom. L.R. 789=3 Bom. Cr. G. 208=17 Cr. L.J. 533=36 Ind. Cas. 581.

SCOTT, C.J. and HEATON, J.

Act I of 1878 (Opium).

- (1) *S. 9 (c)—Illicit possession of opium—Possession of substance unfit for use as opium and containing only traces of opium.*

The accused were convicted under S. 9 (c) of the Opium Act for being in illicit possession of two and a half seers of opium. The substance seized from the possession of the accused was on chemical analysis found to contain traces of opium amounting to less than one per cent, and to be unfit for use as opium. There was no evidence as to whether the traces of opium could be extracted from the mass and used as opium: *Held*, that the conviction could not be sustained. *Mahomed Kazi v. King-Emperor*, 20 C.W.N. 1206=17 Cr. L.J. 412=35 Ind. Cas. 972.

SANDERSON, C.J. and WALMSLEY, J.

- (2) *Ss. 9, cls. (c) and (e) and 3—Opium—Possession by servant—Master's liability—Onus of proof—Acquittal—Appeal against the same—When to be allowed—Export—Definition under S. 3.*

N, on entering the train for Delhi, was searched, but only a small and legitimate amount of opium was found upon him. His servant A, who was not with him, but entered the train at a later stage, was searched and a large quantity of opium (10 seers 6 chittak) was found concealed in his bedding. A stated that he was in possession of the opium under the directions and on behalf of his master, N, while N asserted that he knew nothing about the matter and that A's possession was on his own account. Upon these facts, the Magistrate convicted N, not only under S. 9, cl. (c) of the Opium Act, of the offence of being in possession of opium unlawfully, but also, under S. 9, cl. (e) of the Act, of the offence of exporting the same unlawfully. The Sessions Judge, on appeal, set aside the convictions, and against the acquittal the Government preferred an appeal to the Chief Court.

I.—Imperial Acts—(Continued).**Act I of 1878 (Opium)—(Concluded).**

Held that the conviction under S. 9, cl. (e), Opium Act, was wrong as there was no 'export' of opium (vide definition of the term 'export' in S. 3 of the Act).

Held, further, that, as the opium was found in the possession of A, it was for the prosecution to prove affirmatively and clearly that the possession of A was merely that of a servant acting under the authority of his master N (a).

Held also that, the prosecution having failed to prove that A was in possession of the opium on N's behalf N could not be convicted of an offence under S. 9, cl. (c) of the Act.

Held also, that the finding of the Sessions Judge was not so clearly and palpably wrong on the evidence as to justify the setting aside of his judgment of acquittal (b). *The Crown v. Nawab*, 15 P.R. 1916 (Cr.)=46 P.W.R. 1916 (Cr.)=17 Cr. L.J. 194=34 Ind. Cas. 306.

RATTIGAN and SHAH DIN, JJ.

References:—(a) 39 O. 344, F. (b) 7 P.R. 1904 (p. 24) (Cr.), R.

- (3) *Ss. 9, 15. See PENAL CODE, No. 75, 20 C.W.N. 1294.*

- (4) *S. 15. See No. 3, supra.*

Act VII of 1878 (Forest).

- (1) *Ss. 25 (b), 76—Punjab Government Notifications No. 61, 26th January 1897, r. 28 and No. 437, 3rd October 1904, r. 1—“Sets fire to” meaning of.*

Held, that, a person is said to set fire to a thing if he puts a match to it or sets it on fire directly, and not if it catches fire as an indirect consequence of his act.

The accused kindled a fire in his master's garden which spread to an unclassified forest, and thence to a reserved forest:

Held, that the accused could not be said to have set fire to either of the forests within the meaning of S. 25 (b) of the Forest Act, but he is guilty under S. 76 of the Act. *Rao v. The Crown*, 51 P.W.R. 1916=20 P.R. 1916 (Cr.)=17 Cr. L.J. 458=36 Ind. Cas. 139.

SIR DONALD JOHNSTONE, C.J. and SCOTT-SMITH, J.

- (2) *S. 41, cl. (b), sub-cl. (a), r. (4)(a)—Rule ultra vires.*

Rule 4, cl. (a) of the rules made under S. 41 of the Forest Act is *ultra vires*. Hence the prohibition contained in the said rule about the moving of firewood from private land without a certificate from the holder or manager of such land is not a proper prohibition. Clause (b), sub-cl. (a) of S. 41 of the Forest Act under which the said r. (4) is made only provides for passes being issued by duly authorized officers; it does not authorize the issue of certificates by private land-owners. *Witho v. The Crown*, 10 S.L.R. 9=17 Cr. L.J. 364=35 Ind. Cas. 668.

PRATT, J.C. and CROUCH, A.J.C.

- (3) *S. 76. See No. 1, supra.*

I.—Imperial Acts—(Continued).**Act XI of 1878 (Arms).**

- (1) Ss. 19 (f), 20—*Wrongful possession of arms—Proof—Evidence Act (I of 1872), S. 25—Admission before Police, inadmissibility of.*

For the purpose of supporting a conviction under Ss. 19 (f) and 20 of the Indian Arms Act (XI of 1878) the articles discovered must be clearly proved to have been in the possession of the accused.

Admissions made to the Police are generally inadmissible as evidence under S. 25, Evidence Act. *Nga Tha Ku v. Emperor*, 17 Cr. L.J. 512=36 Ind. Cas. 480.

TWOMEY, J.

(2) Ss. 19 (f) and 20—*Revolver found in pocket of one of two men sitting together—When both guilty—No concealment.* *Udham Singh v. The Crown*, 27 P.W.R. 1915 (Cr.)=16 Cr. L.J. 637=30 Ind. Cas. 461. See Final Part, 1915, Col. 9.

(3) Ss. 19-F., 20—Commitment to the Court of Sessions by the High Court in revision. See CRIM. PRO. CODE, No. 310, 20 C.W.N. 732.

- (4) Ss. 19 (f), 20 and 29—*Sanction when necessary—Irregularity, when not curable—Crim. Pro. Code, S. 537.*

Proceedings may be instituted against any person under S. 20 of the Arms Act for the secret possession of arms in contravention of the provisions of S. 14 or S. 15 without previous sanction under S. 29. If however in such a case a Magistrate finds that the intention to conceal the possession is not made out he should discharge the accused under S. 20. Proceedings under S. 19 (f) may then be instituted if and when the necessary sanction thereto is given under S. 29.

The absence of sanction when required under S. 29 is a defect that cannot be cured by S. 537, Crim. Pro. Code.

Per Parlett, J.—It is the want of sanction required by S. 195 alone which is curable under S. 537 and the absence of sanction required by any other provision of law cannot be so remedied. To take the contrary view would render almost nugatory the requirements of the law regarding sanction. The Legislature has enacted with respect to certain offences that no Court shall take cognizance of them or, in the case of S. 29 of the Arms Act, that no proceedings shall be instituted against any person in respect of them, without the previous sanction of a specified authority. Without such sanction a Court is not competent to take cognizance of or to hold any proceedings in respect of such offences, and if it does so its proceedings, unless covered by cl. (b) of S. 537, are entirely without jurisdiction and invalid. The absence of sanction when required under S. 29 of the Arms Act is a defect fatal to any proceedings held without such sanction. *Po Cheln v. King-Emperor*, 8 L.B.R. 452=17 Cr. L.J. 209=34 Ind. Cas. 341 (F.B.).

FOX, C. J. TWOMEY, PARLETT and YOUNG, JJ.

I.—Imperial Acts—(Continued).**Act XI of 1878 (Arms)—(Concluded).**

- (8) S. 20—*Heavy sentence, reduction of.*

Having regard to the circumstances of the present case the sentence of three years' rigorous imprisonment passed by the lower Court was reduced to one of three months' rigorous imprisonment. *In re Blamboyll Kutiaaherli Ahamad*, 17 Cr. L.J. 80=32 Ind. Cas. 672.

AHDUR RAHIM and AYLING, JJ.

(6) S. 20. See EVIDENCE ACT, No. 12, 72 P.L.R. 1916.

(7) S. 20. See Nos. 1 to 4, *supra*.

(8) S. 29. See No. 4, *supra*.

Act XVIII of 1879.

See LEGAL PRACTITIONERS ACT.

Act VI of 1882.

See COMPANIES ACT.

Act IV of 1889 (Merchandise Marks).

- (1) S. 15—*Prosecution more than three years after the first offence—Limitation.*

Although a trade-mark is false and fraudulent the accused is not to be dealt with criminally unless the prosecution has been filed within the time limited by S. 15 of the Merchandise Marks Act (IV of 1889).

The expression first offence in the above said section within 3 years of which the prosecution must be filed "must be construed as the first offence of the series. The recourse to the Criminal Courts is only provided as a speedy remedy to traders who are diligent. If the words 'first offence' were applied to the most recent instance of use of a false trade-mark it would be open to the party aggrieved to stand by for years and then take action, and this construction would render the provision of law as to limitation entirely nugatory.

Hence a prosecution filed more than three years after the accused first imported goods with a false trade mark is barred under the above section. *Jagan Nath v. The Crown*, 10 S.L.R. 45=17 Cr. L.J. 337=35 Ind. Cas. 671.

PRATT, J.C.

(2) S. 15. See TRADE MARK, No. 1, 17 Cr. L.J. 488.

Act IX of 1890.

See RAILWAYS ACT.

Act IX of 1894 (Prisons).

(1) S. 42—Detention in Civil Prison whether amounts to imprisonment. See CRIM. PRO. CODE, No. 277, 17 Cr. L.J. 480.

Act XII of 1896 (Excise).

- (1) S. 51—*Joint possession—General Clauses Act, S. 13.*

Under S. 51 of the Excise Act the joint possession by several persons of more fermented liquor than can be sold retail to one would be an offence (a).

If two persons having each bought 4 quarts of liquor put them together and carry them home, each of them is in the contemplation of

1.—Imperial Acts—(Continued).**Act XII of 1896 (Excise)—(Concluded).**

law in possession of the whole. **King-Emperor v. Nga Pyu**, 8 L.B.R. 464=17 Cr. L.J. 476=36 Ind. Cas. 156.

FOX, C.J., ORMOND and TWOMEY, JJ.

Reference:—(a) P.J.L.B. 405, F.

(2) S. 51—*Possession of over 4 quartz of tar.* **King-Emperor v. Nga Aw**, 8 Bur. L.T. 246=8 L.B.R. 217=32 Ind. Cas. 654=17 Cr. L.J. 62. See Final Part, 1915, Col. 12.

Act VIII of 1897 (Reformatory Schools).

S. 31—*Youthful offender—Punishment.*

S. 31 of Act VIII of 1897, read with the definition of youthful offenders, enables practically any Court in the case of an offender under S. 15 to deliver him to his parents with or without sureties for his future good behaviour. **Emperor v. Abdul Aziz**, 14 A.L.J. 1158=17 Cr. L.J. 524=36 Ind. Cas. 492.

WALSH, J.

Act X of 1897 (General Clauses).

(1) See ACT I OF 1910 (PRESS), No. 1, (1916) 2 M.W.N. 385.

(2) S. 13. See ACT XII OF 1896 (EXCISE), No. 1, 8 L.B.R. 464.

(3) S. 20. See PENAL CODE, No. 6, 1 Lat. L.J. 373.

Act V of 1898.

• See CRIM. PRO. CODE.

Act I of 1899.

See STAMP ACT.

Act I of 1904 (Poisons).

Ss. 2, 10. *cls. (a) and (b) — Retail sale of poison when unlawful—Scope of rules made under S. 2.*

The exemption granted by cl. (a), S. 10, Poisons Act, would not apply where the person making a retail sale of poison did not make the sale in exercise of his profession as a medical practitioner, and the exemption granted by cl. (b) of the section would not apply where he was not duly qualified to act as a Chemist and Druggist.

The rules made by the Burma Government under S. 2 of the Act only apply to retail sales, and apparently wholesale sales remain uncontrolled. **N. M. Dey v. Emperor**, 16 Cr. L.J. 764=31 Ind. Cas. 364=8 Bur. L.T. 244.

PARLETT, J.

Act V of 1908.

See CIV. PRO. CODE.

Act VI of 1908 (Explosive Substances).

S. 8—*Accidental explosion—Injury to property—Obligation to give notice to Police—"Occupier," meaning of—Penal Code, S. 176—Omission to give notice—Intention.* **Zerl Khan v. Emperor**, 16 Cr. L.J. 622=30 Ind. Cas. 446=8 Bur. L.T. 288. See Final Part, 1916, Col. 18.

1.—Imperial Acts—(Continued).**Act XVI of 1908.**

See REGISTRATION ACT.

Act XVII of 1908 (Indian Emigration).

See PRACTICE AND PROCEDURE, No. 1, 14 A.L.J. 1222.

Act IV of 1909 (Whipping).

S. 5—*Finding as to age final—Sentence of whipping inadequate but carried out—Other punishment, whether can be awarded.* **Emperor v. Po Ba**, 15 Cr. L.J. 538=24 Ind. Cas. 946=7 Bur. L.T. 292=8 L.B.R. 143. See Final Part, 1914, Col. 21.

Act I of 1910 (Press).

(1) Ss. 3, 4, 17, 19 and 22—*Power of High Court—Jurisdiction of Magistrate to cancel order first exempting—Keeping of printing presses and publication of newspapers, legitimate business—Construction of S. 4—Difference between Ss. 124-A and 153-A of Penal Code and S. 4 of the Press Act—Consideration of extracts as falling under the sub-clauses to S. 4.*

Abdur Rahim, Offg. C.J.—The provisions of the Press Act are applicable to all printing presses: Under S. 3 (1), the Magistrate is to take security from any person who makes a declaration before him with respect to any printing press apart from any question whether it was set up before or after the Act.

The use of the words 'or may' before the words "cancel or vary any order under this sub-section" indicates that an order dispensing with the deposit of security is not included in the words "any order within this sub-section." But in an application under S. 17 of the Act an order purporting to be made under S. 3 (1) by the Magistrate, even if illegal, cannot be set aside.

It is true in one sense that a proviso is part of the section to which it is attached. But in ordinary legal parlance a proviso is to be distinguished from the enactment to which it is generally appended either for the purpose of explaining what particular matters are not within the meaning of the enactment or for providing exceptions and qualifications to the enactment or for other similar purposes. The proviso is something subordinate to the main clause and the general rule is that what is contained in the proviso is not to be imported by implication into the clause, which would tend to extend its scope beyond what is warranted by the natural meaning of the words used by the Legislature.

S. 3 (1) imposes a serious disability on persons desiring to keep printing presses. It must have the effect of, hampering the carrying on of, what is ordinarily, not only a perfectly legitimate business, but one which has played such an important part in the diffusion of knowledge and progress of civilization.

As regards the order of forfeiture, S. 22 read with Ss. 17 and 19 debars the Court from interfering with it except on the ground, namely that the extracts in question are not of the nature described in the sub-sections to S. 4.

1.—Imperial Acts—(Continued).

Act I of 1910 (Press)—(Continued).

The Act imposes no duty upon Government to issue any warning or to ask for any explanation before taking action.

S. 4 vests the local Government with a discretion so large and unfettered that the keeping of printing presses and the publication of newspapers becomes an extremely hazardous undertaking in the country. It may be doubted if it is possible for the keeper of any printing press in the country to maintain such an efficient expert supervision over matters that are printed as to detect everything that might be regarded to fall within the "wide-spread net" of S. 4. Similarly a newspaper may be consistently staunch in its loyalty to the Government, its general policy may be above all reproach, the sincerity and *bona fides* of the intention of the Editor may not be liable to question, but if any letters or other writings, are let in, may be, through carelessness, which come within the scope of any of the clauses to S. 4, the Government may at once without any trial or even a warning forfeit the security, and in this way ultimately put an end to the newspaper itself. That the influence of a periodical on the public life of the country is on the whole decidedly beneficial need be no bar to the Government action. The Local Government, it may be assumed, will not indiscriminately exercise the power which it possesses under the enactment, but the vesting of such unlimited power in the Executive Government is undoubtedly a serious encroachment on the freedom which the press in India enjoyed before the passing of the Act. The Act, as is well known, was passed in order to counteract the manifold ingenious devices adopted by the anarchists of Bengal for carrying out their propaganda. We are not concerned with the question whether the Legislature was justified in applying such a drastic press law to the whole of India, while the evil sought to be met was mainly connected with the activities of a band of young revolutionists in one corner of the country.

On the construction of S. 65 of the Government of India Act, 1915, as at present advised it seems to me that the construction put upon "unwritten laws" by Norman, J., is what is really required by the plain meaning of the words used. There is no difficulty in conceiving that the Imperial Parliament with all its great traditions in upholding the cause of liberty should have been unwilling to grant to the Indian Legislature, constituted as it is, any Legislative powers which would enable the Government of India to encroach upon those fundamental rights of the people, the violation of which especially by a foreign Government, is so calculated to lead to a disturbance of that peace in the realm which it is the highest concern of the Crown always to assure. That the provision of S. 43 of 3 and 4 Will. IV, Cap. 85, was not to be regarded as of no practical value and importance or as something quite obsolete is made clear by its

1.—Imperial Acts—(Continued).

Act I of 1910 (Press)—(Continued).

repetition in identical language in S. 65 of the Government of India Act of 1915.

The Government acting under S. 4 of the Press Act need not hear the person whose property it seizes, need not take any evidence nor is it bound to follow any kind of procedure which would ensure that the forfeiture was made after proper deliberation with due regard to the rights of the parties concerned and in the true interests of the State.

The right of appeal to the High Court under the provisions of Ss. 17 and 19 does not make any substantial difference, as the *onus* is cast upon the owner of the confiscated property to prove that the order of forfeiture was wrong and in such circumstances the right must be treated as more or less illusory.

The *onus* is laid under Ss. 17 and 19 upon the person whose security has been forfeited to prove that the publications selected by the Government at their own discretion may not have the tendency described in the various clauses. That is not only reversing the ordinary procedure in trials, but the difficulty of proving such a negative as this must in many cases be insurmountable.

It is unnecessary to determine any of the questions, whether the Press Act is *ultra vires* or at least Ss. 1, 17, 19 and 22 of the Imperial Legislature, for the simple reason that this Court is constituted and this application has been made under the special provisions of the Press Act itself and S. 22 of that Act prevents all interference on our part except on the ground mentioned in Ss. 17 and 19.

Undoubtedly the language of S. 4 of the Act is extremely, nay, dangerously wide, but the interpretation of the learned Judges in 41 Cal. is unreasonably wide. The words "whether by inference, suggestion, allusion, metaphor, implication or otherwise" are merely by way of explanation, and do not in any way enlarge the meaning of the words "which are likely or may have a tendency directly or indirectly." By "tendency," is meant the natural effect of the words used on the readers of the newspaper in question; no regard should be paid to the effect which they may possibly produce on the minds of abnormally constituted persons, or persons whose acquaintance with the language is inadequate, or on those who might content themselves with reading certain passages or expressions apart from the context or to the interpretation which men of ingenious minds may put upon them. All that has to be taken into account is the effect which the words are by their nature likely to produce on a normal average reader understanding them in their plain natural meaning.

Apart from Expl. 2, in applying S. 4 (1), the intention of the editor or the writer is not to be considered, if it is not shown that the words in their plain ordinary meaning may not tend to produce the objectionable effects mentioned in cls. (a) to (f).

*1.—Imperial Acts—(Continued).***Act I of 1910 (Press)—(Continued).**

The clauses lump together the offences defined by Ss. 124-A and 159-A of the Penal Code with this difference that no question of intention of the editor or writer of the articles arises apart from Expl. 2.

"Hatred and contempt," which are ordinary English words, mean something more than mere disapproval or dislike.

'Government' as used in the section denotes an established authority entitled and able to administer the public affairs of the country, and does not mean merely the British connection. But it is not identical with any particular individuals who may be administering the Government. "What is contemplated in the section is the collective body of men, i.e., the Government defined under the Indian Penal Code. It means the person or persons collectively in succession who are authorised to administer the Government for the time being. One particular set of persons may be open to objection and to assail them and to attack them and excite hatred against them is not necessarily exciting hatred against the Government because they are only individuals and not representatives of that abstract conception which is called Government. The individual is transitory and may be separately criticised, but that which is essentially and inseparably connected with the idea of Government established by law cannot be attacked without coming within" this section.

All criticisms of the measures of a Government must in some degree involve reflections on the Government itself. But S. 4 allows less scope to criticisms directed against the Government itself than to criticisms of measures of the Government.

Comments on the measures and actions of the Government are exempted from the operation of S. 4 provided the person making the comment does not excite or attempt to excite thereby hatred or contempt against the Government. But the protection afforded by this explanation is extended only to comments on Government's measures and actions and not to attacks on the Government itself which have to be judged by the light of S. 4 alone without reference to Expl. 2.

In certain stages of society, reforms in the constitution of the Government are a biological and political necessity. To say that such questions are not open to public discussion, supposing that the law is not violated by the manner and the methods adopted in such discussion, would be opposed to all sound maxims of constitutional law.

The difficulties of a foreign Government constituted as it is in this country, are necessarily very great. It is not to be expected that it should be in complete touch with the genuine sentiments, feelings and aspirations of the people. The information that it can command must at best be second hand and is often likely to proceed from interested sources. With the best of intentions, it is liable to make many mistakes, sometimes serious blunders. These

*1.—Imperial Acts—(Continued).***Act I of 1910 (Press)—(Continued).**

and other inherent difficulties of the Government as at present constituted may or may not justify the demand for Home-rule, and it may be that Self-Government is necessary for the full growth of the people. But the law does not permit a publicist discussing the Government actions and failures to impute base and dishonourable motives.

I am prepared to acquit the petitioner of any wilful attempt to disseminate disaffection or hatred against the Government of the country or to create feelings of hatred against any class of His Majesty's subjects. But I have been unable to hold that some of the extracts from the publication in "New India" cited before us may not have such a tendency.

Agting, J.—The present Bench is a special tribunal constituted under a special enactment for a single specific purpose—namely to determine whether certain words contained in the newspaper (and specified in the order of forfeiture) are or are not of the nature described in S. 4 (1) of the Press Act.

The interpretation of the learned Judges on the construction of S. 4 (1) of the Press Act in 41 Cal. is too wide.

There is nothing in the Act which throws on the applicant the *onus* of proving that the words, which are made the ground of forfeiture, do not fall within the scope of the section. It cannot be deduced from the words of S. 19.

Whether the words are likely or may have a tendency to produce certain results must be determined primarily by inference from their own nature. The words themselves form the main evidence in the case; and the Act throws no *onus* on either side. The words of section "are likely or may have a tendency," does not "embrace the whole range of varying degrees of assurance from certainty on the one side to the very limits of impossibility on the other." The wording of the section is not so all embracing that even a person "acting in the highest interests of humanity and civilisation" is confronted with an almost hopeless task in showing that the words he has used do not fall within it.

That the wording of the section is very wide is, however, undeniable, and in some respects it clearly goes beyond the provisions of the Penal Code.

The governing words "are likely or may have a tendency" undoubtedly leave the question of intention quite immaterial and confine our attention to the natural effect of the words without reference to what the writer meant or wished to be understood.

In the case of comments on the measures of Government an intention to excite hatred, contempt or disaffection is necessary to bring them within the scope of cl. (c) of S. 4 (1). The intention is of course deducible from the words of the extracts themselves.

To give effect to the interpretation that Government means only the British connection would go far to render the task of governing

I.—Imperial Acts—(Continued).

Act I of 1910 (Press)—(Continued).

India impossible. The true interpretation is to be found in the General Clauses Act (X of 1897) which governs the Press Act as regards definitions of terms. The addition of the words "established by law in British India" seems to be intended to emphasize the fact that it is the Government existing at the time that is sought to be protected from attacks of the kind forbidden.

"Hatred" and "contempt" do not mean only such hatred and contempt as would lead to the commission of the crimes referred to in other clauses of sub-section, *e.g.*, murder, violence, resistance to the law, intimidation of public servants and others.

S. 124—A, I.P.O., was practically recast so as to make it clear that Strachey, J.'s, interpretation of the law in 22 Bom. was correct. The interpretation of Strachey, J., on the words of S. 124-A, Penal Cod., which are identical with those of the Press Act in 22 Bom. is quite correct.

The phrase "dwelling adversely on its foreign origin or character" must not be understood in too comprehensive a sense, or divorced from the context. All unfavourable criticism of a Government's constitution, policy or measures must necessarily tend to arouse dissatisfaction. So far there is nothing illegitimate. But between dissatisfaction on the one hand and hatred, contempt and disaffection on the other, there is a vast gulf.

It is open to any one to draw attention to the non-Indian elements in the Government of India and to argue that these impair the efficiency of that Government and that it would be to the public advantage, if they were replaced by Indian elements. That is legitimate criticism. But it is not legitimate to go further and to use the existence of the non-Indian elements of Government as a means of exciting hatred, contempt and disaffection against Government. That as Strachey, J., puts it, would be to hold up the Government to hatred and contempt by dwelling adversely on its foreign character and origin. It all depends on the manner in which and the object with which the circumstances are used in argument.

As regards intention, it seems to me most unsafe to judge of the intention of the petitioner in publishing the specified article, by reference to other articles previously published at long intervals, of time, and mostly in other connections.

Seshagiri Iyer, J.—S. 22 only enacts that the declaration is a notice to all persons that the Government have declared the forfeiture and does not declare that the forfeiture has been legally made.

* The foundation of our jurisdiction under the Act is S. 17. It is a statutory right that we are asked to exercise, and we can grant relief only in respect of the grounds on which the party can seek our intervention.

I.—Imperial Acts—(Continued).

Act I of 1910 (Press)—(Continued).

It is true that the language of S. 22 reads as if all proceedings under the Act are liable to be revised by us. But the apparent intention of the Legislature is that only such proceedings under the Act as lend themselves to attack on the grounds mentioned in S. 17 should be revised by the High Court.

The use of the expression "no proceeding purporting to be taken under the Act" may have been inserted *ex majori cautela*.

The true aim to be kept in view is to construe the statute in such a way as to carry out its main intention. In doing that, inaccurate and loosely worded phrases have to be subjected to some pruning and adjustment.

Proceedings under S. 3 are not subject to our revisional jurisdiction under Ss. 17 and 22 of the Press Act.

The view of Norman, J., "Allegiance and protection are reciprocally due from the subject and the sovereign. It is evident that the strict observance of the laws which provide for such liberty and security ensures the faithful and loving allegiance of the subjects. No man can study the History of England, or can read the great judgment passed by the High Court of Parliament by the Bill of Rights on King James II, without seeing that on the faithful observance by the sovereign of the unwritten laws and constitution of the United Kingdom, as contained in the Great Charter and other Acts, depends in no small degree the allegiance of the subjects. It would be a startling thing to find that rights of so sacred a character could be taken away by an act of a subordinate Legislature. It would be strange indeed if a great popular assembly like the Parliament of England had put into the power of a Legislature which has not, and in the nature of things could not have, any representative character, the power of abrogating or tampering with such fundamental laws" quoted and approved."

There is no presumption that an Act is not intended to interfere with existing rights. An Act of Legislature in this behalf cannot be regarded as interfering with the allegiance of the subject.

The foundation of all criminal laws in India would be shaken to its root, if it is held that the Legislature has no power to enact laws depriving the subject of his liberty. So also with reference to property. It is impossible to argue—I do not wish to commit myself definitely to an opinion on this matter—that any Act of the Legislature which permanently deprives the subject of his property without vesting in a judicial tribunal the power to pronounce on the legality or justice of the step taken, may be said to strike at the root of the allegiance due from the subject.

Instead of taking the decision of the Court first, and then declaring the forfeiture, the process has been reversed; such a procedure cannot be said to affect the allegiance of the subject.

S. 4 of the Press Act is not *ultra vires* of the powers of the Imperial Legislature.

I.—Imperial Acts—(Continued).

Act I of 1910 (Press)—(Continued).

In construing the words of a section a consideration of the seriousness of the consequences is no right test. The law has to be administered as it is found.

The word 'likely' in S. 4 (1) of the Press Act refers to the probable inference that may be drawn. When that word is followed by the words 'may have a tendency' the contention that the barest possibility of the words conveying a particular impression was contemplated seems not unreasonable. But the Legislature must have had in mind not an unthinking perverse and blind possibility but the consequence, however far-fetched and remote it might be, which can be deduced by a reasonable human being. The process by which the inference has to be drawn is very tightly worded. When the probability or possibility is to be reached directly or indirectly whether by inference, suggestion, allusion, metaphor or implication or otherwise, it looks as if all egress is barred.

The word 'otherwise' used in S. 4 (1) is the finishing stroke. It is no wonder that the learned Chief Justice of the Calcutta High Court pronounced the right vested in the High Court as "illusory."

While the operative portion of S. 4 deals purely with the language employed, divorced from considerations of motive or intention the Expl. II furnishes a ground of exemption, and it can be shown under it that there was no intention to excite or to attempt to excite hatred, contempt or disaffection.

'Disaffection' means 'disloyalty.'

It is true that in the vast majority of cases the intention must be gathered from the language employed, but it is possible to show that what *prima facie* appears objectionable should not be given the meaning attributable to the words employed.

The times have changed a great deal since the learned Judge delivered his charge. If I may use a very hackneyed expression, the angle of vision has changed largely.

When Strachey, J., in 22 Bom. says "dwelling adversely on its foreign origin and character" would make a man guilty of exciting hatred and contempt, I am not prepared to accept it, without qualification. In my opinion, suggestions to the effect that an indigenous agency would be more suitable in certain departments of the administration and should be more largely employed in others, should not be regarded as exciting hatred or disaffection. Of course language may be employed which may render the advocacy dangerous. But *prima facie* I would be unable to discern in criticisms of this kind an intention to excite hatred or contempt. I would also qualify the phrase which says that 'attributing indifference to the welfare of the people' would amount to sedition. If criticism attributing indifference to the welfare of the people is couched in language, which imports corrupt or malicious motives, the writer cannot escape, but if it aims only to

I.—Imperial Acts—(Continued):

Act I of 1910 (Press)—(Continued).

draw attention to a weak point in the administration in the hope that criticism may lead to the redress of grievances or the removal of a disability, the writing cannot be condemned. Subject to these reservations, I accept the summing up of Strachey, J., in 22 Bom. as fairly accurately explaining the words "hatred" and "contempt."

To public political articles great latitude is given and the articles must be dealt with in a free, fair and liberal spirit. Dealing as they do with the public affairs of the day, such articles, if written in a fair spirit, and *bona fide*, often result in the production of public good, and should not be viewed with an eye of narrow criticism.

The important question which might have necessitated a great deal of discussion, was fairly solved by the admission of the learned Advocate-General that he had instructions to say that the discussion as to Home Rule was not *per se* objectionable. A reservation was made that the discussion might amount to bringing into hatred or contempt the Government established by law in British India, if the methods advocated to gain "Home Rule" and the language employed in pushing it forward were calculated to disseminate hatred or contempt.

There can be no doubt that two essentials should be kept in mind in asking for changes in the machinery of Government. The allegiance to the throne and person of the Sovereign should be held as inviolate; and there should be no suggestion that the connection which makes India an integral part of the British Empire should be severed. Within these limits it is permissible to ask that the details of the administrative machinery should be readjusted to meet the exigencies of the times.

A demand for change there will be in the most perfect form of popular Governments. That demand ex-necessitate would show that the existing machinery is out of gear in some particular or other. In one sense such a criticism may excite disaffection towards the Government established by law. It is conceivable that there may be even dislike, but if the object is to rearrange the personnel and even in a measure substitute new classes of men in the places occupied by the old, provided the advocacy is attributable to a genuine desire to strengthen the feeling of loyalty and the link that binds the empire, there can be no room for saying that hatred, contempt or disaffection was preached.

The demand that there should be alterations in the State is one of those claims which every law-abiding subject interested in the well-doing of the Government might legitimately advance.

I am not to be understood as suggesting that the expression "Government established by law in British India" applies only to British Sovereignty and the British connection.

I adopt Mr. Justice Strachey's definition of these words. He says: "It means, in my

1.—Imperial Acts—(Continued).

Act I of 1910 (Press)—(Continued).

opinion, British rule and its representatives as such, the existing political system as distinguished from any particular set of administrators." It is the system of Government that S. 4 (1) (c) contemplates, and not the persons who for the time being carry on the details of the administration. Cl. (a) does not require much comment. A great deal will depend upon the language used. Cl. (c) is not easy to define. The objects aimed at must be those which would render friendly co-operation between the different races living in India impossible. The language must be such as to lead to the breaking of the peace. Otherwise, any argument tending to suggest the particular persons are not carrying on the machinery of Government efficiently may be said to incite the people to interfere with the maintenance of law and order. Dissatisfaction with men and measures is believed in many quarters as a healthy sign of progress. It is not necessarily incompatible with a desire not to interfere with the administration of the law or with the maintenance of law and order.

In my opinion, there must be some connection between the subject-matter of the articles tendered and of the articles which are objected to. *Annie Besant v. The Government of Madras*, (1916) 2 M.W.N. 385=5 L.W. 1=39 M. 1085.

ABDUR RAHIM, OFFG. C.J., AYLING and
SESHAGIRI IYER, JJ.

(2) Ss. 3, 4, 17, 19 and 22. See ACT I OF 1910 (PRESS), No. 1, (1916) 2 M.W.N. 385.

(3) Ss. 3 and 22—Meaning of proceeding in S. 22—Power of Court to issue certiorari when issued—When act judicial—Duty of Magistrate under S. 3, ministerial—Exercise of power by ministerial or executive officer in excess—Remedy—Right of suit.

Abdur Rakim, Offg. C. J.—The High Court in which the old Supreme Court of Madras is absorbed has all the jurisdiction and authority of the Court of King's Bench in England. This includes the power to issue the writ of certiorari.

This jurisdiction cannot be taken away by any Act of the Legislature except by express words or by necessary implication. There is nothing in S. 22 of the Press Act which can be said to have deprived the High Court of this power.

The first part of S. 22 does not refer to the validity of an order of forfeiture but to the fact that it has been made. The word 'proceeding' in S. 22 means proceedings under S. 4 and other similar section of the Act relating to the order of forfeiture and does not include an order of the Magistrate under S. 3 (1) of the Act.

The High Court has jurisdiction to issue the writ of certiorari in order to remove the proceedings of Courts or of persons entrusted with judicial functions out of the ordinary course of legal procedure for the purpose of quashing them.

1.—Imperial Acts—(Continued).

Act I of 1910 (Press)—(Continued).

The statutory powers of revision and control are available only over the proceedings of ordinary Courts: A writ of certiorari is issued not only to Courts but to tribunals specially constituted and entrusted with duties of a judicial character.

The writ of certiorari lies only with respect to judicial acts and not to ministerial acts. Proceedings will not be removed by a writ to a superior Court unless they are capable of being determined there. A writ is granted only in respect of matters which, but for some special legislation creating special tribunals, would have been within the ordinary jurisdiction of the superior Court.

Whether an act is judicial or not depends on the nature of the powers conferred by the Legislature, the character of the act sought to be quashed and the nature and extent of the discretion vested with the authority and other similar considerations.

The Legislature, in delegating to the Magistrate the functions under S. 3 (1), does not regard him as a Court but as an executive officer entrusted with the performance of certain administrative duties.

The Press Act has conferred upon the Presidency Magistrate novel powers, which were never known to be exercised by this Court or by any superior Court in the land.

If an executive or administrative officer acts in excess of his powers, such acts are not liable to be reviewed by the High Court whether by means of a writ of certiorari or under its ordinary revisional powers. The only remedy open to an aggrieved person in such cases would be by an action.

Ayling, J.—The Magistrate when he cancels or varies an order under the sub-section to S. 3 need not record special reasons. The recording of special reasons is limited to an order dispensing with security.

The term "proviso" as applied to the second paragraph of S. 3 (1) is a misnomer. The effect of the paragraph is simply to give the Magistrate additional powers over and above those conferred by the first paragraph. The words "an order" cover an order dispensing with security. The sub-section is designed to give the Magistrate a full discretion both as regards requiring security and determining the amount, and this discretion is not once for all but may be revised from time to time.

The proceeding referred to in S. 22 includes proceedings of a Magistrate under S. 3 (1).

In cases of a newly constituted offence or liability, the Legislature may, without any undue jealousy of the power of the Court, elect to take away the power of interference of certiorari absolutely or in respect of proceedings with jurisdiction.

The jurisdiction of the Court is equally barred in respect of proceedings purporting to be taken under the Press Act, as in respect of proceedings taken under the said Act with jurisdiction, by reason of S. 22. The Chief

1.—Imperial Acts—(Continued).

Act I of 1910 (Press)—(Continued).

Presidency Magistrate's order under S. 3 (1) cannot hence be set aside.

The Press Act is an entirely new enactment brought into force in the interests of public tranquillity and imposing novel liabilities on the keeper of presses and publishers of newspapers chiefly in the matter of security. It is self contained and complete.

As to whether the order of the Magistrate under S. 3 (1) was a judicial act or not, if it were necessary to determine, I should not be prepared to dissent from the conclusion of the other Judges that it is an administrative one.

By depositing security as required by the order the petitioner has not waived her right to subsequently question its validity.

The petitioner took no action whatever till more than three months later, when the Government, proceeding on the assumption that the initial order of the Magistrate was valid, took further steps under S. 4 and forfeited the security. The exercise of the extraordinary power to issue *certiorari* being discretionary ought not be exercised in such circumstances.

Seshagiri Iyer, J.—The High Court has the same powers over persons resident within the local limits of its ordinary original civil jurisdiction as are exercised by the Court of the King's Bench in England.

Even after the Press Act, I of 1910, the right to keep a Press and to use it, is a common law right inherent in every subject and has not the slightest resemblance to the exercise of a trade or calling for which a license should be taken out.

It is not a condition precedent to the issue of a writ, that this Court should be able to place itself in the position of the Court whose order is complained against.

The fact that the power to issue a writ has been engrafted into legislative provisions is not an argument for holding that that power does not exist *aliunde*. The writ may assume various forms. There must be the exercise of some right or duty to decide in order to provide scope for a writ of *certiorari* at Common Law.

Unless the power to issue the writ of *certiorari* is expressly taken away, it inheres in the Court. Even if it is taken away, the High Court can interfere if there has been a want of jurisdiction, in the inferior Court or if fraud has been practised in the procuring of the judgment.

S. 22 of the Press Act does not expressly or by implication take away the right of interference by the High Court.

Prima facie an order passed by an officer who acts ordinarily judicially may be presumed to have been passed by him in that capacity. The officer need not be sitting as a Court to attach to himself judicial functions.

A proviso must be considered with relation to the principal matter to which it stands as a proviso and should not be read as enlarging the scope of the section.

1.—Imperial Acts—(Continued).

Act I of 1910 (Press)—(Concluded).

(a) There is nothing in the Act which compels the Magistrate to hold any enquiry, although he is not debarred from doing so. (b) The nature of the information to be laid before him is not specified. (c) The Magistrate is not bound to state any reasons. (d) He has then unfettered discretion in fixing the amount. (e) A special provision is made in S. 22 of the Act granting the same protection for proceedings passed in good faith as are secured to Judicial Officers by Act XVIII of 1850. These considerations show that the action of the Chief Presidency Magistrate is not judicial but only ministerial.

The power to dispense with the security only qualifies the rule which imposes the security. The order contemplated by the second clause of the proviso is different in nature from that which the first part enables the Magistrate to make.

The Chief Presidency Magistrate has no power to demand security after once dispensing with it at the time of the declaration. *Annie Besant v. Emperor*, (1916) 2 M.W.N. 497 = 4 L.W. 625 = 32 M.L.J. 151 = 39 M. 1164.

ABDUR RAHIM, OFFG. C.J., AYLING and SESHAGIRI IYER, JJ.

(4) Ss. 3 and 22—Meaning of proceeding in S. 22. See ACT I OF 1910 (PRESS), No. 3, (1916) 2 M.W.N. 497.

(5) S. 4—See Nos. 1 and 2, *supra*.

(6) S. 4 (1)—Order made by Local Government of Delhi—Jurisdiction of Calcutta High Court to interfere—*Delhi Laws Act* (XIII of 1912). *In re Abdul Kalam Azad*, 42 C. 730 = 16 Cr. L.J. 698 = 30 Ind. Cas. 746. See FINAL PART, 1915, Col. 20.

(7) S. 17—See Nos. 1 and 2, *supra*.

(9) S. 19—See Nos. 1 and 2, *supra*.

(9) S. 22—See Nos. 1, 2, 3 and 4, *supra*.

Act IX of 1910 (Electricity).

S. 33—"Every person" meaning of—Application of section. *In re Mr. Hawkins*, 16 Cr. L.J. 620 = 30 Ind. Cas. 444 = 18 M.L.T. 150 = 39 M. 696. See FINAL PART, 1915, Col. 22.

Act III of 1911 (Criminal Tribes).

(1) Ss. 22, 24—Charge, framing of, necessity of—Conviction.

Where the statement made by the accused in the Magistrate's Court shows that he had no real defence, on that statement alone a charge could be framed and a conviction recorded under S. 22, if not under S. 24 of the Criminal Tribes Act. *Janu Bhar v. Emperor*, 17 Cr. L. J. 70 = 32 Ind. Cas. 662.

PIGGOTT, J.

(9) S. 23—Whether evidence of convictions before the passing of Act is admissible.

Under S. 23 of the Criminal Tribes Act, once a tribe has been notified under S. 3, any member of that tribe who has been convicted subsequent to the date of the notification and who

1.—Imperial Acts—(Continued).

Act III of 1911 (Criminal Tribes)—(Concl'd.).

has had previous conviction is liable to enhanced punishment. **Emperor v. Adhia**, 14 A.L.J. 687 = 17 Cr. L.J. 463 = 36 Ind. Cas. 143.

RAFIQ, J.

- (3)—S. 23 — Punishment — Accused being member of criminal tribe at subsequent and not at previous conviction—Application of Act.

S. 23 renders a member of such a tribe on a second conviction for certain offences liable to a period of imprisonment which is not to be less than seven years.

The fact that at the time the accused was previously convicted the tribe to which he belonged had not been notified as a criminal tribe is no bar to the application of S. 23 of the Criminal Tribes Act, if at the time of the previous conviction he is a member of such notified criminal tribe. **Emperor v. Mendal**, 17 Cr. L.J. 392 = 35 Ind. Cas. 824.

LINDSAY, J.C.

- (3-a) S. 24.—See No. 1, *supra*.

- (4) S. 23, sub-S. (1), cl. (a), construction of—"Second conviction"—Cl. (b) "third conviction"—Meaning.

S. 23 (1) of the Criminal Tribes Act (1911) is not altogether easy of interpretation; but it would appear that the phrase "second conviction" has reference to the words in the sentence "is hereafter convicted" and not to the earlier words "having been convicted." The section will thus read, "whoever, having been convicted, is hereafter convicted, shall on second conviction be punished with imprisonment for a term of not less than seven years;" and the words "second conviction" must be taken to signify a first conviction for a scheduled offence after the coming into force of the Act following upon either one or many convictions of scheduled offences prior to the Act; and a third conviction of cl. (b) to signify a second conviction so following.

The words on a second conviction cannot be taken to mean second after the notification. *In re Sellamani*, 32 M.L.J. 212 = 17 Cr. L.J. 149 = 33 Ind. Cas. 629.

AYLING and NAPIER, JJ.

Act V of 1912 (Provident Insurance Societies).

Ss. 2 (S), G. 7, 21—Company having share capital divided into shares and carrying on business of provident insurance society—Registration whether necessary. **Deputy Legal Remembrancer v. Sital Chandra Pal**, 42 C. 300 = 16 Cr. L.J. 149 = 27 Ind. Cas. 213 = 16 Cr. L.J. 670 = 30 Ind. Cas. 721 See FINAL PART, 1915, Col. 22.

Act III of 1914 (Copyright).

(1) S. 7 (a)—Copyright—Translation. **Hira Lal v. Saraswati**, 13 A.L.J. 636 = 16 Cr. L.J. 656 = 30 Ind. Cas. 490. See FINAL PART, 1915, Col. 23.

(2)—S. 7 (a)—Infringement of copyright—Printing of book at one place—Loss to complainant caused elsewhere—Loss not an essential

1.—Imperial Acts—(Concluded).

Act III of 1914 (Copyright)—(Concluded).

part of offence—Offence where complete—Court at the place of printing—Proper forum. See CRIM. PRO. CODE, No. 126, 28 P.R. 1916 (Cr.).

Act I of 1916 (Emergency Legislation Continuance).

Emergency Legislation Continuance Act (1 of 1915), *if ultra vires*—Ordinances 3 and 5 of 1914—Power of Governor-General in Council to pass Act embodying provisions of ordinances—Ordinance 3 of 1914—S. 11, effect of—Jurisdiction of Courts to quash orders of internment passed under *Emergency Legislation Continuance Act*—*Indian Councils Act*, 1861 (24, 25 Vict., c. 67), Ss. 22, 23.

Under S. 23 of the Indian Councils Act, 1861 (24, 25 Vict., c. 67), no ordinance can have any force of law for more than six months from its promulgation but the power of the Governor-General in Council to pass an Act embodying the provisions of an ordinance is in no matter controlled or taken away by that section. It is clear that the Governor-General in Council has power to pass an Act like the *Emergency Legislation Continuance Act* (1 of 1915) which embodies the provisions of Ordinances 3 and 5 of 1914.

Held (as to the contention that inasmuch as S. 11 of the Ordinance No. 3 of 1914 which is embodied in the *Emergency Legislation Continuance Act* of 1915 seeks to oust the jurisdiction of the Courts, it offends against S. 22 of the Indian Councils Act, 1861), that the *Emergency Legislation Continuance Act* of 1915 is not *ultra vires* of the Governor-General in Council and the High Court has not power to call in question orders passed thereunder. It is for the Governor-General in Council to be satisfied on the materials before them and the Court cannot call for the materials or examine them.

In England the common law rule that when an Act is repealed and the repealing Act is repealed by another which manifests no intention that the first shall continue repealed the repeal of the second Acts revives the first does not apply to repealing Acts passed since 1850 and the last repeal does not now revive the Act or provisions before repealed unless words be added reviving them. The same principle or rule of law applies to this country. S. 9 of the General Clauses Act (1 of 1869) expressly provided that for the purpose of reviving either wholly or partially a Statute, Act or Regulation repealed, it shall be necessary expressly to state such purpose, and the same is the effect of Ss. 6 and 7 of the General Clauses Act (X of 1897). *In the matter of Jawa Nathoo*, 20 C.W.N. 1327.

CHAUDHURI, J.

2.—"Bengal Acts."

Act XX of 1856 (Bengal Chaukidari).

S. 52.—See PENAL CODE, No. 77, 14 A.L.J. 789.

2.—Bengal Acts—(Continued).

Act VI of 1870 (Village Chaukidari).

(1) Ss. 29, 40. See PENAL CODE, No. 78, 17 Cr. L.J. 164.

(2) S. 40. See No. 1, *supra*.

Act III of 1884 (Bengal Municipal).

(1) S. 44. See No. 10, *infra*.

(2) S. 45. See No. 10, *infra*.

(3) Ss. 175, 178, 179, 202—*Procedure—Owner required to execute work—Preliminary procedure—Failure to observe—Jurisdiction of Magistrate.*

There are two distinct stages in the preliminary procedure when an owner is required to do a certain thing by the Municipal authority; there is first the initial notice under S. 175 of the Bengal Municipal Act, followed by objection, if any, on the part of the person notified, and there is next the explanation or notification of the order absolute, if any, made after his objection had been heard. This procedure is, by virtue of S. 175, applicable in its entirety to a case under S. 202.

Proceeding before a Magistrate on application under S. 202 is without jurisdiction, where there is a failure to observe the essential preliminary steps due to non-compliance with provisions of Ss. 178 and 179. **Nabib v. Noakhali Municipality**, 23 C.L.J. 598 = 17 Cr. L.J. 265 = 34 Ind. Cas. 985.

MOOKERJEE and SHEEPSHANKS, JJ.

(4) S. 178. See No. 3, *supra*.

(5) S. 179. See No. 3, *supra*.

(6) S. 202. See No. 3, *supra*.

(7) S. 230. See No. 10, *infra*.

(8) S. 271. See No. 10, *infra*.

(9) S. 345.

It is necessary for a conviction under S. 345 of the Bengal Municipal Act to prove that the Magistrate, on the application of the Commissioners, had ordered the land to be closed as a market-place and had taken order to prevent such land being so used. **Puti Kabarilal v. Vice Chairman, Berhampur Municipality**, 20 C.W.N. 1015.

CHITTY and WALMSLEY, JJ.

(10) Ss. 353, 44, 45, 271, 230—*Order or consent of Commissioners necessary for prosecution under the Act—Power of Chairman to give such order or consent on behalf of the Commissioners—Vice chairman, exercise by, of powers of Chairman—Consent of Chairman subsequently obtained, validating effect of.*

The accused was prosecuted under S. 271 of the Bengal Municipal Act for disobeying a requisition under S. 230. The report of the offence was made by the out-door Inspector and it was submitted to the District Magistrate by the Chairman with a recommendation to prosecute the accused. The Inspector appeared before the Magistrate and was examined as the complainant. The document which was submitted by the Chairman to the Magistrate

2.—Bengal Acts—(Continued).

Act III of 1884 (Bengal Municipal)—(Concl'd.).

bore an eight-anna stamp. It further appeared that the notice against the accused was issued on the authority of the Vice-chairman. There was no written order of delegation of duties or powers by the Chairman to the Vice-chairman which could cover this order made by the Vice-chairman.

Held—that because the report of the offence made by the Inspector which was submitted by the Chairman to the District Magistrate bore an eight-anna stamp, it did not follow that it must be regarded as a petition of complaint and that the Chairman was merely in the position of a complainant.

That the order or consent of the Commissioners necessary under S. 353 for the institution of a prosecution under the Act is an order or consent by the Chairman as representing the Commissioners which the Chairman can give under S. 44.

That in the present case the order of the Chairman was an order or consent in writing by the Chairman within the meaning of S. 353 and was sufficient.

That it being clear that the act of the Vice-chairman was done with the express consent of the Chairman subsequently obtained, the case was covered by the proviso to S. 45. **Chairman of Hughly-Chinsura Municipality v. Krista Lal Mullick**, 20 C.W.N. 824 = 24 C.L.J. 57.

CHITTY and WALMSLEY, JJ.

Act VIII of 1885 (Bengal Tenancy).

(1) S. 71—Paddy cut and carried away by landlord from tenant's land—Value—Summary trial for theft—Jurisdiction of Magistrate. See PENAL CODE, No. 141, 20 C.W.N. 1212.

(2) S. 71 (4)—I.P.C. (XLV of 1860), S. 424—*Removal of baidi crops by the tenants—Tenant acting dishonestly—If amounts to an offence.*

S. 71, sub-S. (4) of the Bengal Tenancy Act provides that if a tenant removes any portion of the produce at such a time or in such a manner as to prevent the due appraisal or division thereof at the proper time the produce shall be deemed to have been as full as the fullest crop of the same description appraised in the neighbourhood on similar land for that harvest. But this is not the only penalty to which a tenant exposes himself if he removes the crop of a field which he holds under the *baidi* system. The object of S. 71, sub-S. (4) is to provide the Courts with a definite rule as to the value of crops which have been wrongly removed by the tenant. If the tenant acts dishonestly he may also be liable to be convicted under S. 424 of the Indian Penal Code (a). **Kuldip Pandey v. King-Emperor**, 1 Pat. L.J. 353 = 17 Cr. L.J. 315 = 35 Ind. Cas. 491.

CHAMBER, C.J. and SHARFUDDIN, J.

Reference:—(a) 38 M. 793, B. and F.

2.—Bengal Acts—(Concluded).

Act III of 1899 (Calcutta Municipal).

- (1) S. 63 (3). See No. 4, *infra*.
- (2) S. 102. See No. 4, *infra*.
- (3) S. 341. See No. 4, *infra*.

(4) Ss. 589, 341, 102, 63, (3)—*Notices issued on behalf of General Committee, whether to be signed and if so, by whom—Special rule of evidence contained in S. 589, applicability of—Proceedings of Committee how to be proved when not signed by Chairman—Irrregularity—Evidence Act, S. 74. Corporation of Calcutta v. Promotho Nath Mullick, 16 Cr. L.J. 659=30 Ind. Cas. 643. See Final Part, 1915, Col. 24.*

Act VI of 1901 (Assam Labour and Emigration).

- (1) S. 161—*Conviction under the section, when sustainable "purpose" "emigration"—"Induces to emigrate"—Meaning of.*

In this case the accused and others employed by him, induced coolies to leave Sambalpur under a promise that they would be employed as domestic servants in Chittagong. The coolies were, in fact, taken to Assam to work in the labour districts. In one case a cooly was stopped at Goalando, in others, they were found in the labour districts and sent back to their own country. The petitioners were convicted under S. 161 of the Assam Labour and Emigration Act, 1901. *Held*, that the conviction could not be maintained and must be set aside, as the above said section would not be applicable to the present case as the coolies did not leave Sambalpur with the object of going to a labouring district and labouring there.

"Purpose" means "the object to be attained or to be kept in view," and "emigration" to be emigration within the meaning of the Act must be emigration with the idea that "the object to be attained or kept in view" by the emigrant is arrival in a labour district and labouring there. *Manik Ram Ahir v. King-Emperor, 1 Pat. L.J. 388.*

ROE and JWALA PRASAD, JJ.

- (2) S. 164—*Keeping houses for recruiting—No license, offence.*

A person who was not a licensed recruiter but who kept a block of houses for putting in persons for recruiting, who actively assisted persons to emigrate and who kept on the establishment as a mere figure, a licensed recruiter was guilty of an offence punishable under S. 164 of the Assam Labour and Emigration Act. *Mahabir Singh v. Emperor, 14 A. L.J. 784=17 Cr. L.J. 511=36 Ind. Cas. 479.*

KNOX, J.

3.—Bombay Acts.

Act XI of 1846 (Mewas Estates).

S. 4. See ACT XIV OF 1874 (SCHEDULED DISTRICTS), No. 1, 18 Bom. L.R. 789.

3.—Bombay Acts—(Continued).

Act VI of 1863 (Bombay Public Conveyances).

- (1) S. 2—*Using a licensed pony in a licensed tonga, though numbered differently.*

A person using in a licensed tonga a licensed pony, though the pony does not bear the number of the tonga, is not guilty of an offence under S. 2 of the Bombay Public Conveyances Act. *Emperor v. Sanjiva Shivappa Bader, 18 Bom. L.R. 65=3 Bom. Cr. C. 163=17 Cr. L.J. 144=33 Ind. Cas. 320.*

BATCHLOR and SHAH, JJ.

- (2) Ss. 2, 3, 34, 35—*Applicability of the Act to livery stable carriages—Liability of owner keeping vehicle without license—Liability of driver—Conviction—Appeal—Revision—Power to recommend to Government to refund fine wrongly inflicted on accused.*

The owner of livery stables who keeps a vehicle for hire without having a license is punishable under S. 2, Bombay Act VI of 1863. But the driver of such a vehicle cannot be punished under S. 3 of the Act for 'driving without a license.' Driving a hired vehicle is not the same thing as plying it for hire.

Where the conviction of the driver is wrong, the Judicial Commissioner, Sind, cannot interfere in appeal or revision under S. 35 of the Act, but might report the conviction to the Local Government with a recommendation that the fine inflicted on the driver be refunded (a).

Amendment of S. 34 of the Act suggested. *Jeevanji & Co. v. The Crown, 9 S.L.R. 205=17 Cr. L.J. 231=34 Ind. Cas. 647.*

PRATT, J.C. and BOYD, A.J.C.

Reference:—(a) Cr. Ref. No. 2 of 1902, F.

- (3) S. 3. See No. 2, *supra*.
- (4) S. 34. See No. 2, *supra*.
- (5) S. 35. See No. 2, *supra*.

Act IV of 1887 (Bombay Prevention of Gambling).

(1) S. 3—*Instrument of gaming—Book recording bets is an instrument of gaming. Emperor v. Nanilal Mangalji, 17 Bom. L.R. 1080=3 Bom. Cr. C. 156=40 B. 263=16 Cr. L.J. 827=31 Ind. Cas. 1003. See Final Part, 1915, Col. 25.*

(2) S. 10—*Approvers—Indemnity—Accused not to be used as approvers. Emperor v. Babulal Baiwant, 17 Bom. L.R. 1078=3 Bom. Cr. C. 154=17 Cr. L.J. 2=32 Ind. Cas. 130. See Final Part, 1915, Col. 26.*

- (3) S. 12—*Playing with cards for insignificant stakes—Sentence.*

The accused, who were peons and mill hands, on a hot afternoon, betook themselves to the cool shades of a Masjid, where they amused themselves by playing cards for insignificant stakes. The trying Magistrate convicted them under S. 12 of the Bombay Prevention of Gambling Act and sentenced them each to fifteen days' simple imprisonment.

Held, that the sentence passed was altogether out of proportion to the criminality of the acts

3.—Bombay Acts—(Concluded).

Act IV of 1887 (Bombay Prevention of Gambling)—(Concluded).

charged; and that a small fine would have been sufficient. *Emperor v. Mahomed Nathu*, 18 Bom. L.R. 940=3 Bom. Cr. C. 223.

BEAMAN and HEATON, JJ.

Act IV of 1890 (Bombay Dt. Police).

(1) S. 39 A, r. 33. See No. 2, *infra*.

(2) Ss. 65, 39-A, r. 33—Public performance of stage play—License—Contractor getting the performance without license—Liability of contractor.

The accused paid a sum of money to certain strolling actors in consideration of a performance to be given by them; and secured the privilege of selling all the tickets and making such profits as he could. The performance was given without license from the Police, as required by r. 33 of the rules framed under S. 39-A of the District Police Act, 1890. The accused was thereupon convicted under S. 65 of the Act:

Held, that the accused did not offend against r. 33, since the words 'assisting in' referred only to persons taking an actual part in the acting or performing which is prohibited. *Emperor v. Aba Waku Gondhall*, 18 Bom. L.R. 188=3 Bom. Cr. C. 168=17 Cr. L.J. 162=33 Ind. Cas. 612.

BATCHELOR and SHAH, JJ.

4.—Burma Acts.

Act III of 1898 (Burma Municipal).

S. 142. (r) — Bye-law under— "Keeping," meaning of.

The Rangoon Municipal Committee made a bye-law to the effect that no person shall keep cows, sheep, goats, etc., within certain limits except with the permission of the Committee.

The applicant took a goat to a Hindu temple to be sacrificed and it was tied up in the temple awaiting the sacrifice ceremony for about two hours.

Held that the expression "keeping cows," etc., means keeping them for some lengthened time; and that the bye-law did not apply to what the applicant did in this case, and his conviction for having infringed the bye-law must be set aside. *Boyenaj Chandra v. Rangoon Municipality*, 8 L.B.R. 328=17 Cr. L.J. 342=35 Ind. Cas. 518.

FOX, C.J.

Act IV of 1900 (Lower Burma Courts).

(1) Ss. 11, 12—Jury trial—Charge of dacoity—Return of unanimous verdict of abetment of robbery, validity of—Crim. Pro. Code, ss. 303, 305. *S. P. Ghosh v. Emperor*, 16 Cr. L.J. 676=30 Ind. Cas. 724=8 Bur. L.T. 247=8 L.B.R. 274. See Final Part, 1915, Col. 39.

(2) S. 12. See No. 1, *supra*.

3 Cr.

5.—Madras Acts.

Act IV of 1884 (Madras District Municipalities).

(1) *Ootacamund Municipality Bye-law, No. 54*—"Other building material," meaning of—Sand, if included in the term. *In re Hassan Sahib*, 16 Cr. L.J. 716=30 Ind. Cas. 1004. See Final Part, 1915, Col. 32.

(2) S. 92. See No. 3, *infra*.

(3) Ss. 103, 92, 111, 147, 209, 218, 269—"Tollgate kist" if tax—Non-payment of toll-gate kist—Prosecution, liability for. *Mohamad Ibrahim Sahib v. Municipality of Anakapalli*, 16 Cr. L.J. 702=30 Ind. Cas. 750. See Final Part, 1915, Col. 32.

(4) S. 111. See No. 3, *supra*.

(5) S. 147. See No. 3, *supra*.

(6) S. 209. See No. 3, *supra*.

(7) S. 218. See No. 3, *supra*.

(8) S. 263. See No. 3, *supra*.

Act I of 1886 (Madras Abkari).

(1) S. 56 (b)—License for the sale of arrack 32 degrees under proof—Sale in breach thereof—Adulteration—Allowance of 2 per cent for wastage under r. 229—Standing Orders of the Board of Revenue, how far a defence—R. 229, Standing Orders of the Board of Revenue, scope of—Whether it has the force of law—Abkari prosecution—Technicality of offence, whether can be considered by Court. *In re Damodora Naidu*, 2 L.W. 1120=16 Cr. L.J. 800=31 Ind. Cas. 656. See Final Part, 1915, Col. 33.

(2) Ss. 56 and 64—Offence under S. 56 not by licensee but by actual offender—Conviction, legality of.

Ss. 64 and 56 of the Abkari Act must be read together, and not only the licensee, but the actual offender (in this case the petitioner) is liable to prosecution for an offence under S. 56 of the said Act (a). *Re Muthaya*, 39 M. 895.=17 Cr. L.J. 2=32 Ind. Cas. 130.

AYLING and PHILLIPS, JJ.

Reference:—(a) (1886) 1 Weir's Cr. R. 647, F.

(3) S. 64. See No. 2, *supra*.

Act III of 1888 (Madras City Police).

S. 75—Place of public resort—Harbour grounds, whether a — Port-Trust Act and bye-law 22 framed thereunder. *The Crown Prosecutor v. Govindarasajulu*, 2 L.W. 937=(1915) M.W.N. 841=16 Cr. L.J. 704=30 Ind. Cas. 752=39 M. 886. See Final Part, 1915, Col. 33.

Act III of 1889 (Towns Nuisances).

S. 3 (10)—Hindu temple—Whether a public place—Gaming—Meaning.

Part of the compound of a Hindu temple is a place of public resort. It is not necessary that every member of the public should have a right of access to a place in order to make it a place of public resort.

The definition of a 'public place' as one where the public go whether they have a right or not has been adopted in India (d).

The word 'gaming' in Act III of 1889, is used on the sense of playing a game for a stake

5.—Madras Acts—(Concluded).**Act III of 1889 (Towns Nuisances)—(Concl'd.).**

or a prize or for money or other thing waged upon the issue of the game.

The question of chance or skill does not enter into the connotation of the verb (b). *The Public Prosecutor v. Musa Sakhamam*, 31 M. L. J. 285 (1916) 2 M.W.N. 196 = 4 L.W. 503 = 36 Ind. Cas. 839.

OLDFIELD and SADASIVA AIYAR, JJ.

References:—(a) 31 C. 542; 14 Q.B.D. 62, R. (b) 6 C.L.J. 708; 23 Ind. Cas. 484; (1892) 2 Q.B. 309; (1903) 1 K.B. 866; 39 C. 968; 34 A. 96; 33 M. 83, R.

Act IV of 1897 (Madras Survey and Boundaries).

S. 17-A—Surveyor authorised to survey estate—Obstruction—Offence. See *PENAL CODE*, No. 48, 31 M.L.J. 305.

Act I of 1903 (Madras Planters Labour).

(1) Ss. 21 and 35—*Refusal to perform contract—Successive directions by a Magistrate to complete performance of a contract, if legal.* *Whitton v. Mammad Maistry*, 2 L.W. 1069 = 18 M.L.T. 511 = (1916) M.W.N. 2 = 16 Cr. L.J. 777 = 31 Ind. Cas. 377 = 39 M. 889. See *Final Part*, 1915, Col. 34.

(2) S. 35. See No. 1, *supra*.

Act III of 1904 (Madras City Municipal).

(1) Ss. 130, 176—*Gross annual rent—What is.* Where the owner of cocoanut garden leased it to a tenant who undertook to pay a rent of Rs. 20 per mensem and to keep the garden properly watered and in case he did not water it to pay an additional sum of Rs. 30 towards the expenses of watering it:

Held that the gross rent of the cocoanut garden, was Rs. 50 the amount received by the landlord for the land maintained in a proper state.

The gross annual rent is the rent which a tenant might reasonably be expected to pay for an hereditament, if the landlord undertook to bear the expenses necessary to maintain the hereditament in a state to command that rent. *Yeerabadrah Iyef v. President, Corporation of Madras*, (1916) 2 M.W.N. 130 = 31 M.L.J. 315 = 35 Ind. Cas. 589.

SESHAGIRI IYER and PHILLIPS, JJ.

(2) S. 176. See No. 1, *supra*.

(3) S. 409, cl. (19)—*Bye-law framed thereunder—"Food," meaning of—Aerated waters, whether food.* *Emperor v. P.R. Ganapathy Iyer*, 16 M.L.T. 545 = 26 Ind. Cas. 311 = 27 M.L.J. 732 = 16 Cr. L.J. 7 = 35 M. 362. See *Final Part*, 1914, Col. 32.

6.—U.P. Acts:**Act I of 1900 (U.P. Municipalities).**

(1) Ss. 87, 128—*Pump, erection of—Proceedings under S. 87 not legal.*

Where a site is a public way or street, no private individual can erect a pump upon it for his own or even for public purposes without permission of the Municipal authority.

6.—U.P. Acts—(Continued).**Act I of 1900 (U.P. Municipalities)—(Old.).**

But a person so erecting without authority cannot be charged or convicted or fined under S. 87 (5) of the Municipalities Act, I of 1900, read with S. 147 of that Act. That section clearly deals with new buildings of the nature of dwelling houses, sheds or other constructions intended for residence or occupation and intended to be erected by a person either upon his own land or upon some land in respect of which he has a right to set up such erection. It follows, therefore, that proceedings against a person who erects a pump in a public street brought under the above section are wholly misconceived.

There are various ways in which the mischief complained of in this case may be dealt with. The Municipality under S. 128 of the Municipalities Act can make rules for the control and management of the streets vested in it under S. 55, and anybody who erected a pump or refused to remove a pump which is maintained in breach of one or other of such rules would be liable to penalty under S. 147.

Any member of the public who either resides there or uses the street, could bring an action in a Civil Court for the removal of the pump by saying that his user of the public way as a member of the public was prejudiced by such pump. *Jagannath v. Emperor*, 17 Cr. L.J. 360 = 35 Ind. Cas. 526.

WALSH, J.

(2) S. 123. See No. 1, *supra*.

(3) S. 128 (a)—*Right to dig up road or drain.* No one has any right to dig up any portion of the roadway or to dig up or alter any portion of the drain.

Removal of loose soil which had accumulated on the side of the drain since the drain was last cleaned would not amount to the offence of digging up the roadway or alteration of drain. *Gulab Singh v. Emperor*, 17 Cr. L. J. 404 = 35 Ind. Cas. 964.

WALSH, J.

(4) S. 130—*Breach of rule made under cl. (e) of S. 130—Six months' notice.*

In order to render a person liable to punishment for breach of a rule made under cl. (e) of S. 130 of the Municipalities Act by reason of the continuance of sale or exposure for sale of certain specified articles upon any premises which are at the time of the making of such rule used for such purpose, it is necessary that six months' notice in writing should have been served upon him in the manner provided by law; and conviction in the absence of such notice ought to be set aside. *Emperor v. Jhamman*, 14 A.L.J. 604 = 38 A. 455 = 17 Cr. L.J. 569 = 34 Ind. Cas. 989.

BANERJI, J.

Act II of 1901 (Agra Tenancy).

S. 51—*Order suspending rent in force—Zamindar distraining crops—Right of—Liability for disobeying order.* *Emperor v. Ram Sarup*, 13 A.L.J. 619 = 16 Cr. L.J. 674 = 30 Ind. Cas. 722. See *Final Part*, 1915, Col. 35.

6.—U.P. Acts—(Concluded).

Act III of 1901 (Land Revenue).

- (1) Ss. 114, 193, 198, 214—*Partition proceedings submitted to Collector for confirmation—Summons issued to accused to appear before Collector—Refusal to take summons—Penal Code, S. 174—Revision.*

Under S. 114 of the Land Revenue Act the Assistant Collector submitted what he called "partition proceedings" to the Collector for confirmation. The Collector issued a notice under S. 193 calling upon the accused to appear before him. The accused did not take the notice and did not attend. The Collector thereupon ordered his prosecution under S. 174 of the Penal Code:—*Held*, that the order was illegal inasmuch as there was no investigation, suit or other business before the Collector, regard being had to the provisions of the Land Revenue Act. **Waris Ali v. Emperor**, 14 A.L.J. 1069=17 Cr. L.J. 471=36 Ind. Cas. 151.

BANERJI, J.

- (2) S. 133. See No. 1, *supra*.

- (3) S. 193. See No. 1, *supra*.

- (4) S. 214. See No. 1, *supra*.

Act II of 1914 (U. P. Town Areas).

S. 41—Chowkidars whether Police officers—Arrest made by them whether legal. See PENAL CODE, No. 77, 14 A.L.J. 789.

7.—Punjab Acts.

Act III of 1911 (Punjab Municipal).

- (1) Ss. 114, 219—*Defective notice by Committee to repair building in dangerous state—Validity of criminal proceedings.*

A notice issued by a Municipal Committee under S. 114, Punjab Municipal Act, is invalid, if it does not specify the portion of the building which, in the opinion of the Committee, is in a dangerous condition, or does not mention the nature of the repairs required to be made (a).

The conviction or disobedience of a notice must fail, where the notice is the foundation of the conviction and the notice is bad in law. **Abdul Aziz v. The Crown**, 9 P.R. 1916 (Cr.)=11 P.W.R. 1916 (Cr.)=32 Ind. Cas. 841=17 Cr. L.J. 105.

SHADI LAL, J.

References:—(a) 5 P.L.R. 1914; 3 P.R. 1912 (Cr.), R.

- (2) S. 153—*House used as brothel—Magistrate, powers of—Order, proper.*

A Magistrate without proper inquiry passed an order upon a charge under S. 153 of the Punjab Municipal Act, to the effect that, if the accused vacated the house by a certain date mentioned therein, well and good, otherwise, she would be fined Rs. 20.

Held, that the order of the Magistrate was bad as it contravened the provisions of S. 153 of the Municipal Act and was passed without sufficient inquiry.

This section does not authorize a Magistrate to order the occupant to vacate the house but to direct him to discontinue the objectionable use of it.

7.—Punjab Acts—(Continued).

Act III of 1911 (Punjab Municipal)—(Ctd).

Held, also, that the evidence of respectable neighbours that the house is used as a brothel or by disorderly persons of any description cannot be rejected on the ground that they are unable to give the names of those persons. What sort of evidence is sufficient in such cases, explained. **Musammam Radha Rani v. Municipal Committee of Lahore**, 10 P.W.R. 1916 (Cr.)=32 Ind. Cas. 334=17 Cr. L.J. 46.

JOHNSTONE, C.J.

- (3) Ss. 172, 175, 195, 219—*Encroachments upon public street—Existence for long time—Removal—Notice requiring—No offer of compensation—Complaint—Provisions of Ss. 172, 175, 195—Non-applicability—Proper course to be followed.* **Kirpa Ram v. Crown**, 2 P.R. 1917 (Cr.)=16 Cr. L.J. 350=28 Ind. Cas. 734=18 P.L.R. 1916. See Final Part, 1915, Col. 36.

- (4) S. 175. See No. 3, *supra*.

- (5) S. 195. See No. 3, *supra*.

- (6) S. 219. See Nos. 1 and 3, *supra*.

- (7) S. 228, explanation—*Authority to prosecute given to the 'Darogha Safai' by office and not by name—Validity.*

The provisions of S. 228, Municipal Act, are imperative, and under the explanation to that section, the authority given must be *personal*, except in the case of the officers enumerated in the explanation who may be authorised by office.

So, where a Municipal Committee gave authority to the *Darogha Safai* by office and not by name, to prosecute an offender under the Punjab Municipal Act, and he filed a complaint, *held*, the complaint was not made by a person duly authorised in accordance with the terms of S. 228, and the proceedings of the Magistrate were without jurisdiction and bad for want of a proper complaint. **The Crown v. Dharma Shah**, 8 P.R. 1916 (Cr.)=13 P.W.R. 1916 (Cr.)=17 Cr. L.J. 199=34 Ind. Cas. 311.

RATTIGAN, J.

Reference:—13 P.R. 1903, R.

Act I of 1914 (Punjab Excise).

- (1) *Sentence—Excise cases.*

In awarding sentences in excise cases, Court should have in view the consideration which is of very great importance that illicit distillation results in not only a loss of excise revenue, but also in drunkenness and crime. In view of the demoralising influence of a sojourn in jail on the character of a person who in other respects is law-abiding, a heavy sentence of fine will be preferable to a sentence of imprisonment, in most cases of a first conviction for infraction of an excise law. The imposition of petty fines will serve no good purpose, but will rather arouse the gambling instinct.

Under the peculiar circumstances of the case where the offender who was an old man about 70 years of age kept the vat of *lahan* not for his own use, but on behalf of another, the Chief Court on revision further reduced the sentence, passed on him on appeal under S. 91 (1) (c) of Act I of 1914, of three months' simple imprisonment and Rs. 100 fine, to the imprisonment

7.—Punjab Acts—(Concluded).

Act I of 1914 (Punjab Excise)—(Concluded).

already undergone, viz., 5 weeks and a fine of Rs. 150. *Lehna Singh v. The Crown*, 63 P.L.R. 1916=26 P.W.R. 1916 (Cr.)=17 Cr. L.J. 282=34 Ind. Cas. 1002.

LE-ROSSIGNOL, J.

(2) S. 61—Illicit manufacture of liquor—Conviction—S. 562, Crim. Pro. Code—Applicability of. See CRIM. PRO. CODE, No. 382, 19 P.R. 1916 (Cr.).

(3) Ss. 61, 75 (1)—*Magistrate, whether can act without any complaint by Excise officer—Jurisdiction.*

A Magistrate has no jurisdiction to take action under S. 61 of the Punjab Excise Act read with S. 75 (1), where there is on the record no complaint or report by an Excise officer. *Harnam Singh v. The Crown*, 18 P.W.R. 1916 (Cr.)=17 Cr. L.J. 151=33 Ind. Cas. 631.

RATTIGAN, J.

(4) S. 75 (1). See No. 3, *supra*.

Additional Evidence.

See ACT XIV OF 1874 (SCHEDULED DISTRICTS), No. 1, 18 Bom. L.R. 789.

Adjournment.

See CRIM. PRO. CODE, S. 344.

Accused entitled to adjournment for securing services of pleader for cross-examining prosecution witnesses—Adjournment not granted—Interference in revision. See CRIM. PRO. CODE, No. 247, 14 P.W.R. 1916 (Cr.).

Administration of Estates Regulation.

See BOM. REG. VIII OF 1827.

Admission.

See ACCUSED.

See CONFESSION.

See EVIDENCE ACT, Ss. 24, 25, 27, 30.

(1) Before Police, inadmissibility of. See ACT XI OF 1878 (ARMS), No. 1, 17 Cr. L.J. 512.

Age.

Offence by a man of 65 years—Age how far to be taken into account in passing sentence. See PENAL CODE, No. 70, (1916) M.W.N. 1.

Agent..

(1) Manager or, if has sufficient possession—Servant, nature of possession of—Order under the S. 145, Crim. Pro. Code, if can be made against servants of landlord. See CRIM. PRO. CODE, No. 94-a, 5 L.W. 118.

Agra Tehancy Act.

See U.P. ACT II OF 1901.

Allegiance.

See ACT I OF 1910 (PRESS), No. 1, (1916) 2 M.W.N. 385.

Alteration of Conviction.

See SENTENCES.

Sentences passed by trial Court under S. 457, Indian Penal Code—Sessions Judge altering the

Alteration of Conviction—(Concluded).

conviction under S. 411—Whether such alteration makes the trial by trying Magistrate illegal. See JOINT TRIAL, No. 2, 49 P.W.R. 1916 (Cr.).

Amaldustak

Whether requires stamp. See STAMP ACT (1899), No. 1, 20 C.W.N. 923.

Amendment of Charge.

Charge, amendment of, by Sessions Court, after expression of opinion by assessors, whether legal. See CRIM. PRO. CODE, No. 184, 50 P.W.R. 1916 (Cr.).

Animal.

Negligent conduct with respect to. See PENAL CODE, No. 84, 18 Bom. L.R. 682.

Apology.

(1) Where the accused expresses his willingness to tender an apology to the complainant, it is unfair for the Magistrate to treat this circumstance as an indication of the accused's guilt. *In re Abdul Rahiman Khan Sahib*, 4 L.W. 556=17 Cr. L.J. 462=36 Ind. Cas. 142. SPENCER, J.

(2) See CRIM. PRO. CODE, No. 163, 4 L.W. 556.

Appeal.

See CRIM. PRO. CODE, Ss. 408, 413, 417, 423, 424.

See REVISION.

See SANCTION TO PROSECUTE.

(1) *Appeal to Magistrate—No appearance for appellants—Appeal dismissed for non-appearance—Dismissal illegal.*

A District Magistrate wrote the following judgment: "No one appears. I see no reason to interfere. I dismiss the appeal."

Held, that the judgment was not in conformity with the law and that the order of the District Magistrate was bad. *Ram Bharose v. Emperor*, 14 A.L.J. 327=17 Cr. L.J. 363=35 Ind. Cas. 657.

TUDBALL, J.

(2) When a Judge disallows a question, counsel, if he wants to make it a ground of appeal should have the question and the order disallowing it recorded. *Delya v. King-Emperor*, 9 Bur. L.T. 183=17 Cr. L.J. 500=36 Ind. Cas. 468.

TWOMEY and PARBETT, JJ.

(3) *Jail appeal, summary dismissal of, no bar to—Appeal subsequently presented by accused's counsel.*

The dismissal of a jail appeal in a summary manner is no bar to a subsequent entertainment of another appeal when that appeal is presented by counsel. *Hulal v. Emperor*, 17 Cr. L.J. 453=30 Ind. Cas. 133.

LINDSAY, J.C.

(4) *Appeal from acquittal—Appellate Courts, position of—Practice as to interference by appellate Court.*

When a competent Court has acquitted a person after due deliberation, its decision should

Appeal—(Concluded).

not be lightly set aside. It will not suffice merely to show that the Court could have drawn other inferences from the facts before it; but it should appear that the Court ought not to have drawn the inferences which it did draw. It is not enough that the appellate Court, sitting as a Court of original jurisdiction, might have arrived at a different conclusion. *Emperor v. Durga Prasad*, 17 Cr. L.J. 540 = 36 Ind. Cas. 588.

KANHAIYA LAL, A.J.C. and KENDALL, A.J.C.

(5) Several accused convicted at the same trial—Appeal by some—Right of appeal by another on whom non-appealable sentence passed See CRIM. PRO. CODE, No. 285, 14 A.L.J. 518.

(6) Magistrate exercising powers under S. 30, Crim. Pro. Code—Conviction—Appeal—Proper forum. See CRIM. PRO. CODE, No. 284, 5 P.R. 1916 (Cr.).

(7) Proceedings under S. 107, read with S. 118, Crim. Pro. Code—Appeal. See CRIM. PRO. CODE, No. 41, 11 A.L.J. 268.

(8) Sentence passed by Assistant Sessions Judge—Appeal if lies to Sessions Court or to High Court. See CRIM. PRO. CODE, No. 282, 23 C.L.J. 595.

(9) Appellate Court setting aside conviction and sentence, ordering retrial, and directing the Magistrate to take additional evidence and to record a fresh decision on the original and additional evidence—Legality—Prejudice to accused—Procedure. See CRIM. PRO. CODE, No. 293, 1 Patna L.J. 99.

(10) Right of—Joint trial—Non-appealable sentence against some accused and appealable sentence against one—Appeal at instance of former—Maintainability. See CRIM. PRO. CODE, No. 288, 31 M.L.J. 837.

(11) Several accused tried jointly—One accused awarded appealable sentence—Right of appeal by others. See CRIM. PRO. CODE, No. 286, 21 P.W.R. 1916 (Cr.).

(11-a) Sanction to prosecute—Order granting or refusing sanction by lower Court—Appeal—Power of superior Court to convert proceedings into one under S. 476—Jurisdiction. See SANCTION TO PROSECUTE, No. 4-c, 1 Pat. L.J. 607.

(12) See CRIM. PRO. CODE, No. 139, 39 M. 768.

(13) See CRIM. PRO. CODE, No. 338, 29 P.R. 1916 (Cr.).

(14) See CRIM. PRO. CODE, No. 62, 17 Cr. L.J. 461.

(15) Ordinance III of 1914—Trial of offenders—Procedure—Appeal—Applicability of provisions of Crim. Pro. Code. See ORDINANCE III OF 1914 (FOREIGNERS), No. 2, 10 P.R. 1916 (Cr.).

Appeal against acquittal.

Finding when to be reversed. See ACT OF 1878 (OPIUM), No. 2, 15 P.R. 1916 (Cr.).

Appearance of Accused.

Surety for appearance—Failure to appear—Suicide by accused—Forfeiture of surety-bond, See CRIM. PRO. CODE, No. 367, 18 Bom. L.R. 683.

Appellate Court.

See APPEAL.

See CRIM. PRO. CODE, Ss. 408, 413, 417, 423, 424.

(1) Appeal from acquittal—Position of—Practice as to interference by. See APPEAL, No. 4, 17 Cr. L.J. 540.

(2) Alteration of conviction from one section to another by appellate Court. See CRIM. PRO. CODE, No. 199, (1916) 2 M.W.N. 267.

Appellate Judgment.

What should be. See CRIM. PRO. CODE, No. 371, 20 C.W.N. 1296.

Approver.

See CONFESSION.

See CRIM. PRO. CODE, Ss. 337 to 339.

(1) Corroboration to be material and direct—Preparation to commit dacoity—Evidence of preaching sedition irrelevant—Ss. 399 and 402, Penal Code—S. 114, cl. (b), Evidence Act.

Held, that there should be direct and material corroboration of an approver's statement. So where the charge is that he and his companions made preparation to commit dacoity and actually assembled together at various places for that purpose, the evidence that they preached sedition and excited the populace to mutiny does in no way corroborate his statement, though their doing so was also illegal.

Held, also, that the evidence tending to show that the co-accused or some of them were seen in the company of the approver at or in the vicinity of the places at which he says dacoities were to be committed, is not sufficient corroboration in support of his statement. *Waryam Singh v. The Crown*, 2 P.W.R. 1916 (Cr.) = 17 Cr. L.J. 107 = 32 Ind. Cas. 843.

RATTIGAN, J.

(2) Value of approver's evidence. See ACQUITTAL, No. 1, 7 P.W.R. 1916 (Cr.).

(3) Pardon how forfeited—, whose pardon is alleged to have been forfeited, procedure in trying. See CRIM. PRO. CODE, No. 242, 8 L. B.R. 447.

(4) Evidence of—when admissible. See EVIDENCE ACT, No. 17, 31 P.W.R. 1916 (Cr.).

Arms.

(1) Lathis, whether "arms" under S. 106, Crim. Pro. Code.

Lathis are undoubtedly arms within the meaning of S. 106 of the Code of Criminal Procedure. *Sarjug Lal v. Emperor*, 17 Cr. L.J. 313 = 35 Ind. Cas. 489.

ROE and JWALA PRASAD, JJ.

Arms Act.

See ACT XI OF 1878.

Arrest.

(1) Circumstances justifying arrest under S. 54, Crim. Pro. Code. See CRIM. PRO. CODE, No. 16, 20 C.W.N. 1233.

(2) Outside Magistrate's jurisdiction. See CRIM. PRO. CODE, No. 54, 8 L.B.R. 378.

(3) Resistance to lawful apprehension—Actual resistance necessary to constitute offence. See PENAL CODE, No. 79, 14 A.L.J. 731.

(4) Arrest—Meaning—Civil arrest—Criminal arrest—No difference. See PENAL CODE, No. 83, 9 S.L.R. 141.

(5) Wrongful confinement—Execution of decree—, of judgment-debtor—Protection while returning from Court—Stay *en route*—Liability of bailiff to punishment—Sentence. See PENAL CODE, No. 123, 121 P.L.R. 1916.

Artificer.

Contractor not, labourer or workman. See ACT XIII OF 1859 (WORKMAN'S BREACH OF CONTRACT), No. 4, 9 Bur. L.T. 108.

Assam Labour and Emigration Act.

See BEN. ACT VI OF 1901.

Assault.

(1) On the thief with *chavis* and *dangs*—Infliction of severe wounds—Death of the thief—Offence committed—Murder. See PENAL CODE, No. 103, 35 P.R. 1916 (Cr.).

Assessors.

See CRIM. PRO. CODE, Ss. 284, 309.

(1) Charge, amendment of, by Sessions Court, after expression of opinion by, whether legal. See CRIM. PRO. CODE, No. 184, 50 P.W.R. 1916 (Cr.).

(2) Trial by—Summoning of assessors for particular date—Selection on another date. See CRIM. PRO. CODE, No. 226, 17 Cr. L.J. 47.

Assistant Sessions Judge.

Sentence passed by—Appeal if lies to Sessions Court or to High Court. See CRIM. PRO. CODE, No. 284, 23 C.L.J. 595.

Attachment.

See CRIM. PRO. CODE, Ss. 87, 39, 146.

(1) And sale of property of an absconding offender—Application for return of property or its sale proceeds made after two years barred—Remedy, if attachment, &c., illegal. See CRIM. PRO. CODE, No. 17, 40 P.W.R. 1916 (Cr.).

(2) Of Mith and cattle found therein—Legality. See CRIM. PRO. CODE, No. 105, 1 Pat. L.J. 356.

Attempt.

See PENAL CODE, S. 511.

(1) Abqitive, to secure medical certificate, no offence under S. 196, Penal Code. See CRIM. PRO. CODE, No. 341, 17 Cr. L.J. 388.

(2) To commit offence—Possibility of success if necessary. See ORDINANCE VI OF 1914 (COMMERCIAL INTERCOURSE WITH ENEMY STATES), No. 1, 31 M.L.J. 178.

(3) Accused charged with an offence, it can be convicted of, to commit such offence. See PENAL CODE, No. 180, 1 Pat. L.J. 391.

Authorities.

High Court — Practice—Citation of Rulings of Chief Court of Burma — Permissibility. The Madras High Court has consistently refused to have rulings of the Chief Court of Burma quoted before it; and it has been stated that it is a wholesome rule. *In re Venkata-krishnayya*, 31 M.L.J. 837.

OLDFIELD and SESHAGIRI IYER, JJ.

Autrefois convict, plea of.

See CRIM. PRO. CODE, S. 403.

See APPEAL No. 3, 17 Cr. L.J. 453.

Bail.

Bail—Arrest under warrant under S. 114, Crim. Pro. Code—Refusal of bail—Illegality—Conditions for refusal. See CRIM. PRO. CODE, No. 68, 9 S.L.R. 158.

Bailiff.

(1) Direction to, to attach goods—Execution by Nazir—Resistance to his entry—No offence—No mention in the warrant of day before which it is to be executed—Illegality. See PENAL CODE, No. 44-a, 1 Pat. L.J. 550.

(2) Wrongful confinement—Execution of decrees—Arrest of judgment-debtor—Protection while returning from Court—Stay *en route*—Liability of, to punishment—Sentence. See PENAL CODE, No. 123, 121 P.L.R. 1916.

Bench of Magistrate.

(1) *Bench of Honorary Magistrates—Magistrates who have heard all evidence to decide the issue—Crim. Pro. Code, S. 350.*

S. 350 of the Crim. Pro. Code, does not apply to cases tried by Benches of Magistrates (a).

There is no provision of law which provides for a change on the constitution of Benches of Magistrates, and in the absence of any such provision it must be held that only those Magistrates who have heard the whole of the evidence can decide the case. *Itala v. King-Emperor*, 8 L.B.R. 463.

TWOMEY, J.

References:—(a) 23 C. 194; 20 C. 870, F.

Benefit of Doubt.

See PENAL CODE, No. 31, 107 P.L.R. 1916.

Bengal Chaukidari Act.

See BEN. ACT XX OF 1856.

Bengal Municipal Act.

See BEN. ACT III OF 1884.

Bengal Tenancy Act.

See BEN. ACT VIII OF 1885.

Bicycle.

Bicycle propelled by auto-wheel—Whether liable to be taxed. See CONSTRUCTION OF ACTS, No. 1, 14 A.L.J. 850.

Bombay Administration of Estates Regulation.

See BOM. REG. VIII OF 1827.

Bombay District Police Act.

See BOM. ACT IV OF 1890.

Bombay Prevention of Gambling Act.

See BOM. ACT IV OF 1897.

Bombay Public Conveyances Act.

See BOM. ACT VI OF 1863.

Boundary Marks.

Surveyor—Placing and measuring lands—No authority to survey the lands—Act done in good faith—Obstruction to surveyor—Offence committed. See PENAL CODE, No. 48, 31 M. L.J. 305.

Breach of Contract.

Jurisdiction of Magistrate where employer resides or carries on business. See IMPERIAL ACT XIII OF 1859 (WORKMAN'S BREACH OF CONTRACT), No. 3, 10 S.L.R. 56.

Breach of Peace.

(1) See CRIM. PRO. CODE, No. 38, 1 Pat. L.J. 361.

(2) See CRIM. PRO. CODE, No. 94-b 5 L.W. 165.

(3) See CRIMINAL TRESPASS, No. 1, 8 L.B. R. 463.

Buddhist Law (Marriage).

Marriage between Buddhist Chinaman and Burmese Buddhist woman according to Burmese custom—Validity under Chinese Law—Presumption.

No particular ceremony is essential for a valid marriage under the Chinese Buddhist Law.

Where a marriage takes place between a Buddhist Chinaman and a Burmese Buddhist woman according to Burmese Buddhist custom, and the parties have cohabited as man and wife for several years, it must, in the absence of evidence to the contrary, be presumed that there was a valid marriage according to the Chinese Buddhist Law. *Ma Sheln v. Kim Seln alias Saw Chan Sein*, 8 L.B.R. 225=9 Bur. L.T. 81=17 Cr. L.J. 112=32 Ind. Cas. 848.

ORMOND, J.

Reference:—8 L.B.R. 222, R.

Building.

See MUNICIPAL ACTS.

(1) Thatch hut, whether a. See PENAL CODE, No. 195, 17 Cr. L.J. 336.

Burden of Proof.

See EVIDENCE ACT, S. 114.

See PRESUMPTION.

See PENAL CODE, No. 31, 107 P.L.R. 1916.

Burial Ground.

Ultra vires—District Magistrate's order—

Burial ground, Closing of.

The District Magistrate of Broach issued the following order:—

"All persons are hereby informed that nobody should bury corpses in the *kharaba* of the *sarkari bet* adjoining the *ovara* of Dashashwamedh or anywhere (else) in the Zadeshwar *bet*; and if anybody does so, he will be criminally prosecuted for disobedience to this order;—"

Held, that the order, was wholly without jurisdiction. *In re Mukundral Atrkram Desai*, 18 Bom. L.R. 554=3 Bom. Cr. Cas. 198.

BATCHELOR and SHAH, JJ.

Burma Chief Court.

High Court—Practice—Citation of Rulings of—Permissibility. See AUTHORITIES, No. 1, 31 M.L.J. 837.

Burma Municipal Act.

See BUR. ACT III OF 1898.

Calcutta Municipal Act (Bengal).

See BEN. ACT III OF 1899.

Cards.

Playing with, for insignificant stakes—Sentence. See BOM. ACT IV OF 1867 (PREVENTION OF GAMBLING), No. 3, 18 Bom. L.R. 940.

Cattle.

Attachment of Math and, found therein—Legality. See CRIM. PRO. CODE, No. 105, 1 Pat. L.J. 356.

Cattle Trespass Act.

See ACT I OF 1871.

Certiorari.

Power of Court to issue when issued—When not judicial—Duty of Magistrate under S. 3, ministerial—Exercise of power by ministerial or executive officer in excess—Remedy—Right of suit. See ACT I OF 1910 (PRESS), No. 3, (1916) 2 M.W.N. 497.

Charge.

See AMENDMENT OF CHARGE.

See CRIM. PRO. CODE, Ss. 221, 222, 226, 227, 233, 234, 237, 238, 239.

(1) Framing of, necessity of—Conviction. See ACT III OF 1911 (CRIMINAL TRIBES), No. 1, 17 Cr. L.J. 70.

(2) Amendment of, by Sessions Court, after expression of opinion by assessors, whether legal. See CRIM. PRO. CODE, No. 184, 50 P.W.R. 1916.

(3) Previous convictions, to be set forth in—Irregularity, when curable. See CRIM. PRO. CODE, No. 176, 8 L.B.R. 461.

(4) See REVISION, No. 6, 17 Cr. L.J. 394.

Charge to Jury.

See CRIM. PRO. CODE, Ss. 297, 299.

See TRIAL.

(1) Jury—Head of charge—What it should contain—Object. See CRIM. PRO. CODE, No. 269, 1 Pat. L.J. 317.

(2) Trial of several accused together—Omission to place defence evidence regarding each accused before Jury, effect of—Misdirection. See CRIM. PRO. CODE, No. 233, 17 Cr. L.J. 19.

(3) See CRIM. PRO. CODE, No. 232, 17 Cr. L.J. 92.

Charter Act.

See ST. 24 AND 25 VIC., CH. 104.

Chaukidari Act (Bengal).

See BEN. ACT XX OF 1856.

Chaukidars.

(1) Arrest made by—Validity—Persons rescuing the arrested person from their custody whether guilty. See PENAL CODE, No. 77, 14 A.L.J. 789.

(2) Thief in custody of—Rescue—No offence. See PENAL CODE, No. 78, 17 Cr. L.J. 164.

(3) Not Police Officer. See PENAL CODE, No. 78, 17 Cr. L.J. 164.

Cheating.

(1) Dissolution of partnership—Collection of old debt thereafter—Omission to pay to other partner. See PENAL CODE, No. 177 a, 36 Ind. Cas. 872.

Chief Court.

High Court—Practice—Citation of Rulings of, of Burma—Permissibility. See AUTHORITIES, No. 1, 31 M.L.J. 837.

Circumstantial Evidence.

See EVIDENCE.

(1) When sufficient to support conviction—Murder—Nature of such evidence. See EVIDENCE, No. 2, 32 P.R. 1916 (Cr.).

(2) See EVIDENCE ACT, No. 23, 17 Cr. L.J. 23.

(3) When insufficient for conviction for murder. See PENAL CODE, No. 95, 22 P.W. R. 1916 (Cr.).

City Municipal Act (Madras).

See MAD. ACT III OF 1904.

City Police Act (Madras).

See MAD. ACT III OF 1888.

Civil Court.

(1) Proceedings of, under S. 195, Crim. Pro. Code, nature of—Costs. See CRIM. PRO. CODE, No. 155, 17 Cr. L.J. 184.

(2) Magistrate how far bound to respect decrees of. See HIGH COURT, JURISDICTION OF, No. 1, 1 Pat. L.J. 336.

Civil Disputes.

See CRIM. PRO. CODE, No. 172, 17 Cr. L.J. 406.

Civil Prison.

(1) Detention in, whether amounts to imprisonment—Prisons Act (IX of 1894), S. 42. See CRIM. PRO. CODE, No. 277, 17 Cr. L.J. 480.

Civ. Pro. Code (1908).

(1) S. 70—Sanction granted in respect of false statements made before a Revenue Court—Revisional power of High Court. See CRIM. PRO. CODE, No. 336, 14 A.L.J. 1077.

(2) S. 115—Civil Court taking action under S. 476, Crim. Pro. Code—Interference of High Court in revision under S. 439, Crim. Pro. Code—Legality—High Court's interference under S. 115, Civ. Pro. Code, when justifiable—Sanction to prosecute—Whether notice necessary. See CRIM. PRO. CODE, No. 351, U.B. R. (1915), 3rd Qr., p. 89.

(3) S. 115. See CRIM. PRO. CODE, No. 155, 17 Cr. L.J. 184.

Civ. Pro. Code (1908)—(Concluded).

(4) S. 115. See CRIM. PRO. CODE, No. 340, 17 Cr. L.J. 316.

(5) S. 135—Wrongful confinement—Execution of decree—Arrest of judgment-debtor—Protection while returning from Court—Stay en route—Liability of bailiff to punishment—Sentences. See PENAL CODE, No. 123, 121 P. L.R. 1916.

(6) S. 151. See INHERENT, POWERS OF COURT, No. 1, 17 Cr. L.J. 537.

(7) O. XXI, r. 2—Petition in Court stating satisfaction of decree if a 'certificate' within the meaning of S. 197, I.P.C. See PENAL CODE, No. 65, 20 C.W.N. 520.

(8) O. XXI, r. 24, O. XXXVIII, r. 7—Warrant—Execution by Nazir instead of bailiff—No mention of date before which it is to be executed—Illegality. See PENAL CODE, No. 44-a, 1 Pat. L.J. 550.

Civil Proceedings.

(1) Effect of Civil Court Decisions on Criminal Courts. See STAY OF CRIMINAL PROCEEDINGS, No. 3, 4 P.W.R. 1916 (Cr.).

(2) Institution of civil suit—Criminal proceedings whether to be stayed. See STAY OF CRIMINAL PROCEEDINGS, No. 1, 9 P.W. R. 1916 (Cr.).

Civil Rules of Practice.

(1) Rules 77 and 276. See CRIM. PRO. CODE, No. 164-b, 36 Ind. Cas. 869.

Commercial Intercourse with Enemies.

See ORDINANCE VI OF 1914.

Commitment to Sessions Court.

See CRIM. PRO. CODE, S. 209.

See MAGISTRATE, JURISDICTION OF.

See REVISION.

(1) See CRIM. PRO. CODE, No. 8, 12 N.L. R. 146.

(2) Offence under Arms Act—Commitment to the Court of Sessions by the High Court in revision. See CRIM. PRO. CODE, No. 310, 20 C.W.N. 732.

(3) Discharge of accused—Grounds for commitment to Sessions Court—Duty of District Magistrate while ordering commitment. See CRIM. PRO. CODE, No. 314, 1 Pat. L.J. 97.

(4) Commitment by a Magistrate for joint trial of three distinct charges of criminal breach of trust and falsification of accounts—Discretion of the Sessions Judge. See CRIM. PRO. CODE, No. 179, (1916) 2 M.W.N. 179.

Common Object.

(1) Rioting, charge of—Evidence—Mention of. See PENAL CODE, No. 29, 16 Cr. L.J. 809.

Companies Act (1882).

(1) Ss. 48, 50—Complaint by clerk authorised by Registrar of Joint Stock Companies—Validity—Accused acting as director or manager—Cannot set up plea that he was not properly qualified—Plea that accused did not become director or manager until after penalty first accrued—Validity—Duty of company under S. 48.

Companies Act (1882)—(Concluded).

Under the Punjab Government Notification No. 3, dated 23-2-1910, published in the Punjab Gazette, dated 26-2-1910, the Registrar of Joint Stock Companies is empowered to authorise any person to institute complaints of offences under the Companies Act, and the complaint filed in this case by a clerk duly authorized by the Registrar is valid (a).

A person who acts as a director or manager of a company cannot set up, in answer to a penalty under S. 50 of this Act (corresponding to S. 27 of the English Act) that he was not legally a director or manager. He becomes a director *de son tort*, and cannot protect himself from the liability cast upon a director by the Act by saying: "I am not a director *de jure*" (b).

It is the bounden duty of the company and of its directors and managers to forward to the Registrar the summary and list specified in S. 48 of the Act, and this obligation does not come to an end on the date on which, by default on the part of the company, directors and managers, the penalty begins to accrue.

It is immaterial that some or all of those persons were not legally qualified to act as directors or managers, or that they did not in fact become directors or managers until after the date when the penalty first accrued.

But a person who became, or acted as, a director or manager after such date could not be punished for the period of the default prior to his becoming a director or manager or acting as such. *Tota Ram v. The Crown*, 14 P.R. 1916 (Cr.) = 38 P.W.R. 1916 (Cr.) = 17 Cr. L.J. 242 = 34 Ind. Cas. 962.

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(2) S. 50. See No. 1, *supra*.

(3) S. 74—Balance sheet—Failure to file the same in time before Registrar of Joint Stock Companies—Managing agents—Directors—Liability for penalty.

The mere fact that a Director of a Company depended for the preparation of the balance sheet upon the managing agents or another director of the Company cannot absolve him from liability for the penalty laid down in S. 74 of the Companies Act (1882) for not filing a balance sheet in time with the Registrar of Joint Stock Companies.

The managing agents of a Company are 'managers' of the Company within the meaning and for the purposes of S. 74 of the Companies Act.

There is no reason why the expression 'manager' as used in S. 74 should not include every person or body of persons who conducts or conduct the affairs of the Company and to whom its management, subject to the control of the Company, is entrusted.

The fact that one of the directors had been convicted in his personal capacity of the offence is no reason why he should not be convicted of the same offence, also in his capacity as a partner of the firm which acted as the managing agents of the Company. *Tota Ram v. The Crown*, 18 P.R. 1916 (Cr.) = 143 P.L.R. 1916 = 17 Cr. L.J. 806 = 35 Ind. Cas. 482,

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Compensation.

See CRIM. PRO. CODE, S. 250.

(1) Discharge of accused—Order for compensation in a separate proceeding—Validity of order—Imprisonment in default when awardable. See CRIM. PRO. CODE, No. 212, 4 L.W. 32.

(2) Prosecution launched as result of information given to Village Magistrate—Discharge of accused—Order of, as against informant—Validity. See CRIM. PRO. CODE, No. 211-a, 32 M.L.J. 78.

Complainant.

(1) Right of, to conduct prosecution—Complainant being also Prosecuting Inspector—Permission, grant of—Discretion of Court. See CRIM. PRO. CODE, No. 362, 17 Cr. L.J. 486.

Complaint.

See CRIM. PRO. CODE, Ss. 200 to 203.

(1) Proceedings in relation to which sanction of Court necessary—Information to police followed by, in Court—Penal Code, S. 211. See CRIM. PRO. CODE, No. 131, 20 C.W.N. 1347.

(2) Right of father of girl enticed away to complain, when husband stands by—Penal Code (Act XLV of 1860), Ss. 498, 499. See CRIM. PRO. CODE, No. 165, 17 Cr. L.J. 363.

(3) Subsequent, can be entertained by same or another Magistrate though previous order of dismissal not set aside. See CRIM. PRO. CODE, No. 169, 16 Cr. L.J. 814.

(4) Practice—Magistrate also being complainant has no jurisdiction to pass order in that case. See MAGISTRATE, JURISDICTION OF, No. 1, 16 Cr. L.J. 801.

(5) What amounts to a. See PENAL CODE, No. 221, 11 A.L.J. 233.

(6) Defamation—, to police constable not privileged—Privilege. See PENAL CODE, No. 224, 17 Cr. L.J. 381.

(7) Dismissal of, by a Magistrate—Sanction given by him under S. 476, to prosecute complainant for giving false complaint—Successor in office referring the matter for enquiry to a Subordinate Magistrate—Report by latter—Conviction on receipt thereof—Irrregularity. See CRIM. PRO. CODE, No. 351-a, 1 Pat. L.J. 553.

(9) Committal sheet—Request by salt officer to Magistrate to examine witnesses and try accused—If a complaint. See CRIM. PRO. CODE, No. 133, 1 Pat. L.J. 592.

Compoundable Offence.

High Court in revision if can grant leave to compound offence. See CRIM. PRO. CODE, No. 329, 20 C.W.N. 1071.

Compromise.

See CRIM. PRO. CODE, S. 345.

Meaning of compromise and withdrawal—Petition filed by complainant praying that the case may be struck off without hearing—Whether compromise or withdrawal. See CRIM. PRO. CODE, No. 208, 20 C.W.N. 1209.

Concurrent Jurisdiction.

Revision—Sessions Judge and District Magistrate in. See CRIM. PRO. CODE, No. 309, 8 L.B.R. 361.

Concurrent Sentences.

See SENTENCE.

(1) Sentence of imprisonment, what is implied in. See CRIM. PRO. CODE, No. 277, 17 Cr. L.J. 480.

Confession.

See APPROVER.

See EVIDENCE ACT, Ss. 24, 27, 30.

(1) *Inducement to make—Lenient punishment—Practice.*

The suggestion that accused persons should, for the ends of justice, be encouraged to confess by the knowledge that if they do so they will receive lenient punishment is one which is likely to convey an entirely wrong impression and to be extremely mischievous. *Ng Kyaw Zan Hla v. King Emperor*, U.B. R. (1916), 2nd Cr., p. 113=17 Cr. L.J. 402=35 Ind. Cas. 962.

SAUNDERS, J.

(2) Where the accused expresses his willingness to tender an apology to the complainant, it is unfair for the Magistrate to treat this circumstance as an indication of the accused's guilt. *In re Abdul Rahlman Khan Sahib*, 4 L.W. 556=17 Cr. L.J. 462=36 Ind. Cas. 142. SPENCER, J.

(3) *Retracted—Evidentiary value of.*

It is most unsafe to convict an accused person upon a retracted confession unless there is corroboration of the confession by other evidence. The confession is, no doubt, admissible against him, but, when it is retracted, its value is greatly diminished and it becomes necessary to have satisfactory corroboration of it so as to enable the Court to determine whether the confession is true or not. *Har Prasad v. Emperor*, 17 Cr. L.J. 453=36 Ind. Cas. 133. BANERJEE, J.

(4) *Evidence Act, S. 21—Confession—Magistrate certifying that confession not made voluntarily—Magistrate examined at the trial to point out portions of the statement involuntarily made—Inadmissibility of confession. Emperor v. Rama Dhan Powar*, 17 Bom. L.R. 893=3 Bom. Cr. C. 110=16 Cr. L.J. 740=31 Ind. Cas. 310. See Final Part, 1915, Col. 46.

(5) Statement of a confessional nature recorded as 'statement'—Admissibility as evidence—Alternative charge for perjury. See CRIM. PRO. CODE, No. 120, 20 M.L.J. 21.

(6) Confession to zaildar in consequence of inducement whether admissible—Value of retracted confession. See EVIDENCE ACT, No. 7, 32 P.W.R. 1916 (Cr.).

(7) Statement made under promise of pardon retracted—Want of corroborative evidence—Conviction whether legal. See EVIDENCE ACT, No. 4, 6 P.W.R. 1916 (Cr.).

(8) Information by accused to Police officer on threat, admissibility of—, retracted effect of. See EVIDENCE ACT, No. 8, 17 Cr. L.J. 33.

(9) Confession before village Sathish—Validity. See PENAL CODE, No. 105, 20 C.W.N. 612.

(10) See PRACTICE AND PROCEDURE, No. 2, 9 Bur. L.T. 135.

Confiscation.

(1) See CRIM. PRO. CODE, No. 370, 17 Cr. L.J., 207.

Consent.

Consent given on misrepresentation of fact—Validity and effect. See PENAL CODE, No. 126, 17 P.R. 1916 (Cr.).

Conspiracy.

See PENAL CODE, S. 109.

(1) Essentials of criminal conspiracy—Joint trial of persons for—Acquittal of some and conviction of the rest—Legality. See PENAL CODE, No. 21, 14 A.L.J. 688.

(2) Conspiracy—Proof—Inference from conduct of parties. See PENAL CODE, No. 16, 9 S.L.R. 223.

Construction of Acts.

(1) *Fiscal enactment—Interpretation of statute—Bicycle propelled by auto-wheel—Whether liable to be taxed.*

Enactments which render the public liable to pay taxes must be strictly construed, or, in other words, unless the language under which they are sought to be charged is perfectly clear, the charging authorities are not entitled to assess a charge, inasmuch as the public have a right to know what exactly are the charges imposed upon them.

Hence, an ordinary bicycle which is propelled by auto-wheel, a mechanical contrivance which may be attached to or detached from the bicycle, is not liable to be taxed as a motor car or motor bicycle. *Emperor v. George Banerji*, 14 A.L.J. 850=36 Ind. Cas. 877.

WALSH, J.

(2) Where the provisions of a statute are doubtful the Courts must lean against the construction which imposes a burden on the subject. A law which interferes with common law rights or imposes fresh obligations must not operate through implication. It should be expressed in clear and unambiguous language. *Mitho v. The Crown*, 10 S.L.R. 9=17 Cr. L.J. 364=35 Ind. Cas. 668.

PRATT, J.C. and CROUCH, A.J.C.

(3) See ACT I OF 1910 (PRESS), No. 1, (1916) 2 M.W.N. 385.

(4) See ACT I OF 1910 (PRESS), No. 3, (1916) 2 M.W.N. 497.

(5) Jurisdiction of Courts to question orders of interment passed under Emergency Legislation Continuance Act. See ACT I OF 1915. (EMERGENCY LEGISLATION CONTINUANCE), No. 1, 20 C.W.N. 1327.

(6) Acts done partly before and partly after the date of a penal statute, if constitute offence. See ORDINANCE VI OF 1914 (COMMERCIAL INTERCOURSE WITH ENEMIES), No. 1, 31 M.L.J. 178.

Construction of Words.

(1) 'Acting as such public servant.' See CRIM. PRO. CODE, No. 164-a, 17 Cr. L.J. 894.

(1-a) 'An order.' See ACT I OF 1910 (PRESS), No. 3, (1916) 2 M.W.N. 497.

Construction of Words—(Continued).

(2) "Any other Act." See STAMP ACT, (1899), No. 2, 24 C.L.J. 441.

(3) "Arms." See ARMS, No. 1, 17 Cr. L.J. 313.

(4) "Believe." See PENAL CODE, No. 171, 17 Cr. L.J. 26.

(5) "Building." See PENAL CODE, No. 195, 17 Cr. L.J. 536.

(6) "Ceases to exercise jurisdiction and is succeeded by another Magistrate." See CRIM. PRO. CODE, No. 264, U.B.R. (1916), 2nd Qr., p. 108.

(7) "Contempt." See ACT I OF 1910 (PRESS), No. 1, (1916) 2 M.W.N. 385.

(8) "Court." See CRIM. PRO. CODE, No. 2, 34 P.R. 1916 (Cr.).

(9) "Disaffection." See ACT I OF 1910 (PRESS), No. 1, (1916) 2 M.W.N. 385.

(10) "Disloyalty." See ACT I OF 1910 (PRESS), No. 1, (1916) 2 M.W.N. 385.

(11) "Emigration." See BENGAL ACT VI OF 1901 (ASSAM LABOUR AND EMIGRATION), No. 1, 1 Pat. L.J. 388.

(12) "Established by law in British India." See ACT I OF 1910 (PRESS), No. 1, (1916) 2 M.W.N. 385.

(13) "Gaming." See MADRAS ACT III OF 1869 (TOWNS NUISANCES), No. 1, 31 M.L.J. 285.

(14) "Government." See ACT I OF 1910 (PRESS), No. 1, (1916) 2 M.W.N. 385.

(15) "Gross annual rent." See MADRAS ACT III OF 1901 (CITY MUNICIPAL), No. 1, (1916) 2 M.W.N. 130.

(16) "Heads of charge" meaning. See CRIM. PRO. CODE, No. 269, 1 Pat. L.J. 317.

(17) "Induces to emigrate." See BENGAL ACT VI OF 1901 (ASSAM LABOUR AND EMIGRATION), No. 1, Pat. L.J. 388.

(18) "In his absence." See CRIM. PRO. CODE, No. 165, 17 Cr. L.J. 363.

(19) "Judgment." See LETTERS PATENT (N.W.P.), No. 1, 17 Cr. L.J. 537.

(20) "Offences of the same kind." See CRIM. PRO. CODE, No. 191, 30 M.L.T. 234.

(21) "Omission to take an oath or make an affirmation." See CRIM. PRO. CODE, No. 231, 9 Bur. L.T. 133.

(22) "Proceeding." See ACT I OF 1910 (PRESS), No. 3, (1916) 2 M.W.N. 497.

(23) "Public place." See MADRAS ACT III OF 1869 (TOWNS NUISANCES), No. 1, 31 M.L.J. 285.

(24) "Purpose." See BENGAL ACT VI OF 1901 (ASSAM LABOUR AND EMIGRATION), No. 1, 1 Pat. L.J. 388.

(25) "Sets fire to." See ACT VII OF 1878 (FOREST), No. 1, 51 P.W.R. 1916 (Cr.).

(26) "Such Court." See CRIM. PRO. CODE, No. 147, 16 Cr. L.J. 787.

(27) "Unwritten laws." See ACT I OF 1910 (PRESS), No. 1, (1916) 2 M.W.N. 385.

(28) "Use of land." See CRIM. PRO. CODE, No. 106, 17 Cr. L.J. 235.

(29) "Complaint." See CRIM. PRO. CODE, No. 133, 1 Pat. L.J. 592.

Construction of Words—(Concluded).

(30) "Second conviction."—"Third conviction." See ACT III OF 1911 (CRIMINAL TRIBES), No. 4-a, 32 M.L.J. 212.

(31) "Parties concerned in such dispute." See CRIM. PRO. CODE, No. 94-a, 5 L.W. 118.

Contract.

Breach of contract—Jurisdiction of Magistrate where employer resides or carries on business. See ACT XIII OF 1859 (WORKMAN'S BREACH OF CONTRACT), No. 3, 10 S.L.R. 56.

Contractor.

Not artificer, labourer or workman. See ACT XIII OF 1859 (WORKMAN'S BREACH OF CONTRACT), No. 4, 9 Bur. L.T. 108.

Contradictory Statements.

(1) Sanction to prosecute—Opportunity to explain to be given. See CRIM. PRO. CODE, No. 159, 17 Cr. L.J. 93.

Conviction.

See PREVIOUS CONVICTION.

See SENTENCE.

(1) Appellate Court setting aside conviction and sentence, ordering retrial, and directing the Magistrate to take additional evidence and to record a fresh decision on the original and additional evidence—Legality—Prejudice to accused—Procedure. See CRIM. PRO. CODE, No. 298, 1 Pat. L.J. 99.

(2) Alteration of conviction from one section to another by appellate Court. See CRIM. PRO. CODE, No. 199, (1916) 2 M.W.N. 267.

(3) Sentence passed by trial Court under S. 457, Indian Penal Code—Sessions Judge altering the, under S. 411—Whether such alteration makes the trial by trying Magistrate illegal. See JOINT TRIAL, No. 2, 49 P.W.R. 1916 (Cr.).

(4) One act constituting two offences for both offenders, and separate punishment, legality of. See PENAL CODE, No. 6, 1 Pat. L.J. 373.

(5) Conviction not technically correct, but doing substantial justice—Not to be interfered with. See PENAL CODE, No. 214, 30 P.W.R. 1916 (Cr.).

(6) Conviction on inadmissible evidence—Legality. See PENAL CODE, No. 191, 20 C.W.N. 1267.

(7) Duty of Criminal Court—Certainty of offence to be made sure of before. See PRACTICE AND PROCEDURE, No. 1, 14 A.L.J. 1222.

(8) Previous, proof of, necessity of, before conviction. See PREVIOUS CONVICTION, No. 1, 17 Cr. L.J. 179.

Copyright.

(1) Printing Book at Lahore—Infringement of, Offence under S. 7 (a) of Copyright Act III of 1914—Completion of offence. See CRIM. PRO. CODE, No. 126, 28 P.R. 1916 (Cr.).

Copyright Act.

See ACT III OF 1914.

Costs.

See CRIM. PRO. CODE, S. 344.

(1) See CRIM. PRO. CODE, No. 109, 17 Cr. L.J. 348.

(2) Proceedings of Civil Court under S. 195, Crim. Pro. Code, nature of. See CRIM. PRO. CODE, No. 155, 17 Cr. L.J. 184.

Counter-case.

Transfer, grounds for—Expression of opinion by Judge in—Judge's competence to try subsequent case. See TRANSFER OF CRIMINAL CASES, No. 1, 1 Pat. L.J. 399.

Counterfeit Coin.

See MISDIRECTION TO JURY, Nos. 1 & 2, 24 C.L.J. 400.

Criminal Breach of Trust.

(1) Article given to accused under written agreement—Competency of Criminal Courts to decide whether agreement was real or nominal. See CRIM. PRO. CODE, No. 313, (1916) 2 M. W.N. 158.

(2) Commitment by a Magistrate for joint trial of three distinct charges of criminal breach of trust and falsification of accounts—Discretion of the Sessions Judge. See CRIM. PRO. CODE, No. 179, (1916) 2 M.W.N. 179.

Criminal Misappropriation.

See PENAL CODE, S. 403.

(1) Misappropriation—Joint trial—Separate trials for misappropriating different items of money during the same period, whether allowed. See CRIM. PRO. CODE, No. 180, 17 Cr. L.J. 30.

Crim. Pro. Code.

(1) Ordinance III of 1914—Trial of offenders—Procedure—Appeal—Applicability of provisions of Crim. Pro. Code. See ORDINANCE III of 1914 (FOREIGNERS), No. 2, 10 P.R. 1916 (Cr.).

(2) Ss. 4, 100, 476—Application for issue of search warrant—Inquiry by Magistrate preliminary to issue of warrant under S. 100—Judicial proceedings—'Court'—Person giving false evidence in such enquiry—Competency of Magistrate to grant sanction to prosecute—Oaths Act, Ss. 5, 14.

An enquiry on an application under S. 100, Crim. Pro. Code, 1898, to issue a search warrant is a judicial inquiry and proceedings preliminary to the issue of a search warrant under S. 100 are judicial proceedings within the meaning of S. 4 (m), Crim. Pro. Code.

In the course of such judicial proceedings, the Magistrate would be empowered to examine persons on oath and such persons would be bound to take oath under S. 5 of the Oaths Act and under S. 14 of that Act would be bound to state the truth.

A Magistrate holding an enquiry under S. 100, Crim. Pro. Code, is a Court within the meaning of S. 4 of the Oaths Act and is competent to grant under S. 476, Crim. Pro. Code, sanction for the prosecution of a person who

Crim. Pro. Code—(Continued).

gives false evidence before him in such proceedings (a). *Abdul Aziz v. The Crown*, 34 P.R. 1916 (Cr.)=17 Cr. L.J. 491=36 Ind. Cas. 171.

CHEVIS and BROADWAY, JJ.

References:—16 M. 421; 8 Bom. L.R. 589; 19 M. 18; 14 B. 381; 28 A. 89 and 15 C. 109, F.; 39 C. 403; 2 P.R. 1893 (Cr.); 12 B. 36; 6 A. 487, D.; 27 C. 455, Not F.; 12 B. 36; 15 M. 198 (F.B.); 15 Ind. Cas. 652 (F.B.); 15 A. 141; 39 C. 953, Ref. to.

(3) Ss. 4 (h), 195 (1) (b), 476—Penal Code, S. 211—False information to the Police—Sanction to prosecute, legality of.

No sanction to prosecute is necessary under S. 195 (1) (b) of the Code of Criminal Procedure when a false charge has been made to the Police and has not been followed by a judicial investigation thereof by a Court.

Where, therefore, the complainant to the Police never applied to the Magistrate for investigation, nor did he impugn the correctness of the Police Report as to the falsity of the complaint, nor did he pray that the person accused by him might be brought to trial, nor was he examined on oath by the Magistrate:

Held, that the order for sanction to prosecute him was bad, if it was deemed to have been granted under S. 195 of the Code, inasmuch as there was no 'complaint' within the meaning of S. 4 (h) of the Code, and the offence could not be said to have been committed in a proceeding in a Court.

Held further, that the order for prosecution could not also be sustained under S. 476 of the Code, as that section must be read with S. 195 and is consequently restricted by the limitations contained in cl. (b) of the section, the alleged offence under S. 211, Penal Code, was committed neither in Court nor brought under its notice in the course of a judicial proceeding. *Tayab Ullah v. King Emperor*, 24 C.L.J. 134=20 C.W.N. 1265=43 C. 1154=36 Ind. Cas. 845.

MOOKERJEE and SHREEPSHANKS, JJ.

References:—7 C.L.J. 373; 10 C.L.J. 564, Rel. on.

(4) S. 28. See No. 7, *infra*.

(5) S. 29. See No. 7, *infra*.

(6) S. 30. See No. 284, *infra*.

(7) Ss. 30, 28, 29, 436, 437—Case triable exclusively by Court of Sessions—Trial by Magistrate with special powers under S. 30 and discharge of accused—Revision by District Magistrate—District Magistrate holding that order of discharge is wrong—Duty to order commitment—Power to order further enquiry by another Magistrate not invested with powers under S. 30.

Where a subordinate Magistrate of the First Class, invested with powers under S. 30 of the Code of Criminal Procedure, makes an order of discharge, in a case, which, under Sch. II of that Code read with S. 28 or 29 thereof, is triable exclusively by the Court of Session, such order is open to revision by the District Magistrate under Ss. 436 and 437 of the same Code (a).

Crim. Pro. Code—(Continued).

Where a District Magistrate considers that a case triable only by a Court of Session, which has been tried by a specially empowered Magistrate and has ended in a discharge, has been incompletely or imperfectly tried, he may order further inquiry by the same Magistrate or by another Magistrate equally empowered, but not by a Magistrate without special powers and, therefore, in a sense, a Court of inferior jurisdiction to the Court which ordered the discharge.

But where in such a case the whole of the prosecution evidence has been taken and there is no material defect of procedure, and the Magistrate discharges, because, in his opinion, the evidence is insufficient or incredible, then, if the District Magistrate comes to a different conclusion upon the evidence, his proper course is to make an order of commitment under S. 436 of the Crim. Pro. Code (b). *Yado v. Emperor*, 12 N.L.R. 94=17 Cr. L.J. 245=34 Ind. Cas. 965.

STANYON, A.J.C.

References:—(a) 15 P.R. 1904 (Cr.), F. (b) 2 C.P.L.R. 82; 14 C.P.L.R. 161; 2 P.R. 1901 (Cr.); 32 C. 1090; 29 C. 397; 10 B. 319, R.

(8) Ss. 30 and 346—*Power of District Magistrate to commit accused for trial on evidence recorded by subordinate Magistrate.*

In this case two accused were charged for murder and abetment thereof respectively, but after examining them upon the evidence for the prosecution the subordinate Magistrate thought the principal offence, if any, committed, to be the lesser form of culpable homicide, and therefore acted under S. 346, Crim. Pro. Code, with a view to disposal of the case, by the District Magistrate, in the exercise of his power under S. 30. The District Magistrate, however, charged the accused with murder and abetment of murder respectively, explained, the charges to them and ordered their commitment.

Held, that the commitment ordered by the District Magistrate in this case was not illegal merely because after receiving the record and report submitted under S. 346, Crim. Pro. Code, by the first class subordinate Magistrate, the District Magistrate committed the accused for trial without hearing the evidence *de novo*. *Emperor v. Ramprasad*, 12 N.L.R. 146=36 Ind. Cas. 867.

DRAKE-BROCKMAN, J.C.

(8-a) S. 35—*See SENTENCE.*

(9) S. 35—*Sentence for offence, directed to take effect after expiry of sentence for default to find security for good behaviour, legality of.* *In re Pichai Anthu*, 16 Cr. L.J. 622=30 Ind. Cas. 446. See Final Part, 1915, Col. 52.

(10) S. 35. See No. 279, *infra*.

(11) S. 35, sub-S. (1), *Scope of—Several sentences of different kinds—How to run—Sentence defective in form.*

S. 35 of the Crim. Pro. Code covers cases of the description, where one of the punishments inflicted is imprisonment, while the other is transportation. It is not restricted to cases where the several punishments are all of the

Crim. Pro. Code—(Continued).

same kind, that is all are sentences of imprisonment or all sentences of transportation.

Omission to determine whether the sentences of imprisonment and transportation are to run concurrently or consecutively makes the sentence defective in form. *Khohua v. King-Emperor*, 23 C.L.J. 596=17 Cr. L.J. 238=34 Ind. Cas. 654.

MOOKERJEE and SHEEPHANKS, JJ.

(12) Ss. 35, 106 and 123 (2)—*Penal Code, Ss. 392 and 75, conviction for offences under—Separate sentences awarded—Legality of sentence—“Distinct offences”—Offence under S. 392, I.P.C., whether involves a breach of the peace—Security for keeping the peace ordered—Failure to furnish security—Reference to the Court of Sessions—Validity of order and reference.* *In re Muthurakka Thevar*, 2 L.W. 631=18 M. L.T. 121=16 Cr. L.J. 611=30 Ind. Cas. 435. See Final Part, 1915, Col. 53.

(13) Ss. 35 (1) and 397—*Jail Code, r. 526, Exp. 1—Different trials—Concurrent sentences—Illegal order.*

An order directing that the sentences in two different cases do run concurrently, is illegal.

S. 35 (1) of the Code of Criminal Procedure authorizes a Court to direct that several punishments passed on an accused for two or more distinct offences do run concurrently, only when such sentences have been passed on him at one trial. It is not competent to a Court to give such a direction when the sentences have been passed in different trials. *Kamal Mandal v. King-Emperor*, 24 C.L.J. 54=20 C.W.N. 1300.

MOOKERJEE and SHEEPHANKS, JJ.

References:—2 Bom. L.R. 111; 4 Bom. L.R. 876; 12 Cr. L.J. 217, R.

(14) Ss. 45 (c), 250, 435, 439—*Compensation for false and vexatious complaint “Information given to Police Officer,” meaning of—Complaint of theft to village headman—Report sent to Station House Officer—Charge by Police—Falsity of charge—Magistrate’s order directing payment of compensation whether legal.* *Nachimuthu Chetty v. Muthusami Chetty*, 15 Cr. L.J. 431=24 Ind. Cas. 167=27 M.L.J. 37=(1914) M. W.N. 804=39 M. 1006. See Final Part, 1914, Col. 51.

(15) S. 46 (1)—*Arrest, meaning—Civil arrest—Not different from Criminal arrest.* See PENAL CODE, No. 83, 9 S.L.R. 141.

(16) Ss. 51, 491—*Directions of the nature of a habeas corpus—Application to be made to Judge on the Original Side of the High Court—S. 54, scope of—Circumstances justifying arrest—“Credible information” and “reasonable suspicion,” meaning of.*

An application under S. 491, Crim. Pro. Code, is to be made to the High Court in its Ordinary Original Criminal Jurisdiction.

The petitioner who was the managing agent of a certain Provident Company of Calcutta was arrested by the Calcutta Police under S. 54, Crim. Pro. Code, on receipt of a letter written by an Inspector of Police in a certain district in the Bombay Presidency to the Commissioner of Police, Calcutta, in which it was stated that,

Crim. Pro. Code—(Continued).

on enquiries into complaints against the Company and their local agent in Bombay, it appeared, there being *prima facie* evidence to that effect, that the managing agent and the local agent committed offences under Ss. 409, 420, I.P.C. The letter contained a request to cause the arrest of the petitioner and was forwarded by the District Magistrate with a note that the petitioner might be arrested under S. 54, Crim. Pro. Code, and sent to the Magistrate, 1st class, of the District, to be tried by him. It was admitted that the officer effecting the arrest in Calcutta relied solely on the aforesaid letter and had no personal knowledge of the facts of the case:

Held—That the arrest of the petitioner under S. 51, Crim. Pro. Code, was not proper.

That S. 54, Crim. Pro. Code, gives wide powers to a police-officer to make an arrest without an order from a Magistrate and without a warrant only in certain circumstances limited by the provisions contained in the section, and it is necessary in exercising such large powers to be cautious and circumspect.

The section gives a police-officer personal authority and involves personal responsibility, and the "reasonable suspicion" and "credible information" must be based upon definite facts which the police-officer must consider for himself before he acts under the section. He cannot delegate his discretion or take shelter under the belief or judgment of another police-officer.

In the circumstances of the case the High Court under S. 491, Crim. Pro. Code, directed the release of the petitioner. *In the matter of Charu Ch. Majumdar*, 20 C.W.N. 1233.

CHAUDHURI, J.

(17) Ss. 87, (2) (a), (b), (3), 88, 89, 469 and 537—*Attachment and sale of property of an absconding offender—Application for return of property or its sale-proceeds made after two years barred—Remedy if attachment, &c., illegal.*

Held, that:—

1. An application under S. 89 of the Code of Criminal Procedure, 1898, not made within two years from the date of the attachment is not entertainable. If the procedure laid down in Ss. 87 and 88 has not been complied with, the irregularities, &c., committed under these sections are covered by S. 537 of the Code.

But in case the provisions of S. 537 are inapplicable, the attachment is not a valid one and the person aggrieved has consequently no remedy under S. 89, inasmuch as this section can help him only when the attachment is a valid one (a).

2. If an application can be under S. 89, the applicant must prove that he had not absconded within the period laid down therein (b).

3. An endorsement or statement to be made in writing by the Court validating the proclamation as is contemplated under S. 87 (3), Crim. Pro. Code, is an important provision of law which should invariably be made use of by the Magistrate when acting under the said S. 87.

Crim. Pro. Code—(Continued).

To legalize issue of the proclamation the Court is bound to find that the warrant cannot be executed and, where such is the case, and the Court decides to issue a proclamation under S. 87, the proclamation must be in writing and should require the absconding person to appear at a specified place and at a specified time not less than 30 days from the date of publishing the proclamation, and the manner in which such publication is to be made is imperatively laid down in S. 87 and if the provisions of this section are not strictly complied with the publication is irregular and illegal. The most important part of the publication is the publishing of the proclamation in the village and it is from the date of the publication that 30 days should be counted. *Mala Singh v. The Crown*, 40 P.W.R. 1916 (Cr.) = 6 P.R. 1917 (Cr.) = 35 Ind. Cas. 974 = 17 Cr. L.J. 414.

BROADWAY, J.

References:—(a) 19 M. 3, R.; 22 A. 213; 15 P.R. 1893 (Cr.), D. (b) 19 Ind. Cas. 333, R.

(18) S. 88. See No. 17, *supra*.

(19) S. 89. See No. 17, *supra*.

(20 and 21) Ss. 90, 91, 92, 501, 537—*Scope and applicability of Ss. 90 and 92—Accused let out on his own bond—Warrant for his arrest under S. 90—Reasons to be recorded—Omission not cured by S. 537—Applicability of S. 501. Re Karuthan Ambalam*, 38 M. 1083 = 17 Cr. L.J. 132 = 38 Ind. Cas. 308. See Final Part, 1915 Col. 232 (a).

(22) S. 91. See Nos. 20 and 21, *supra*.

(23) S. 92. See Nos. 20 and 21, *supra*.

(24) S. 96—*Search warrant—Practice as to issue of—Trade-mark counterfeiting.*

The power of issuing a search warrant is not intended to be used for the purpose of giving complainants an opportunity of fishing for evidence. The warrant is intended for use in respect of definite documents believed to exist which must be clearly specified in the warrant, and before issuing it the Magistrate must have before him some information or evidence that the documents are necessary or desirable for the purposes of the inquiry before him.

To issue a search warrant for the search of a man's house and for the production of all papers and books in it for the purpose of an inquiry as to whether he had used or sold articles with a counterfeit trade mark, is a gross perversion of the law. *V.S.M. Molden Brothers v. Eng Thaug & Co.*, 17 Cr. L.J. 543 = 36 Ind. Cas. 591.

FOX, C.J.

(25) S. 96 (1)—*Search warrant directing seizure of all goods of certain description, legality of—Duty of Magistrate to state reasons—Stay of criminal proceedings by Sessions Judge.*

Held, that a Magistrate has no authority for issuing, on the application of the complainant, a search warrant ordering the summary seizure of all the goods of a certain description in the possession of the accused.

Crim. Pro. Code—(Continued).

Where, therefore, in the course of a trial under Ss. 482, 483 and 486 of the Penal Code, the Magistrate issued, on the application of the complainant, a search warrant directing seizure of all articles bearing the complainant's trademark and remarked, without giving reasons, that the accused would not produce these things if he were required by summons to do so :

Held, that, inasmuch as the Magistrate gave no reasons whatever for believing that the accused would not produce the articles in question if a summons were issued to him for their production, the requirements of sub-S (1), S. 76, Crim. Pro. Code, were not complied with and consequently the order of the Magistrate issuing the search warrant was illegal and improper.

Held, also, that, under the circumstances of this case, the order of the Sessions Judge directing stay of criminal proceedings pending decision of the civil suit is a proper one. *Piyare Lal v. Thakar Dat Sharma*, 12 P.W.R. 1916 (Cr.) = 32 Ind. Cas. 652 = 17 Cr. L.J. 60.

SHAH DIN, J.

(26) S. 100—"Any person within the local limits of his jurisdiction."

The words "any person within the local limits of his jurisdiction" in S. 110, Crim. Pro. Code, apply also to a person undergoing a sentence of imprisonment in a Jail within the local limits of the Magistrate's jurisdiction. *Emperor v. Nga Saing alias Ah Saing*, 9 Bur. L.T. 39 = 8 L.B.R. 353 = 17 Cr. L.J. 88 = 32 Ind. Cas. 680 (F.B.).

FOX, C.J., ROBINSON and PARLETT, JJ.

* *References*:—4 L.B.R. 148 = 7 Cr. L.J. 447, overruled; P.J.L.B. 201; 9 Bom. L.R. 214 = 5 Cr. L.J. 247; 17 Ind. Cas. 413 = 13 Cr. L.J. 781 = 26 M. 96 = 23 M.L.J. 535, R.

(27) S. 100. See No. 2, *supra*.

(28) S. 103. See EVIDENCE ACT, No. 13, 10 S.L.R. 7.

(29) S. 106—*Findings necessary to justify an order for bond for keeping the peace on a conviction for unlawful assembly—Penal Code*, S. 143.

The petitioners were convicted under S. 143, I.P.C., and bound down under S. 106, Crim. Pro. Code, to keep the peace.

Held—That the findings did not sufficiently and clearly show that the acts for which the accused were convicted under S. 143, I.P.C., necessarily involved a breach of the peace or any evident intention of committing the same, and the order under S. 106, should be set aside. *Abdul Ali v. King-Emperor*, 20 C.W.N. 197 = 23 C.L.J. 109 = 43 C. 671 = 17 Cr. L.J. 241 = 34 Ind. Cas. 961.

GRAEVES and WALMSLEY, JJ.

(30) S. 106—*Letters Patent appeal—Proceedings under Ch. VIII, Crim. Pro. Code—Criminal trials*. *Adur Desikachari v. Emperor*, 28 M.L.J. 307 = (1915) M.W.N. 224 = 16 Cr. L.J. 303 = 28 Ind. Cas. 527 = 39 M. 539. See Final Part, 1915, Col. 54.

(31) S. 106—*Presumption—Possession—Rebutting of presumption—Compromise—Security*

Crim. Pro. Code—(Continued).

for keeping the peace, order as to, cancellation of. *In re Ranga Gownden*, 16 Cr. L.J. 700 = 30 Ind. Cas. 719. See Final Part, 1915, Col. 54.

(32) S. 106. See CRIMINAL TRESPASS, No. 1, 8 L.B.R. 463.

(33) S. 106—*Lathis, whether "arms" under S. 106, Crim. Pro. Code*. See ARMS, No. 1, 17 Cr. L.J. 313.

(34) S. 106. See No. 12, *supra*.

(35) S. 107—*Security to keep the peace—Validity of order*.

Where the evidence on the record disclosed reliable statements that the persons, who were ordered to furnish security to keep the peace, were men who had shown by their acts and general behaviour that the object of their lives for the time was to disturb the public tranquillity by wounding the religious feelings of the Muhammadans of a certain locality, *held* that the Magistrate was justified in making such order, although the order drawn up in accordance with the police report might have been expanded. *Chunni Lal v. Emperor*, 14 A.L.J. 430 = 17 Cr. L.J. 301 = 35 Ind. Cas. 173.

KNOX, J.

(36) S. 107—*Breach of the public peace—Evidence justifying proceedings under the section*.

A Magistrate dealing with the proceedings under S. 107 of the Crim. Pro. Code, who possesses knowledge of certain facts which he obtains from sources outside the record, should not base his judgment upon those facts, but he should base it upon evidence relevant to the case. The law requires that, to justify an order under the said section, there must be a finding that the persons from whom the security is demanded are likely to commit a breach of the peace or to disturb the public tranquillity or to do any wrongful act that may occasion a breach of the peace or disturb the public tranquillity. *Mathura Sahu v. Emperor*, 14 A.L.J. 769 = 17 Cr. L.J. 484 = 36 Ind. Cas. 164.

WALSH, J.

(37) S. 107—*Security to keep the peace—Evidence necessary before passing order for security—Joint inquiry*.

There must be definite evidence in the case of any and every person charged under S. 107, Crim. Pro. Code, that there is a danger of a breach of the peace by him. It is clearly insufficient against a collective body of persons to suggest that they are indulging in feelings of hostility towards another body of persons. *Shambhu Nath v. Emperor*, 14 A.L.J. 656 = 38 A. 464 = 17 Cr. L.J. 400 = 35 Ind. Cas. 832.

WALSH, J.

(38) S. 107—*Persons who do not go to the place where a breach of the peace is apprehended can be bound down under the section*.

Two holy men of Gaya were contesting the right to take offerings from pilgrims on their alighting from the train at the Gaya railway station. One of these employed servants armed with a lathi. This had given rise to one

Crim. Pro. Code—(Continued).

disturbance resulting in a criminal trial, and several minor disturbances.

In this case a master was putting forward a claim which was in itself likely to be fought over by armed forces. It was found that in spite of the fact the servant had on a previous occasion brought about a breach of the peace the master had continued to employ him and continued to send him to the railway station armed with a *lathi*; considering these facts, *held* that S. 107 of the Crim. Pro. Code was applicable to a man in his position. He is in fact asserting a claim and making preparations for the enforcement of that claim through a servant who is continuously armed.

The fact that the master does not himself go to the railway station, but always remains in his house is no bar to the application of S. 107 of the Code as against him. **Balalal Mañton v. King-Emperor**, 1 Pat. L.J. 361.

ROSE and JWALA PRASAD, JJ.

(39) S. 107—*No evidence to show that accused was likely to commit breach of peace, etc.—Accused stating he has no objection to give security—Order for security—Legality. The Crown v. Sheodan*, 24 P.R. 1915 (Cr.)=16 Cr. L.J. 784=31 Ind. Cas. 384. See Final Part, 1915, Col. 55.

(40) S. 107. See Nos. 62, 68, 103, *infra*.

(41) Ss. 107, 117, 118, 406—*Joint trial—Illegality—Reference—Power of High Court—Appeal*.

In consequence of certain events which happened, the Magistrate bound over two contending factions, between whom ill-feeling existed over a certain matter, to keep the peace under S. 107 of the Code of Criminal Procedure. In doing so the Magistrate held a joint trial of the two parties, and received evidence for and against them.

Held, reversing the order of the Magistrate, that the joint trial of the two parties hostile to each other was not justified by S. 117 (4) of the Code.

Held, further that S. 406 of that Code does not give a right of appeal in proceedings under S. 107, read with S. 118. **Har Datt Pande v. Emperor**, 14 A.L.J. 269=17 Cr. L.J. 165=33 Ind. Cas. 645.

TUDBALL, J.

(42) Ss. 107, 145—*Magistrate apprehending breach of the peace—Order to furnish security—Order illegal*.

There being a dispute about the possession of a house between two sets of persons, proceedings were instituted under S. 145 of the Crim. Pro. Code. The Magistrate decided in favour of one set, but apprehending a disturbance on the part of the other set, he ordered them to furnish security:—

Held that the order of the Magistrate was illegal and without jurisdiction, there being nothing to justify the making of an order under one section in proceedings taken under another section. **Emperor v. Sri Deo**, 14 A.L.J. 794=17 Cr. L.J. 527=35 Ind. Cas. 495.

WALSH, J.

Crim. Pro. Code—(Continued).

(43) S. 109 (b)—*Bond for keeping the peace—Findings necessary to justify an order under section—Distinction between S. 109 (b), Crim. Pro. Code and S. 153-A, I.P.C.*

Although to constitute an offence under S. 153-A, I.P.C., there must clearly be an intention to promote feelings of enmity or hatred, different considerations arise with regard to the provisions of S. 109 (b), Crim. Pro. Code. In order to justify an order under S. 109 (b), Crim. Pro. Code, one has only got to find that there are words used in the leaflet or matter complained of which are likely to promote feelings of enmity or hatred; and once one has got these words present, there is no necessity for finding intention such as would be necessary if the person was placed under his trial under S. 153-A, I.P.C. **Sital Prosad v. King-Emperor**, 20 C.W.N. 199=23 C.L.J. 105=43 C. 591=17 Cr. L.J. 254=34 Ind. Cas. 974.

GREAVES and WALMSLEY, JJ.

(44) S. 109—*Surety's immovable properties to be taken into consideration in deciding as to their fitness*.

It is not correct to look only to moveable properties of the proposed sureties, and the sufficiency of a surety has to be considered from a general view of his stability and the property which he holds.

The immovable properties belonging to the sureties should also be taken into consideration in deciding as to the stability of their position. **Purna Chandra Chakravarty v. Emperor**, 17 Cr. L.J. 91=32 Ind. Cas. 682.

CHITTY and WALMSLEY, JJ.

(45) Ss. 109, 110—*Security for good behaviour under both sections, if legal. Re Kosa Kumaran*, 16 Cr. L.J. 626=30 Ind. Cas. 450=38 M. 556, Note. See Final Part, 1915, Col. 57.

(46) Ss. 109, 110—*Binding over under both sections—Legality. Re Rangasami Pillai*, 38 M. 555=16 Cr. L.J. 631=30 Ind. Cas. 455. See Final Part, 1915, Col. 57.

(47) Ss. 109, 195, 439—*False statement before a judicial officer of one District making inquiry into the sufficiency of security under S. 109, Crim. Pro. Code, taken by a Magistrate of another district. See SANCTION TO PROSECUTE*, No. 4, 52 P.W.R. 1916 (Cr.).

(48) S. 110—*Jurisdiction of Magistrate over persons residing outside his jurisdiction*.

Having regard to the plain language of S. 110 of the Code of Criminal Procedure it is clear that a Magistrate is given power to deal with persons who have a general reputation as bad characters and who happen to be within his jurisdiction, as there is nothing in the section bearing upon the question of residence (a). **Emperor v. Munna**, 14 A.L.J. 1074=17 Cr. L.J. 390=35 Ind. Cas. 822.

WALSH, J.

References:—(a) 36 M. 96, F.; 27 C. 993, F.

(49) S. 110—*Security for good behaviour—Judgment must contain discussion of evidence—Repute*.

Held, that the evidence that a certain person is of bad character is not sufficient to put a man

Crim. Pro. Code—(Continued).

on security under S. 110 of the Crim. Pro. Code, but there should be clear evidence on the record to show what exactly he had been doing and how he had been living.

Held, also that, where there is strong evidence of apparently respectable men on the record to show that a person has not in recent times lived a disreputable life and such evidence has not been rebutted, security under S. 110 ought not to be demanded from such a person. **Muhammad Hussain v. The Crown**, 30 P.L.R. 1916=17 Cr. L.J. 142=33 Ind. Cas. 318.

JOHNSTONE, J.

(50) *S. 110—Revision—Magistrate on appeal writing a judgment of four lines.*

Where a District Magistrate on appeal in a case under S. 110 of the Code of Criminal Procedure wrote a judgment of four lines, without giving even an indication of the fact that he had weighed the evidence for and against the accused, *held* that there had not been a proper trial of the case and that it should be re-tried. **Sarwan v. Emperor**, 14 A.L.J. 279=17 Cr. L.J. 167=33 Ind. Cas. 617.

TUDBALL, J.

(51) *S. 110—Accused imprisoned for failure to furnish security—Order under S. 110 whether can be made against him—Order for security—Restrictions on sureties—Validity.*

An order under S. 110, Crim. Pro. Code, cannot be made against an accused person who has been imprisoned for failure to furnish security under that section, until he has had time after his release either to retrieve his character or to show that he has no intention of doing so (a).

An order for security should not be restricted to sureties who are inhabitants of one village. **Nga Po Hmi v. King-Emperor**, U.B.R. (1915), 3rd Cr., 86=32 Ind. Cas. 677=17 Cr. L.J. 85. SAUNDERS, J.C.

References:—(a) 31 C. 783; 28 A. 306, R.

(52) *S. 110—Security for good behaviour—Appeal—Magistrate to write a judgment.*

Ordinarily a Court of Criminal Appeal in a summary trial is not bound to write a judgment, but an appeal from an order requiring a person to furnish security to be of good behaviour is distinguishable from an appeal against a conviction in respect of an offence specifically charged. A District Magistrate should not dispose of an appeal against an order requiring a person to furnish security otherwise than by a judgment showing on the face of it that he has applied his mind to a consideration of the evidence on the record, of the pleas raised by an appellant, both in the Court below and in his memorandum of appeal. **Lal Behari v. Emperor**, 14 A.L.J. 445=38 A. 393=17 Cr. L.J. 809=35 Ind. Cas. 485.

PIGGOTT, J.

(53) *S. 110—Previous conviction, proof of, in cases of bad livelihood—Central Bureau register, evidentiary value of—Presidency Magistrate, special rule if any applicable*

Crim. Pro. Code—(Continued).

to—Locus penitentis—Evidence of general repute.

Presidency Magistrates are not absolved from the ordinary rules of evidence in taking proof of previous convictions. Whenever it is required to prove a previous conviction against a man, whether it be for the purpose of enhancement of punishment under S. 75, I.P.O., or in proceedings under Chap. VIII of the Crim. Pro. Code, such previous conviction must be proved strictly and in accordance with law. Unless they are so proved, no Court, whether it be that of a Presidency Magistrate or not, can properly take such previous convictions into consideration against an accused person.

Before the Magistrate previous convictions of one of the accused were sought to be proved by two witnesses one of whom was a certified expert in finger prints and who produced a register from the Central Bureau containing the thumb impression of the accused and his descriptive roll and a list of his previous convictions. The other witness was a clerk in the prison at Bombay who produced an extract from the jail register showing previous convictions of a man who was certified therein to be the same man as the accused, and certified copies of previous convictions of the same man. This witness was asked by the Magistrate to examine the accused and see if he bore the marks attributed to the convict in Bombay and he expressed his opinion that he did.

Held—That previous convictions were not properly proved.

Accused persons should be given some chance of reforming their characters and they should not be proceeded against under S. 110, Crim. Pro. Code, soon after they have emerged from jail.

Nature of evidence sufficient to prove habitual commission of offence discussed. **The King-Emperor v. Sheikh Abdul**, 20 C.W.N. 725=17 Cr. L.J. 185=43 C. 1198=33 Ind. Cas. 825.

CHITTY and WALMSLEY, JJ.

(54) *S. 110—Preventive sections—Arrest outside Magistrate's jurisdiction.*

Where the accused was clearly within the jurisdiction of the Magistrate when he was arrested and when the Magistrate took proceedings under S. 110, Crim. Pro. Code against him, the fact that the actual arrest was effected out of the jurisdiction of such Magistrate would not render the proceedings invalid (a). **King-Emperor v. Po Aung**, 8 L.B.R. 378=17 Cr. L.J. 319=35 Ind. Cas. 495.

PARLETT, J.

References:—(a) 27 C. 993, dissented from; 9 Bom. L.R. 244; 23 M.L.J. 535, F.; 3 O.L.J. 195, D.

(55) *S. 110—Magistrates having jurisdiction to make order under that section.*

S. 110 of the Code of Criminal Procedure only permits of the particular Magistrates mentioned in the section dealing with such cases. Orders in such cases made by other Magistrates are to be held invalid as having

Crim. Pro. Code—(Continued).

been made without jurisdiction. *Puran v. Emperor*, 17 Cr. L.J. 141=33 Ind. Cas. 817. RICHARDS, C.J.

(56) S. 110—*Jurisdiction of Magistrate—“Within the local limits.” meaning of. King-Emperor v. Durga Halwal*, 19 C.W.N. 1032=16 Cr. L.J. 618=30 Ind. Cas. 442=43 C. 153. See Final Part, 1915, Col. 58.

(57) S. 110—*Security for good behaviour, period for—Security for good behaviour for two years, of local—Magistrate, duty of. In re A. Shakoore Salt*, 16 Cr. L.J. 614=30 Ind. Cas. 438. See Final Part, 1915, Col. 58.

(58) S. 110—*Duty of lower Courts in cases thereunder—Position of High Court. Miharban Singh v. Emperor*, 13 A.L.J. 1046=16 Cr. L.J. 805=31 Ind. Cas. 821. See Final Part, 1915, Col. 58.

(59) S. 110—*Rule to be observed in cases under the section by Courts—Revision—Interference by High Court. Hakim Singh v. Emperor*, 13 A.L.J. 1055=16 Cr. L.J. 810=31 Ind. Cas. 826. See Final Part, 1915, Col. 59.

(60) S. 110. See Nos. 45, 46, *supra* and 72, *infra*.

(61) S. 110 (f)—*Security for good behaviour—Evidence.*

Evidence, which was rejected as unreliable and insufficient to convict a person of the charge of dacoity, should not be treated as reliable evidence to show that such person was a dangerous and desperate character to be called upon to furnish security for good behaviour.

The fact that the accused had been convicted by the Sessions Judge although he was afterwards acquitted on appeal by High Court could not be made the basis of such order. *Gulab Chand v. Emperor*, 17 Cr. L.J. 184=33 Ind. Cas. 824.

LINDSAY, J.C.

(62) Ss. 110, 107, 439—*Revision—Interference by High Court on merits—Appeal—Judgment—Court, duty of—Practice.*

Per Walsh, J.—In questions arising under S. 110 and S. 107, the moment it is shown, *prima facie* that there is something which the Courts below have done either in excess of their powers, or by a too summary exercise of their powers, or by misapplying the rules of evidence or by not giving due effect to the evidence for the defence, an application for revision should be admitted.

The High Court will not generally interfere on the merits except in very exceptional cases, because it is idle to suggest that the High Court sitting with only the paper evidence before it, and provided the lower Court has addressed itself to the right question and tried the case according to law, should presume to differ on questions which are purely questions of fact and questions depending on the demeanour of witnesses.

The High Court would be justified in interfering in revision if it is shown that the lower Court, that is the second Court, in hearing the appeal has not taken the trouble to re-hear the case in appeal.

Crim. Pro. Code—(Continued).

The judgment of the lower appellate Court should show that it has really and not nominally gone through the record. “It is not a question of the length of the judgment but of its matter.” It is not necessary for the lower appellate Court to set out over again in detail all the points in the evidence and the reasons, provided that it is clear and the Court has shown by its judgment that it has taken the trouble to re-hear the case. *Gayani v. Emperor*, 17 Cr. L.J. 461=36 Ind. Cas. 141.

WALSH, J.

(63) Ss. 110, 117 (2), 256—*Persons against whom security proceedings are taken—Witnesses giving evidence against them—No right to recall them for further cross-examination.*

A person against whom proceedings under S. 110, Crim. Pro. Code, are taken, cannot, in pursuance of the provision of law contained in S. 117 (2), invoke the aid of S. 256, and is, therefore, not entitled to ask the Court to recall witnesses who have given evidence against him, for further cross examination. *Crown v. Ahmed Baksh*, 1 P.R. 1916 (Cr.)=32 Ind. Cas. 676=17 Cr. L.J. 84.

SHADI LAL, J.

Reference :—35 C. 243, F.

(64) Ss. 110 and 122—*Surety, rejection of—Judicial enquiry—Want of sufficient control over the accused not a good ground of rejection.*

The question whether a particular person who is offered as a surety is or is not fit, within the meaning of S. 122 of the Crim. Pro. Code, must be decided by the Magistrate himself, upon evidence taken for the purpose; sureties offered should not be refused except after judicial enquiry (a).

Rejection of sureties on the ground that they do not show that they have sufficient control over the accused is not valid in law (b) *Rayan Khan v. Emperor*, 24 C.L.J. 61=20 C.W.N. 1133=43 C. 1024.

MOOKERJEE and SHEEPSHANKS JJ.

References :—(a) 3 O.L.J. 575; 10 C.W.N. 1027; 42 C. 706; 37 C. 91, F. (b) 37 C. 91; 16 Bom. L.R. 188=15 Cr. L.J. 268, R.

(65) Ss. 110, 167—*Proceedings under S. 110—Power to remand accused to custody.*

Where proceedings are instituted under S. 110 of the Code of Criminal Procedure the Magistrate cannot remand an accused person to custody.

S. 167 of the Crim. Pro. Code applies to proceedings under Ch. XIV and not to those under S. 110. *Re Subbaraya Chetty*, 39 M. 928.

TYABJI and PHILLIPS, JJ.

(66) Ss. 110, 435, 488, 844, 197, 178, 192, 556, 527, 528 and 526—*Power of Chief Court—Transfer of case, when the Magistrate has expressed himself in strong language against petitioner in another connected case—Proceedings under S. 110 not a criminal case—Nor the person against whom*

Crim. Pro. Code—(Continued).

proceedings are pending is an accused person—Jurisdiction of the Chief Court to entertain application for transfer of case under S. 110, Crim. Pro. Code.

The petitioner was proceeded against under S. 110, Crim. Pro. Code, in the Court of a Magistrate, to show cause why the security should not be demanded from him. The Magistrate had expressed his opinion in a very strong language against the petitioner if a connected case. The petitioner applied under S. 526, Crim. Pro. Code, to get the case transferred to some other Court. The case was referred to a Division Bench to decide the question whether proceedings under S. 110 of the Crim. Pro. Code can be transferred from one Court to another under S. 526 of the Code (a).

The referring Judge (Rattigan, J.) was of opinion that such proceedings cannot be transferred and observed:—"If this Court has jurisdiction, I am satisfied that a transfer should be directed, as the Magistrate before whom the proceedings are being held has in another case expressed himself in rather strong language against the petitioners." *Rehman v. Crown*, 78 P.L.R. 1916.

RATTIGAN, J.

References:—15 A. 365; 4 P.R. 1896 (Cr.); 42 P.R. 1905=64 P.W.R. 1905 (Cr.); 6 P.R. 1911=30 P.W.R. 1911 (Cr.); 26 M. 188; 2 C.L.J. 614; 34 A. 533; 25 B. 179; 28 C. 709; 1 P.R. 1913=42 P.W.R. 1912 (Cr.); 16 C. 781 (787); 13 P.R. 1885 (Cr.), R.

(67) S. 112—*Security for good behaviour—Magistrate refusing to accept sureties—Irregularity—High Court—Jurisdiction.*

Where a person was bound over by the Magistrate under S. 112 of the Code of Criminal Procedure, to be of good behaviour, and sureties were offered whom the Magistrate refused to accept, whereupon such person asked the Sessions Judge to examine the record and it appeared also that he had been bound over without any such enquiry or record of evidence as is required by law, held, on reference by the Sessions Judge, that the High Court had jurisdiction to deal with the entire question, and to set aside the order of the Magistrate as the procedure adopted by him was in contravention of the provisions of law. *Emperor v. Sukhdeo*, 14 A.L.J. 215=17 Cr. L.J. 157=39 Ind. Cas. 637.

PIGGOTT, J.

(68) Ss. 114, 107, cl. (4)—*Warrant under S. 114—Arrest—Bail—Refusal by Magistrate—Illegality—No jurisdiction to refuse.*

A Magistrate has no jurisdiction to refuse bail to an accused arrested under a warrant under S. 114, Crim. Pro. Code. *Fazl Mahomed wd. Sabirul v. The Crown*, 9 S.L.R. 158=32 Ind. Cas. 669=17 Cr. L.J. 77.

BRATT, J.O.

References:—81 M. 315 (F.B.), *Rel.*; 36 M. 474, R.

(69) S. 117. See No. 41, *supra*.

(70) S. 117 (3). See No. 68, *supra*.

(71) S. 118. See No. 41, *supra*.

Crim. Pro. Code—(Continued).

(72) Ss. 121, 110—*Security for good behaviour—Principal committing offence—Bond of sureties—Liability to forfeiture—Legality.* *Crown v. Suer Singh*, 10 P.R. 1915 (Cr.)=16 Cr. L.J. 549=29 Ind. Cas. 821=21 P.L.R. 1916. See Final Part, 1916, Col. 64.

(73) S. 122. See No. 64, *supra*.

(74) Ss. 123, 397—*Nature and object of imprisonment under S. 123—Person already in prison convicted again and sentenced to a term of imprisonment—The two terms should run concurrently.*

Imprisonment under S. 123, Crim. Pro. Code, on account of failure to furnish security for good behaviour is not a sentence of imprisonment, within the meaning of S. 397, Crim. Pro. Code. The object of detaining men in prison under S. 123 is to control their conduct for a certain period.

Where a person sentenced to imprisonment under S. 123, Crim. Pro. Code, is convicted of an offence and sentenced to a term of imprisonment, this latter sentence should run concurrently with the imprisonment under S. 123, and not after the expiry of the sentence of imprisonment under S. 123. *Markandae Genda v. The King-Emperor*, 1 Pat. L.J. 212=17 Cr. L.J. 528=36 Ind. Cas. 496.

CHAMIER, C.J. and JWALA PRASAD, J.

(75) S. 123 (2). See No. 12, *supra*.

(75-a) S. 133. See MAGISTRATE, JURISDICTION OF.

(76) S. 133—*Letters Patent appeal—Order under Ch. X of Crim. Pro. Code—Not appealable.* *Nisalakara Row Subbaya v. Poola Ramayya*, (1915) M.W.N. 210=16 Cr. L.J. 349=28 Ind. Cas. 733=39 M. 537. See Final Part, 1916, Col. 65.

(77) Ss. 133, 135 (b), 137 (1)—*Reasonable opportunity to show cause—Order if can be made on result of local inspection—Vague and indefinite order.*

A proceeding under S. 133, Crim. Pro. Code, is in the first instance entirely *ex parte*, and the report or the other information whereupon the Magistrate has taken action before making the conditional order is no evidence against the opposite party. It is consequently desirable that reasonable opportunity should be given to the opposite party to show cause as contemplated by S. 135, cl. (b), and to adduce evidence as prescribed by S. 137 (1).

An order under S. 133 cannot even by consent of parties be based upon information gathered at a local enquiry.

When in a proceeding under S. 133, instituted against a number of persons, it is alleged that various unlawful obstructions have been caused upon a public way, it is essential that the order should state accurately, with regard to each person, the specific obstruction made by him, which he is required to remove, unless it is alleged that all the persons are jointly responsible for all the obstructions mentioned. *Raimohan Karmakar v. King-Emperor*, 30

Crim. Pro. Code—(Continued).

C.W.N. 1171=17 Cr. L.J. 409=35 Ind. Cas. 969.

MOOKERJEE and SHEEPHANKS, JJ.

Reference:—11 C.L.J. 114, F.

(78) S. 195 (b). See No. 77, *supra*.

(79) S. 197 (1). See No. 77, *supra*.

(80) S. 144—*Magistrate, whether can give possession of property to Village Munsif—Jurisdiction.*

A Magistrate has no power under S. 144 of the Code of Criminal Procedure, to direct a Village Munsif to be in possession of the property. *Baganathi Serval v. Yelayee*, 3 L.W. 498= (1916) 2 M.W.N. 88=17 Cr. L.J. 190=33 Ind. Cas. 880.

SESHAGIRI AIYAR, J.

Reference:—12 C.W.N. 1044, F.

(81) S. 144—*Successive orders, propriety of—Revision by High Court of order under section after expiration of two months.*

A Magistrate should not by successive orders under S. 144, Crim. Pro. Code, extend the period of two months prescribed by cl. (5) of the section (a).

Case in which the High Court set aside an order under S. 144, Crim. Pro. Code, after the expiration of two months from the date of the order. *Bheshaur Chuckerbutty v. The Emperor*, 20 C.W.N. 758=24 C.L.J. 272=17 Cr. L.J. 300=34 Ind. Cas. 312.

CHITTY and WALMSLEY, JJ.

Reference:—(a) 11 C.W.N. 79, R.

(82) S. 144—*Object of—Evasion of the law—Arbitrary and successive renewals of order under the section—High Court's power to revise—Charter Act, S. 15. Govinda Chetti v. Perumal Chetti*, 25 M.L.J. 370=14 Cr. L.J. 589=21 Ind. Cas. 381=38 M. 489=16 Cr. L.J. 629=30 Ind. Cas. 453. See Final Part, 1913, Col. 68.

(83) S. 144. See No. 115, *infra*.

(84) Ss. 144, 195, 476—*Penal Code, S. 188—Prohibition order under S. 144, Crim. Pro. Code, passed without any evidence—Prosecution for disobedience of order not properly passed—Cognizance of case under S. 188 by the same Magistrate who passed the order disobeyed.*

A servant of the first party filed a petition before the Sub-divisional Magistrate complaining that the second party were about to construct a drain and if the first party opposed them there was a likelihood of a breach of the peace, whereupon the Magistrate without taking any evidence issued an injunction under S. 144, Crim. Pro. Code, against the second party. On the next day, on the complaint of the same man, the Magistrate summoned the second party under S. 188, I.P.C. Subsequently he transferred the case to a Magistrate with second class powers and again withdrew it from his file and sent it to the Additional District Magistrate.

Held—That the proceedings were wholly irregular.

That, the order under S. 144, Crim. Pro. Code, should never have been made.

Crim. Pro. Code—(Continued).

That in summoning the second party under S. 188, I.P.C., the Sub-divisional Magistrate was taking cognizance of the offence under S. 188, I.P.C., which he had no power to do. Either action by the Magistrate under S. 476, Crim. Pro. Code, or an application for sanction under S. 195, Crim. Pro. Code, was necessary. The High Court quashed the proceedings under S. 188, I.P.C., and also set aside the order under S. 144, Crim. Pro. Code, which was the foundation of those proceedings, although that order had expired. *Chandra Kanta Kanjilal v. King-Emperor*, 20 C.W.N. 981=17 Cr. L.J. 464=36 Ind. Cas. 144.

CHITTY and WALMSLEY, JJ.

(85) S. 145—*Order made without regard to provisions of the section and without recording evidence—Ultra vires and void.*

In this case the Magistrate in acting under the provisions conferred on him by S. 145 of the Code of Criminal Procedure, made no order in writing stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace existed concerning the property in dispute and requiring the parties concerned in such dispute to attend his Court and to put in written statements of their respective claims as respects the facts of actual possession of such property. The Magistrate further omitted to make the order required by sub-S. (1) of S. 145, and no copy of the order was served upon any of the parties, nor was a written copy published as required by sub-S. (9) of the section. When the petitioners appeared in the Magistrate's Court they made an application to him to summon four witnesses for them and to take their evidence; the necessary summonses were issued, but the evidence of the witnesses was not taken by the Magistrate at all.

Held, that the Magistrate had wholly disregarded the positive provisions of S. 145, and that the order of the Magistrate under the section was *ultra vires* and must be set aside. *Tara Chand v. Behari Lal*, 22 P.R. 1916 (Cr.). =36 Ind. Cas. 868.

SHAH DIN, J.

References:—68 P.J.R. 1914; 4 P.R. 1916 (Cr.), R.

(86) S. 145—*Dispute as to immoveable property—Preliminary order passed and written statements filed—Breach of the peace found unlikely—Magistrate, if can drop proceedings—Jurisdiction.*

The Court has jurisdiction to decline to proceed with an inquiry under S. 145 of the Crim. Pro. Code whenever it is shown to its satisfaction that the dispute which was likely to cause a breach of the peace no longer exists and that the whole danger has disappeared (a).

Where in pursuance of a preliminary order passed by a Magistrate under S. 145, Crim. Pro. Code, the parties filed written statements of their respective claims and subsequently the Magistrate became satisfied that there was no further apprehension of danger to the public peace.

Held that the Magistrate was not bound to continue the proceedings.

Crim. Pro. Code—(Continued).

The provision in cl. (7) of the section is intended to keep alive the jurisdiction of the Magistrate where the danger to the peace still exists in spite of the death of any party to the proceedings. *Kamulammal v. Yavu Rowther*, 4 L.W. 67=17 Cr. L.J. 128=58 Ind. Cas. 814.

AYLING and NAPIER, JJ.

Reference:—(a) 80 C. 112 (116), *Appr.*

(87) S. 145—*Determination of possession—Order under O. XXI, r. 96, Civ. Pro. Code—Effect on Magisterial enquiry.*

The actual possession of the lands in dispute is the only subject of enquiry under S. 145, Crim. Pro. Code. An order for delivery of symbolical possession under O. XXI, r. 96, Civ. Pro. Code, has no bearing upon the magisterial enquiry. *Ramalingam Pillai v. Raja of Ramnad*, 16 Cr. L.J. 736=31 Ind. Cas. 176.

AYLING, J.

(88) S. 145—*Joint title to land, effect of, on the applicability of the section.*

The mere fact that there may be a joint title to the land would not prevent the application of S. 145, Crim. Pro. Code. *Bijnath Marwari v. W. S. Street*, 20 C.W.N. 518=17 Cr. L.J. 251=34 Ind. Cas. 971.

CHITTY and WALMSLEY, JJ.

Reference:—17 C.W.N. 944, F.

(89) S. 145—*Order under section contrary to decree of Civil Court.*

The petitioners, the second party to the proceeding under S. 145, Crim. Pro. Code, obtained a decree against one of the first party and another person who were entitled to an undivided one-fourth share in the property in dispute. This share was sold in execution of the decree and purchased by the decree-holders, the petitioners, who obtained delivery of possession through the Court. The Magistrate finding that the petitioners were never in actual possession of the property and the crop was grown by the first party made an order in favour of the latter.

Held—That the order was liable to be set aside. *Atul Hazrah v. Uma Charan Chongdar*, 20 C.W.N. 796=23 C.L.J. 555=17 Cr. L.J. 182=33 Ind. Cas. 822.

CHITTY and WALMSLEY, JJ.

(90) S. 145—*Joint possession of property in dispute—Magistrate, Jurisdiction of.*

Where in a dispute regarding possession of immoveable property the Magistrate found both parties to the dispute to be in joint possession of the said immoveable property, he cannot issue an order under S. 145 of the Code of Criminal Procedure, prohibiting any of the parties from disturbing the possession of the other till evicted in due course of law. (a). *Yeerabhadra Pillai v. Shunmugam Pillai*, 17 Cr. L.J. 76=32 Ind. Cas. 668.

SRINIVASA AIYANGAR, J.

References:—(a) 4 C.W.N. 426; 26 Ind. Cas. 844; 16 Cr. L.J. 52; 2 L.W. 107, F.

(91) S. 145—*Object of.*

Orders under S. 145 of the Code of Criminal Procedure should not be lightly disturbed. They are made for the purpose of keeping the

Crim. Pro. Code—(Continued).

peace pending the parties' legitimate appeal to the proper civil tribunal. *In re Lingaraja Misra*, 17 Cr. L.J. 143=33 Ind. Cas. 319.

COUTTS-TROTTER, J.

(92) S. 145—*Revision—High Court, interference by.*

The High Court* will interfere in only very exceptional cases with orders made under S. 145, Crim. Pro. Code. *Hardeo Singh v. Ram Chariter Singh*, 17 Cr. L.J. 286=34 Ind. Cas. 1006.

ROE and JWALA PRASAD, JJ.

(93) S. 145—*Scope of—Actual physical possession, consideration of—Possession, nature of, irrelevant—Written statement—Jurisdiction.* *Narayana Asari v. Kandasami Asari*, 16 Cr. L.J. 525=29 Ind. Cas. 541=3 L.W. 164. See Final Part, 1915, Col. 62.

(94) S. 145—*Notice issued—Subsequent dismissal of petition without enquiry—Legality.* *Yelayuda Kone v. Narayana Kone*, 2 L.W. 1208=16 Cr. L.J. 789=31 Ind. Cas. 645. See Final Part, 1915, Col. 70.

(94-a) S. 145, scope and applicability of—*"Parties concerned in such dispute" meaning of—Manager or agent, if has sufficient possession—Servant, nature of possession of—Order under the S. 145, Crim. Pro. Code, if can be made against servants of landlords.*

The words 'parties concerned in such dispute,' occurring in S. 145 of the Crim. Pro. Code include persons who are interested in or claim a right to the property in dispute (a).

A servant of a landlord cannot be treated as in actual possession either in his own right or on behalf of another and the possession in such a case is with the person who pays him his wages, and consequently S. 145 of the Code can have no application to such servants in the absence of their masters.

An order passed under S. 145 against servants without their master being on the record is one made without jurisdiction and is liable to be set aside in revision by the High Court (b). *Nagoji Row v. Subbarayulu Naidu*, 5 L.W. 118=36 Ind. Cas. 876.

SPENCER, J.

References:—(a) 21 C. 29; 18 M. 51, F. (b) 6 C.L.R. 193; 31 C. 48, R.

(94-b) S. 145—*Dispute relating to land—Breach of the peace, likelihood of—Statement of grounds of belief, sufficiency of—Possession on the date of the preliminary order, finding as to—Question of jurisdiction—Order of Magistrate under the section—High Court's powers of interference under S. 107 of the Government of India Act—Remedy by suit, open—Revisional jurisdiction taken away by S. 435 (3)—How affects High Court's power to set aside order—Practice.*

In the case of proceedings under S. 145 of the Crim. Pro. Code, if the Police report shows that there is a dispute relating to land likely to lead to a breach of the peace and the Magistrate believes it and issues the preliminary order

Crim. Pro. Code—(Continued).

basing his information on such report only, he acquires sufficient jurisdiction to act under the section and it is not necessary for him to set out any further reasons for his being satisfied as to the existence of such a dispute. His order under the section is final and the High Court will not scrutinise the said reasons (a).

Where the dispute between the parties was as to possession of the land in question on the date of the preliminary order and the Magistrate has recorded a finding in general terms that possession was with one of the contesting parties, it follows that the possession so found refers to the date of the said preliminary order and the Magistrate's proceedings cannot be challenged for an error of jurisdiction on that ground.

An order under the section passed by a competent Magistrate should not be lightly interfered with by the High Court as its object is to preserve peace and as such orders are exempted from the revisional jurisdiction of the High Court by S. 435 (3) of the Code and as the aggrieved party has his remedy by civil suit. *Krishnappa Naidu v. Alamelu Ammal*, 5 L.W. 165=36 Ind. Cas. 855.

KRISHNAN, J.

Reference:—(a) 33 C. 352, F.

(93) S. 145—Order of Magistrate—High Court's power of interference. See HIGH COURT, JURISDICTION OF, No. 1, 1 Pat. L.J. 336 (S.B.).

(96) S. 145—Possessory order under S. 145, Crim. Pro. Code, in favour of accused—Crops sown and cut down by accused—Theft. See PENAL CODE, No. 142, 17 Cr. L.J. 75.

(97) S. 145—Theft of crops—Order directing complainant to be put in possession, whether sufficient—Effect of order. See PENAL CODE, No. 143, 17 Cr. L.J. 81.

(98) S. 145 See No. 42, *supra*.

(99) S. 145 (4)—Failure to take evidence—Passing of final order on the evidence of person not witness of either party—Illegality—Requirements of S. 145 (4).

In proceedings under S. 145, Crim. Pro. Code, a Magistrate, after recording the statements of each party, examined a person who was not called as a witness by either party, without questioning the parties as to whether they wanted to adduce evidence, and passed a final order against the petitioners.

Held, that the enquiry was of a summary character and that the order was bad in law.

S. 145 (4) requires an examination of the witnesses of the parties and this requirement is not satisfied by the examination of a person who is not a witness of either of them. *Fateh Sher Khan v. The Crown*, 4 P.R. 1916 (Cr.)=23 P.W.R. 1916 (Cr.)=17 Cr. L.J. 129=33 Ind. Cas. 305.

SHADI LAT, J.

Reference:—8 C.W.N. 719, R.

(100) S. 145 (4)—Magistrate's refusal to examine witnesses—Declining jurisdiction—Irregularity—Revision.

Crim. Pro. Code—(Continued).

When the mind of the Magistrate is not applied to finding as to who was in possession on the date of the preliminary order, the proceedings must be taken to have been passed without jurisdiction (a).

Failure to receive the evidence tendered in proceedings under S. 145, Crim. Pro. Code, would amount to the declining of jurisdiction by the Magistrate (b).

Per Seshagiri Aiyar, J.—The two grounds which justify proceedings under S. 145 are apprehension of a breach of the peace and a threat to disturb peaceful possession. Any violation of the law which deprives the party from placing the materials to enable the Magistrate to arrive at a conclusion on these two vital points, must be regarded as affecting jurisdiction.

The High Court has jurisdiction to consider the proceedings of the Magistrate where it is satisfied he has acted illegally or has committed serious irregularities in the procedure. *Marudanayakam Pillai v. Mohammad Rowthen*, 17 Cr. L.J. 217=34 Ind. Cas. 329.

SESHAGIRI AIYAR, J.

References:—(a) 27 Ind. Cas. 911=16 Cr. L.J. 239, F. (b) 29 M. 561=16 M.L.J. 419=1 M.L.T. 405=5 Cr. L.J. 91; 17 Ind. Cas. 65=36 M. 275=23 M.L.J. 499=12 M.L.T. 499=(1912) M.W.N. 1164=13 Cr. L.J. 753; 24 Ind. Cas. 697=26 M.L.J. 208=(1914) M.W.N. 352=15 Cr. L.J. 609=16 C. 513=24 A. 315=A.W.N. (1902) 74; 34 C. 810=6 Cr. L.J. 452, R.

(101) S. 145 (4) (1)—Addition of parties—Wrongful and forcible dispossession—Digging tank with sanction of Municipality—Party if must have had notice of the proceeding to be concerned in the dispute.

Where, in a proceeding under S. 145, Crim. Pro. Code, it appeared that one of the parties, within two months from the commencement of the proceeding, obtained sanction from the Municipality and proceeded to dig a tank on the land in dispute to the exclusion of another party who was then found to be in possession:

Held—That it was forcible and wrongful dispossession within the meaning of sub-S. 4, cl. (1) of S. 145.

Held further—That under the Full Bench Ruling in 30 C. 155=6 C.W.N. 737, a party may be added provided he was concerned originally in the dispute which was the foundation of the proceeding, and there is no necessity for a fresh proceeding. Further if a party is added before the inquiry begins, there is no irregularity.

That whether or not there was then an apprehension of a breach of the peace is a matter eminently for the exercise of the Magistrate's discretion.

For a person to be concerned in a dispute relating to land, it is not necessary to be actually present near the land or to have had notice of the proceeding when started. *Manmotha Nath Chatterjee v. Ganga Gir Gossain*, 30 C.W.N. 978=17 Cr. L.J. 449=36 Ind. Cas. 129.

OHITTY and WALMSLEY, JJ.

Crim. Pro. Code—(Continued).

(103) S. 145 (7)—*Scope of—Charter Act (24 and 25 Vict., c. 104), S. 15—Revision petition under the Charter Act—Death of petitioner pending revision—Abatement of proceedings—Legal representative, if can be brought on record to prosecute, the revision—Power of High Court to deal suo motu—Formalities of jurisdiction, compliance with—Practices.*

S. 145, cl. 7 of the Code of Criminal Procedure, regulates only proceedings under the said section and its provisions can have no application to revisional proceedings under the Charter Act.

Where the petitioner against whom an order under S. 145 had been made preferred a revision petition to the High Court and pending disposal of the same, died, the proceedings abate and a petition by his son to be brought on the record in order to prosecute the revision does not lie.

The High Court will not of its own motion interfere in revision when all the formalities necessary to give jurisdiction to the Magistrate have been complied with (a). *Alluri Subbaraju v. Alluri Ramabhadra Raju*, 4 L.W. 440=17 Cr. L.J. 389=35 Ind. Cas. 821.

OLDFIELD and KRISHNAN, JJ.

Reference:—(a) 36 M. 275, R.

(103) Ss. 145 and 107—*Proceedings if can be had after order under S. 107, Crim. Pro. Code—Jurisdiction of Magistrate.*

There would be no want of jurisdiction on the part of a Magistrate to continue proceeding under S. 145, Crim. Pro. Code, after having made an order under S. 107, Crim. Pro. Code. *Nasiruddin Sarkar v. Gofuruddin Mahomed*, 21 O.W.N. 160.

CHITTY and WALMSLEY, JJ.

(104) Ss. 145, 146—*Attachment of the property in dispute—Civil adjudication as to the rights of some of the parties—Withdrawal of attachment by Magistrate—Practice—Mesne profits, award of, by Magistrate.*

It is not necessary that there should be a decree in favour of all the parties to enable the Magistrate to withdraw an attachment made under S. 146 of the Crim. Pro. Code, and if there is an adjudication by a Civil Court in favour of some at least of the parties, that is sufficient for the purpose of enabling the Magistrate to walk out of the property (a).

Where the award of mesne profits involves nice questions of *res judicata*, the Magistrate should leave the matter to be decided by the Civil Court. *Vittobah Rao v. Narasinga Rao*, 4 L.W. 55=20 M.L.T. 247=(1916) 2 M.W.N. 173=17 Cr. L.J. 391=35 Ind. Cas. 507.

SESHAGIRI AIYAR, J.

Reference:—(a) 17 M.L.T. 392, F.

(105) Ss. 145 and 146—*Attachment of math and cattle found therein—Legality.*

In a proceeding under S. 145 of the Code of Criminal Procedure, 1898, in respect of a certain village and the math or aashal situate therein, the Magistrate, acting under cl. (4), attached the subject-matter in dispute, viz., the village and the math, and directed the Sub-Inspector

Crim. Pro. Code—(Continued).

of Police to take charge of them. The Sub-Inspector accordingly attached the property including certain cattle that were found by him in the math at the time of attachment. The Magistrate eventually directed the attachment of the village and the math under S. 146 until the rights of the parties should be determined by a competent Court.

Held, that the Police Sub-Inspector acted legally in taking charge of and attaching the cattle found in the math at the time of attaching the math under orders of the Magistrate under S. 146 of the Crim. Pro. Code (a).

Per *Jwala Prasad, J.*—"No doubt, under S. 145 or 146 of the Crim. Pro. Code, moveable property such as cattle cannot be attached. But in this case the Magistrate ordered the attachment of the math which is immoveable property. The Sub-Inspector attaching the math, took charge of the cattle as they were found in the math. The Sub-Inspector of course, was not only entitled but was bound to take charge of everything that was within the math including the cattle. After attachment no party had a right to enter into the math or to take possession of the property moveable or immoveable appertaining to and found within the math." *Mahant Bharat Das v. Ram Charitar Das*, 1 Pat. L.J. 356.

ROE and JWALA PRASAD, JJ.

References:—(a) 14 Ind. Cas. 318, F.; 30 C. 110, D.

(106) Ss. 145 to 147—*Temple, dispute as to possession and management—Whether a dispute, as to 'use of land' within Ss. 145 or 147.*

With reference to disputes regarding the right of the management of the temple and the performance of *pooja* therein, S. 147, Crim. Pro. Code does not apply. That section deals simply with disputes regarding "the use of any land or water." The words "land or water" are used in their ordinary significance without the extended meaning assigned to them as used in S. 145 of the Code of Criminal Procedure, by cl. 2 of that section.

The words "use of any land or water" will not cover a right to perform *pooja* in a temple; nor would they cover the right of management of the temple itself (a).

A dispute as to the management of the temple may be dealt with under S. 145 of the Code of Criminal Procedure.

If only the right to perform *pooja* to a particular idol in the temple were in dispute, the matter might be different.

A "temple" is a "building," within the meaning of cl. 2 of S. 145 of the Code of Criminal Procedure. *Palaniyandi Pandaram v. Palaniappa Thevan*, 17 Cr. L.J. 285=34 Ind. Cas. 661.

AYLING, J.

References:—(a) 6 Ind. Cas. 182=14 O.W.N. 611=11 Cr. L.J. 292=12 O.L.J. 22=37 C. 578, F.; 11 M. 233=2 Weir 117=29 M. 237=4 Cr. L.J. 58; 35 Ind. Cas. 999=16 M.L.T. 427=27 M.L.J. 587=15 Cr. L.J. 671, D.

Crim. Pro. Code—(Continued).

(107) *Ss. 145, 147—Scope of right to collect tolas, dispute as to.*

A dispute as regards a right to collect tolas (small perquisites) from a *hat* on one day every year, is one concerning the right of use of any land within the meaning of S. 147 of the Code of Criminal Procedure (a).

The words used in S. 147 are of wider and more general application than those in S. 145 of the Code. *Sarat v. Mobarak*, 24 C.L.J. 437.

SANDERSON, C.J., and SMITHER, J.

Reference:—23 C. 55, R.

(108) *Ch. XII, Ss. 145, 147 and S. 435—Revisional powers of High Court—Jurisdiction—Sessions Judge calling for a proceeding before an inferior Court—Discretion.*

A Magistrate, after taking proceedings under Ch. XII, Crim. Pro. Code, subsequently passed an order in which he directed, either under S. 145 or S. 147, of that Code, that an order be sent to the police directing them to deliver possession of a house to the complainant and to instruct the accused not to interfere with his possession till they got a decree from a Court in their favour. The Sessions Judge sent for these proceedings and referred them to the High Court.

Held (1) that it was optional with the Sessions Judge to send for any proceedings before an inferior Criminal Court and, guided by S. 435 of the Crim. Pro. Code, he, under the special circumstances of the case, would have exercised a wise discretion by not calling for it; (2) that the order of the Magistrate directing delivery of possession was without jurisdiction. *Sheorani v. Balj Nath*, 14 A.L.J. 146=17 Cr. L.J. 145=33 Ind. Cas. 625.

KNOX, J.

(109) *Ss. 145, 148, 439, proceedings under—Discretion of Magistrate—High Court, revisional power of—Government of India Act (1915), S. 107—Costs.*

Section 148½ of the Crim. Pro. Code, clearly contemplates that a Magistrate shall direct payment only of such costs as have been actually incurred. So before making an order as to payment of costs it is necessary and proper that the Magistrate should hold an enquiry as to what expenditure in costs were actually incurred.

But where proceedings of the Magistrate under S. 145, Crim. Pro. Code, are not void for want of jurisdiction the proceedings in regard to costs fall clearly under Ch. XII of the Crim. Pro. Code and are, therefore, not open to revision, either under S. 107 of the Government of India Act of 1915 or under S. 439 of the Crim. Pro. Code (a). *Nemdhari Singh v. Ram Tahal Rai*, 17 Cr. L.J. 348=35 Ind. Cas. 524.

ROE and JWALA PRAHAD, JJ.

References:—(a) 9 C.W.N. 887=1 C.L.J. 331=2 Cr. L.J. 408, F.

(110) *Ss. 145, 156—Disputed land under water rendering act of possession by either*

Crim. Pro. Code—(Continued).

party impossible—Order in favour of one party on the ground of his possession in the previous year—Substitution by High Court of order under S. 146 for order under S. 145.

Where in a proceeding under S. 145, Crim. Pro. Code, the Magistrate made the final order in favour of one party, finding that, as there could not be any act of peaceful possession within two months of the date of the proceeding owing to the land being under water, the possession of the current year was to be presumed in favour of the man who was in possession during the previous years;

Held—That the order was in direct contravention of S. 145, cl. (4), and the Magistrate should have passed an order under S. 146, Crim. Pro. Code.

The High Court substituted an order under S. 146, Crim. Pro. Code, for the order under S. 145, made by the Magistrate. *Satyendra Nath Banerjee v. Krishnadhan Adhikary*, 20 C.W.N. 1014.

CHITTY and WALMSLEY, JJ.

(111) *Ss. 145, 439—Revision—Criminal cases—Failure to observe prescribed procedure. Musammatt Budhan v. Ram Rakha Mal*, 169 P.L.R. 1915=32 P.W.R. 1915 (Or.)=16 Cr. L.J. 623=30 Ind. Cas. 452. See Final Part, 1915, Col. 72.

(112) *Ss. 145, 522—Whether Magistrate competent to place one in possession by ousting another—Ordre illegal. Tulshi Ram v. Abrar Ahmad*, 13 A.L.J. 932=16 Cr. L.J. 714=30 Ind. Cas. 1002=37 A. 654. See Final Part, 1915, Col. 73.

(113) S. 146. See Nos. 104, 105, 106, *supra*.

(114) S. 147. See Nos. 106, 107, 108, *supra*.

(115) *Ss. 147, 144, 438, 439—Nature of proceedings under Ch. XII of the Crim. Pro. Code—Interference in revision—High Court's power to call for a finding or for additional evidence—Public street—Jurisdiction of Magistrate to pass orders under S. 147, Crim. Pro. Code—Sentimental caste objections whether to be countenanced by Magistrates—Powers of High Court under Charter Act—How to be construed.*

Per Phillips, J.—Proceedings under Ch. XII, Crim. Pro. Code, are of a special nature and are such that the Magistracy may well be allowed greater liberty in carrying out those provisions than they are allowed in trying ordinary crime. The provisions of the chapter are concerned with disputes relating to immovable property which are likely to cause a breach of the peace, and give Magistrates power to deal with matters of a quasi-civil nature, because upon the Magistracy and Police is thrown the burden of maintaining the public peace. In this view it is undesirable that such orders should be interfered with in revision, unless they are made without jurisdiction or are obviously unreasonable or unjust (a).

S. 439, Crim. Pro. Code, does not give the High Court power to call for a finding when exercising its powers of revision, although it

Crim. Pro. Code—(Continued).

does give power to call for additional evidence upon which the High Court can itself come to a conclusion. An order of the High Court, based solely upon the finding submitted by the lower Court, is not correct. The additional evidence must be weighed by the Court of Revision and its decision based upon a consideration thereof.

The powers of the High Court under the Charter Act should not be construed in a limited manner.

There is nothing in the language of S. 147, Crim. Pro. Code, which necessarily debars a Magistrate from passing an order with reference to a public street.

Per Sadasiva Aiyar, J.—Sentimental caste objections should not be countenanced by Magistrates acting under S. 147 of the Crim. Pro. Code, though of course they can, in emergent cases, pass *temporary orders*, under S. 144 (even if such orders encourage caste bigotry) when the preservation of the public peace is required. Even in such cases, the temporary nature of the order cannot be attempted to be changed by continued renewals (b).

Under S. 15 of the Charter Act, the High Court's power of revision can be exercised to the like extent (at least) to which the powers of revision can be exercised in a case coming under S. 439, Crim. Pro. Code. S. 439 gives the High Court power to exercise all the powers of a Court of Appeal under S. 428. S. 428 allows fresh evidence to be taken by the appellate Court or by a Magistrate under the orders of the appellate Court, but the appellate Court has to come to its own conclusion upon the evidence so taken, and there is no provision in S. 428 allowing the appellate Court to accept the finding of the Magistrate come to on such evidence.

The Magistrate has jurisdiction under S. 147, Crim. Pro. Code, to pass orders even against the right of passage through a public street. But he ought not to pass such a prohibitory order unless it is clearly proved that there is a right by custom or by grant or by a Statute in one section of the public to prevent another section of the public from using the public street on particular occasions or for particular purposes, when such use is ordinarily and *prima facie* lawful (c). *Sudalaimuthu Chettiar v. Enan Samban*, 16 Cr. L.J. 767 = 31 Ind. Cas. 367.

SADASIVA AIYAR and PHILLIPS, JJ.

References.—(a) 36 M. 275 = 17 Ind. Cas. 6 = 19 M.L.T. 489 = 23 M.L.J. 499 = (1912) M.W. N. 1154 = 13 Cr. L.J. 753, F. (b) 38 M. 489 = 16 Cr. L.J. 629 = 80 Ind. Cas. 453, F. (c) 6 M.L.J. 193; 7 M. 49 = 2 Weir 115; 6 M. 233 = 2 Weir 77; 80 M. 186 = 9 Bom. L.R. 663 = 6 C.L.J. 566 = 17 M.L.J. 240 = 4 A.L.J. 833 = 11 Q.W.N. 585 = 2 M.L.T. 204 = 30 I.A. 93; 26 M. 554 = 1 Weir 260 = 13 M.L.J. 171; 23 Ind. Cas. 730 = 15 M.L.T. 230 = (1914) M.W.N. 894 = 15 Cr. L.J. 862 = 26 M.L.J. 233, F.

(116) *Ss. 147, 148—Right of way, dispute as to—Local enquiry, report on—Statements of parties, order on—Jurisdiction.*

6 Cr.

Crim. Pro. Code—(Continued).

In this case the Deputy Magistrate took cognisance of a dispute as to a right of way falling under S. 147 of the Code of Criminal Procedure. Under S. 148 he directed a Subordinate Magistrate to hold a local enquiry. That Magistrate made the enquiry and submitted his report and, as provided by the section, it was read as evidence in the case.

Held, that the Deputy Magistrate acted with jurisdiction because he acted on the Sub-Magistrate's report and decided the case.

There is no reason to hold that he acted without jurisdiction when his decision was based on the materials in the case. *Muthuswami Nadan v. Kalinga Muppan*, 17 Cr. L.J. 478 = 36 Ind. Cas. 158.

SPENCER, J.

(117) S. 148. See Nos. 109, 116, *supra*.

(118) S. 149.—Preventive powers of police-officers—Power to stop *puce* held without license. See ACT V OF 1861 (POLICE), No. 4, 8 L.B.R. 929.

(119) S. 156. See No. 110, *supra*.

(119-a) S. 164. See CONFESSION.

(120) S. 164—Statement of a confessional nature recorded as "statement"—Admissibility as evidence—Alternative charge for perjury—Penal Code, S. 193—Confessions and statements, difference between.

Where, in the course of the investigation of an offence, a witness makes a statement of a confessional nature which is recorded by the Magistrate under S. 164, Crim. Pro. Code, as statement and not as confession, and subsequently, in the course of the preliminary enquiry before the committing Magistrate, retracts that statement, it is admissible in evidence against that witness on a prosecution for perjury on an alternative charge. *In re Maddala Ramanujamma*, 20 M.L.T. 21 = 17 Cr. L.J. 196 = 39 M. 977 = 34 Ind. Cas. 307.

AYLING and NAPIER, JJ.

(121) *Ss. 164, 512*—Admissibility, proof and evidentiary value of dying declarations. See EVIDENCE ACT, No. 19, 16 Cr. L.J. 769.

(122 & 123) S. 165—Search-warrant—S. 332, Penal Code. *Emperor v. Brikhban Singh*, 13 A.L.J. 979 = 38 A. 14 = 16 Cr. L.J. 819 = 31 Ind. Cas. 995. See Final Part, 1915, Col. 76.

(124) S. 167. See No. 65, *supra*.

(125) S. 177. See No. 350, *infra*.

(125-a) S. 177. See MAGISTRATE, JURISDICTION OF.

(126) *Ss. 177, 179—Printing book at Lahore—Infringement of copyright—Offence under S. 7 (a) of Copyright Act III, of 1914—Completion of offence—Loss occasioned by sale elsewhere—No essential part of offence—Jurisdiction to try offence—Lahore Court, proper Court—Scope of S. 179, Crim. Pro. Code.*

Where the printing of a book for sale took place at Lahore, only the Lahore Court has jurisdiction under S. 177, Crim. Pro. Code, to

Crim. Pro. Code—(Continued).

inquire into and try a charge against the printer under S. 7 (a), Indian Copyright Act, 1914.

The words of S. 179, Crim. Pro. Code, embrace only such consequence as modify or complete the act alleged to be an offence.

Held, that the offence under S. 7 (a) of the Copyright Act was complete as soon as the books infringing the copyright work were printed and that it did not depend for its completion upon the ensuing of any consequence, such as is contemplated by S. 179, Crim. Pro. Code. *Kall Das v. Karam Chand and Abdul Aziz*, 28 P.R. 1916 (Cr.).

SHADI LAL, J.

(127) Ss. 177, 179—*Wrong measure used at Meerut—Discovery of fraud at Agra—Jurisdiction—Penal Code*, Ss. 420, 465. *Prag Das Bhargava v. Daulat Ram*, 13 A.L.J. 1067 = 16 Cr. L.J. 825 = 31 Ind. Cas. 1001. See Final Part, 1915, Col. 76.

(128) S. 178. See No. 66, *supra*.

(128-a) S. 179. See MAGISTRATE, JURISDICTION OF.

(129) S. 179—*Offence where to be charged—Primary and secondary consequences—Ss. 406, 409, Indian Penal Code*. *Krishnamachary v. Shaw, Wallace and Company*, (1915) M.W.N. 418 = 18 M.L.T. 25 = 16 Cr.L.J. 491 = 29 M.L.J. 178 = 29 Ind. Cas. 331 = 39 M. 576. See Final Part, 1915, Col. 77.

(130) S. 179. See Nos. 126, 127, *supra*.

(130 a) S. 181. See MAGISTRATE, JURISDICTION OF.

(131) S. 181 (2)—*Criminal Breach of Trust—Trial—Forum—Jurisdiction—Penal Code*, S. 408. *Crown v. Raghu Singh*, 22 P.R. 1915 (Cr.) = 16 Cr.L.J. 775 = 42 P.W.R. 1915 (Cr.) = 31 Ind. Cas. 375. See Final Part, 1915, Col. 78.

(132) S. 181, cl. (4)—*Kidnapping committed outside British India—Jurisdiction of British Courts "when person kidnapped" detained within British India—Meyurbhunj not in British India* *Bhuvra Santal v. Dama Santal*, 20 C.W.N. 62 = 17 Cr.L.J. 128 = 33 Ind. Cas. 304. See Final Part, 1915, Col. 78.

(133) Ss. 4 (h), 190, 200, 537—*'Committal sheet' forwarded by Salt Officer to Magistrate—Request to examine witnesses and try accused—Complaint within the meaning of S. 4 (h)—Issue of process without examining complainant on oath—Irregularity—No prejudice to accused—Curable defect*.

Where a 'committal sheet' signed by a Superintendent of the Salt Department was sent to the Magistrate in accordance with the procedure laid down by paragraph 12 of the 'Instructions issued by the Commissioner of Salt Revenue for the guidance of officers of the Salt Revenue Department' and where the 'committal sheet' contained *inter alia*, a definite request to the Magistrate to summon certain witnesses and try the accused for the offences set out in the sheet.

Crim. Pro. Code—(Continued).

Held, that 'the committal sheet' was a complaint within the meaning of S. 4 (h), Crim. Pro. Code, 1898. Where a Magistrate, on receipt of a complaint, issued processes at once without examining the complainant on oath as required by S. 200, Crim. Pro. Code.

Held, that the procedure was an irregularity, and that the conviction by the Magistrate cannot be set aside in the absence of any prejudice to the accused by reason of such irregularity. *Phagun Sahu v. King-Emperor*, 1 Pat. L.J. 592.

CHAMIER, C.J. and SHARFUDDIN, J.

(133-a) S. 192. See No. 66 *supra*.

(133 b) S. 195. See SANCTION TO PROSECUTE.

(134) S. 195—*Sanction—Scope of section—Proceedings in relation to which sanction of Court necessary—Information to police followed by complaint in Court—Penal Code*, S. 211.

Where the information to the Police was followed by a complaint to the Court based on the same allegations and on the same charge as that contained in the information to the Police and the complaint was investigated by the Court, sanction or a complaint of the Court itself under S. 195 (b), Crim. Pro. Code, would be necessary before the Court could take cognizance of an offence punishable under S. 211, I.P.C., alleged to have been committed by making a false charge to the police, on the ground that it was an offence committed in relation to a proceeding in Court. *F.A. Brown v. Ahanda Lal Mullick*, 20 C.W.N. 1317 = 25 C.L.J. 59 = 36 Ind. Cas. 857.

SANDERSON, C.J. and WALMSLEY, J.

(135) S. 195—*Power to dismiss for default by Original Courts and on appeal*.

Quere :—Whether the ruling in 32 B. 203 that sanction petitions under S. 195, Crim. Pro. Code, are not liable to be dismissed for default by the Original Court, applies also to petitions under cl. 6 of S. 195 of the Crim. Pro. Code. *Subramania Aiyar v. Rangia Reddi*, (1916) M.W.N. 8.

AYLING and PHILLIPS, J.J.

(136) S. 195—*Perjury committed in judicial enquiry—Jurisdiction of High Court to sanction prosecution—S. 193, Penal Code*. Petitioner applied to the High Court for setting aside an *ex parte* decree on the ground that he was not served with notice of a second appeal. An enquiry was ordered before the lower Court and the report of the lower Court showed that there were good grounds to prosecute the petitioner for the perjury committed in his evidence given at the enquiry before that Court. *Held* that the High Court had power to give sanction for the prosecution of the petitioner on a charge under S. 193, I.P.C., in connection with the petitioner's said statement. *Gudala Suriah v. Jamal Bee Bee*, 16 Cr. L.J. 740 = 31 Ind. Cas. 340.

SADASIVA AIYAR and NAPIER, J.J.

(137) S. 195—*Charge made to the Police found to be false—Same charge repeated to Magistrate and action taken thereon—Right of*

Crim. Pro. Code—(Continued).

person aggrieved to institute prosecution in respect of the charge made to the Police—
Ss. 182, 211, Penal Code.

Where a charge has been made to the Police and on investigation found to be false, if the same charge is repeated to a Magistrate by a complaint upon which he takes action, a person aggrieved cannot then ignore the Magistrate's proceedings and institute a prosecution in respect of the charge made to the Police. *Jaggu v. Pala*, U.B.R. (1916), 4th Qr., p. 95=17 Cr. L.J. 177=33 Ind. Cas. 817.

SAUNDERS, J.O.

References :—U.B.R. (1910–1913), 134 ; 6 L.B.R. 50 ; 14 C. 707, R.

(188) S. 195, scope of—Sanction to prosecute, grant of—Principles governing grant of sanction—Reasonable chance of conviction, how far necessary—Non desirability of prosecution on grounds of public justice—Whether a good ground for refusal of sanction—Application by a private party—Considerations in granting sanction—Statement *prima facie* untrue—If can be explained by other evidence—Discretion of sanctioning Court, whether absolute and unqualified—Failure of sanctioning Court to give reasons—Correctness of the order—Duty of the appellate Court to be satisfied as to.

Per Ayling, J.—S. 195, Crim. Pro. Code, neither lays down nor suggests any principles for the guidance of the Court in granting or refusing sanctions, but the Court should have regard to the rule of prudence that an individual is not permitted to use the penal law merely to satisfy his own private ends or private spite.

In an application for the revocation of a sanction granted by a lower Court, the Superior Court is bound to see whether the order granting sanction is correct, and where the lower Court fails to give any reasons for its order, to consider whether the order is one which the Superior Court itself would have passed under the circumstances.

The following are some of the rules of prudence which a Court should follow in granting or refusing sanction.

1. A Court before granting sanction should consider whether the case is one in which a prosecution could be instituted with a fair chance of success (a).

2. A Court may properly refuse sanction where it considers that a prosecution is not desirable in the public interest even though the prosecution may possess every chance of success, e.g., where the moral turpitude is very slight, or the offender may have already suffered sufficiently or other considerations may intervene.

3. Where the sanction is applied for by a private party it is for the Court to test its desirability by the rules of prudence.

Per Seshagiri Iyer, J.—Although when sitting in appeal, the High Court may be guided very largely in matters of discretion by what influenced the Court below, the hands of the High Court are not tied.

Crim. Pro. Code—(Continued).

The following principles should guide the Court which is called upon to give sanction to prosecute under S. 195, Crim. Pro. Code.

1. The paramount principle is to see that the person to be charged before a Magistrate is not subjected to unnecessary expense and humiliation.

2. (a) It is not what on the face of a document or of a statement appears to be untrue that should guide a Court in granting sanction.

(b) If further materials are placed before it which would enable it to conclude that the *prima facie* impression is unfounded, it is the duty of the Court to examine the materials fully and satisfy itself whether in the interests of justice prosecution is desirable.

3. Every circumstance telling in favour of the person against whom sanction is asked for, should be weighed before the Court makes up its mind although in the order granting the sanction, care should be taken to see that conclusions are not stated which may prejudice the accused.

4. It is the duty of the authority giving sanction or upholding it to go into the merits of the application for sanction with reference to the evidence before it and unless there is sufficient *prima facie* evidence and a reasonable probability of conviction, the Court will not be exercising its discretion properly in granting or upholding the same (b).

5. It is also the duty of the Court to see if there are good grounds for thinking that a prosecution is necessary in the interests of justice (c).

The view of *Napier, J.*, in 17 M.L.T. 15, dissented from.

6. The discretion vested in a Court in giving sanction is not an absolute and unqualified discretion but is a discretion given in the interests of justice and in the interests of persons to whom protection is intended to be given under S. 195 of the Crim. Pro. Code, and unless the discretion is exercised to advance justice and extend protection, the Court will not be exercising its discretion properly.

7. The object of S. 195, Crim. Pro. Code, is to protect parties resorting to Courts and witnesses, against vexatious or frivolous prosecutions for their resorting to Courts and giving evidence therein and such protection is afforded by prescribing the necessity of a preliminary sanction by the Court before which the offence is alleged to have been committed before a prosecution is launched, and by giving a right of appeal to the Court to which the Court giving sanction is subordinate (d).

8. Before withdrawing the protection and sanctioning prosecution the presiding functionary should be satisfied that the privilege has been forfeited, that there has been such a conduct on the part of the person as renders him reasonably liable to conviction and that the interests of justice demand his prosecution.

Where a respondent in a first appeal in the High Court swore to a counter-affidavit in a petition for the stay of execution of his decree, and stated therein that he owned 1000 acres of

Crim. Pro. Code—(Continued).

land and a house in Palni and the appellant applied for sanction to prosecute him on the ground that these statements were false as the lands had been sold to another and the house was held by the respondent on behalf of a trust, and it was found that the sale of the lands referred to, had been consistently averred by him to be *benami* in the counter-affidavit in the sanction petition as well as in some proceedings in the Madura Sub-Court to which the appellant and the alleged vendee of the lands were parties, and was not disputed by the latter, and there was nothing in the title deed of the house to indicate that the same was held by the respondent as trustee, but, on the contrary it appeared to be a sale-deed absolutely in favour of the respondent personally, and a learned Judge of the High Court granted sanction to prosecute him for perjury.

Held, that on the facts there was no probability of a conviction and the sanction granted must be revoked. **Palanappa Chettiar v. Ramasami Chettiar**, 4 L.W. 615 = 20 M.L.J. 557 = 32 M.L.J. 54.

AYLING and SESHAGIRI IYER, JJ.

References :—(a) 23 M. 210, R. (b) 12 M.L.J. 408; 26 M. 116, 117, F. (c) (1911) 2 M.W.N. 172, F.

(139) S. 195—Sanction, granting of, under, to be made on legal evidence—S. 195 (b), High Court hearing an appeal under—Judges divided equally in opinion—Whether an appeal lies under Art. 15 of the Letters Patent.

The petitioner in this case preferred a complaint against the respondent and his wife, charging them with criminal breach of trust in respect of some jewels entrusted to them at a marriage which took place in his house. The Magistrate suspected that the case was false and directed the Police Inspector to hold a preliminary investigation under S. 202 of the Crim. Pro. Code. The Inspector reported that the case was entirely false. Respondent thereupon applied for sanction to prosecute petitioner for preferring a false complaint, an offence punishable under S. 211 of the Indian Penal Code, and the Magistrate granted the sanction. The District Magistrate, on application made to revoke it, refused to do so. A further application was thereupon made to the Sessions Judge. He dismissed it, regarding it as an appeal presented out of time. *Held* that the Sessions Judge was wrong in supposing that an application to a superior Court to revoke a sanction granted by an inferior Court is an appeal coming within the purview of Art. 154 of Sch. II to the Limitation Act.

Held per White, C.J.—That on the materials before the High Court they were not prepared to say there was legal evidence before the second-class Magistrate on which the order granting sanction should be made; and that consequently the sanction should be set aside. The preliminary objection whether appeal lay

Crim. Pro. Code—(Continued).

was not considered necessary to be gone into. **Bapu v. Bapu**, 39 M. 768.

WHITE, C.J., MILLER and OLDFIELD, JJ.

(140) S. 195—Sanction granted—No appeal.—

There can be no appeal from an order of a Judge sanctioning a prosecution under S. 195, Crim. Pro. Code. **Ramjas v. Mahadeo Pershad**, 17 Cr. L.J. 537 = 36 Ind. Cas. 585.

RICHARDS, C.J., and BANERJI, J.

(141) S. 195—Application for sanction to prosecute—Applicant failing to appear—Dismissal for default—Legality—Proper procedure. **Rup Narain v. Maha Dayal**, 4 P.R. 1915 (Cr.) = 16 Cr. L.J. 288 = 28 Ind. Cas. 336 = 22 P.L.R. 1916. See Final Part, 1915, Col. 80.

(142) S. 195—Several Deputy Magistrates at a place—One of them transferred—Officer appointed to fill the gap whether the successor in office of the officer transferred—Offence committed in the Court of the outgoing Magistrate—Application for sanction to the Magistrate appointed instead—Power of the latter officer to grant sanction. **Girish Chandra Ray v. Sarat Chandra Singh**, 42 Cr. L.J. 667 = 16 Cr. L.J. 695 = 30 Ind. Cas. 743. See Final Part, 1915, Col. 81.

(143) S. 195—Offence committed before Naib Tahsildar—Proceedings held in his administrative capacity—Not acting as a Revenue Court—Previous sanction for prosecution for offences under Ss. 465, 468, 471, I.P.C.—Not necessary. **Crown v. Lehna Singh**, 18 P.R. 1915 (Cr.) = 31 Ind. Cas. 641 = 16 Cr. L.J. 785. See Final Part, 1915, Col. 81.

(144) S. 195—Sanction to prosecute—Private grudge. **Patan Din v. Bhagwan Din**, 16 Cr. L.J. 624 = 30 Ind. Cas. 448. See Final Part, 1915, Col. 81.

(144-a) S. 195. See Nos. 84, *supra* and 347, 348, 349, 350, *infra*.

(145) S. 195 (b)—Sanction to prosecute—Procedure.

Where a matter is brought before a Sessions Judge under cl. (6), S. 195, Crim. Pro. Code, he has discretion to give or to refuse the sanction which the Magistrate had refused to grant. If he thinks that the matter is one which called for further investigation before a sanction was rather given or refused, he is competent to hold a very thorough and searching enquiry in the course of which he may examine witnesses and receive evidence.

S. 195 of the Crim. Pro. Code does not in itself lay down anything as to the materials upon which a Court is to proceed when considering an application for sanction. It does not say that the Court is bound to proceed on such materials as may be on the record at the time when sanction was applied for, neither on the other hand does it in terms empower the Court to hold an enquiry before granting or refusing sanction: at the same time it does invest the Court with a discretion to proceed either by way of sanction or by way of complaint, and S. 476 of the same Code expressly empowers a Court to make any preliminary

Crim. Pro. Code—(Continued).

enquiry that it may consider necessary before taking action under that section. If the Session Judge thinks fit to record a memorandum to the effect that under the circumstances, he was not prepared either to grant the sanction asked for or to confirm the Magistrate's order refusing sanction without first making some enquiry, with a view to satisfying himself whether the matter was not one in which it was more expedient for him to proceed by way of complaint under S. 476, Crim. Pro. Code, there could not be any doubt as to the legality of his action. *Rahmatullah v. Emperor*, 17 Cr. L.J. 29—32 Ind. Cas. 157.

PIGGOTT, J.

(146) S. 195 (1). See Nos. 3, 47, *supra*.

(147) S. 195 (1) (b)—“Such Court,” interpretation of—Court abolished but re-established with curtailed territorial limits—Jurisdiction—Sanction for prosecution for offence committed before abolition.

In this case, the question was whether the Court of the Sub-Magistrate of B which granted sanction for prosecution was within the meaning of S. 195, Crim. Pro. Code the same Court before which one of the statements with reference to which the petitioner has been prosecuted, was made. It appeared that, by a notification in the Fort St. George Gazette, the office of the Deputy Tahsildar at B was abolished (*i.e.*), there was no Sub-Magistrate at B as a result of the notification. About two years after the said Court was restored with some slight modification, that is to say, its territorial jurisdiction was somewhat curtailed. Thus there was an interval of two years during which time, there was no Sub-Magistrate's Court at B at all. The old Sub-Magistrate's Court ceased to exist, and it was revived two years afterwards. *Held* that it could not be said that there was any such continuity as would enable the High Court to hold that the Court that was re-constituted was the same as the one that ceased to exist. *In re Appu Atla*, 16 Cr. L.J. 787—31 Ind. Cas. 643.

AYLING and ABDUR RAHIM, JJ.

(148) S. 195, sub-S. (1), cl. (b)—Subordinate Magistrate transferred after disposing of a case and acquitting accused—Application for sanction to prosecute complainant—Sanction given by District Magistrate—Legality of sanction—Subordinate Magistrate, whether subordinate to District Magistrate. *Mofazzuddin Ahmed v. Basanta Kumar Ghosh*, 16 Cr. L.J. 640—30 Ind. Cas. 464. See Final Part, 1915, Col. 82.

(149) S. 195 (1) (b) (c)—Object of cl. (1) (b)—Fabrication of false evidence in advance with the intention of using it in subsequent Civil suit—Sanction whether necessary for prosecution—Ss. 192, 193, Penal Code. *K. Parameswaran Nambudripad v. Emperor*, 18 M.L.T. 322—16 Cr. L.J. 721—39 M. 677—31 Ind. Cas. 161. See Final Part, 1915, Col. 83.

(150) S. 195 (6)—Sanction to prosecute—Jurisdiction of District Court to grant sanction as appellate Court.

Crim. Pro. Code—(Continued).

The defendant produced in answer to the claim in the Court of the Munsif a receipt which the plaintiff alleged had been fraudulently altered. The Munsif and on appeal the District Judge found the receipt having been so altered. The latter Court sanctioned prosecution of the defendant for offence under Ss. 471, 467, Penal Code. In the Chief Court it was contended that the District Court had no jurisdiction to grant the sanction.

Held, that the contention was not valid. *Miran Bukhsh v. Bell Ram*, 67 P.L.R. 1916—17 Cr. L.J. 238—34 Ind. Cas. 654.

SHADI LAL, J.

(151) S. 195, cl. 6—Sanction to prosecute—Expiry of time—Power of High Court to extend time.

The High Court can, under S. 195, cl. 6 of the Crim. Pro. Code, extend the time of a sanction to prosecute, even after the expiry of the period of six months from its date. *Krishna Kering & Co., v. J. R. Miller*, 18 Bom. L.R. 686—17 Cr. L.J. 377—35 Ind. Cas. 809.

BACHELOR, AG.C.J. and HEATON, J.

(152) Ss. 195 (c), sub cl. (3), 437—Abetment of forgery—Sanction of the Civil Court to prosecute—Document produced by party in the Civil Court—Whether prosecution without sanction legal.

The provisions of S. 195 (c) apply to the case of any person who, at the time when a Criminal Court is invited to take cognizance of the matter, can rightly be described “as a party to any proceeding in any Court” in which the document has been produced or given in evidence, that is to say, who is or has been a party to such a proceeding (a).

C purported to convey certain immovable property to H by a sale deed. On the same day H purported to mortgage the same property to B. C and B filed suits in the Court of the Subordinate Judge. B contended that the sale-deed was a forgery and that he had been defrauded. C's contention also was similar. The Court granted appropriate relief to B as well as to C holding the sale-deed to be forged and B as having been defrauded. It took proceedings under S. 476, Crim. Pro. Code, against H and another person who was alleged to have forged C's signature on the sale-deed. B was a witness for the prosecution. H and his co-accused were convicted. The Sessions Judge issued notice to B to show cause why he should not be prosecuted for abetment of an offence under Ss. 467 and 471 read with Ss. 109 and 114, Penal Code. In the meantime C filed a complaint against B charging him with abetment of forgery before a Magistrate who took cognizance of it. There was no sanction given by the Subordinate Judge. B applied in revision to the High Court. *Held* that the offence having been alleged to have been committed by B, a party to the proceeding pending before the Subordinate Judge, sanction by him was necessary before the

Crim. Pro. Code—(Continued).

Magistrate could take cognizance of the complaint. *Bhawani Das v. Emperor*, 14 A.L.J. 74=32 A. 169=17 Or. L.J. 289=35 Ind. Cas. 161.

TUDBALL and PIGGOTT, JJ.

Reference:—(a) 4 Bom. L.R. 268, doubted.

(153) *Ss. 195 and 197—Sanction for prosecution necessary before prosecuting under any of the sections mentioned in S. 195, Crim. Pro. Code (1898)—Municipal Commissioner, public servant—Dismissal or removal from the Office without the sanction of the Local Government—Objection taken at the close of prosecution's whole evidence—Indian Penal Code (Act XLV of 1860), Ss. 323, 504.*

Held, that every Municipal Commissioner is not a public servant within the meaning of S. 197, Crim. Pro. Code. A Court should not assume that every Municipal Commissioner is not removable from his office without the sanction of the Local Government, without any reliable evidence on the record.

Held, also that S. 197 of the Crim. Pro. Code is not applicable in the case against a Municipal Commissioner of Alwalpur of the Jullundur City. *Nathu Khan v. Muhammad Bakhsh*, 48 P.W.R. 1916 (Cr.).

SHAH DIN, J.

(154) *Ss. 195, cl. (6), 429, 439—Application under S. 195 (6) not on appeal—Art. 154, Limitation Act, not applicable to it—Whether sanction must be based on 'legal evidence'—Sanction based on Police Report and complainant's sworn statement, whether legal and valid—Difference of opinion—Whether S. 36, Letters Patent or S. 429 of Crim. Pro. Code applies—Order refusing to revoke sanction same as one granting sanction—S. 36, Letters Patent, applies. *Bapu alias Audmulam Pillal v. Bapu alias Krishnayan*, (1912) M.W.N. 489=44 Ind. Cas. 305=11 M.L.T. 367=22 M.L.J. 419=18 Cr. L.J. 209=39 M. 750 (F.B.). See Final Part, 1912, Col. 66.*

(155) *Ss. 195, 439—Proceedings of Civil Court under S. 195, nature of—Costs—Jurisdiction—Revision to High Court, nature of—Civ. Pro. Code (Act V of 1908), S. 115.*

The Court must treat proceedings by Civil Courts under S. 195 of the Code of Criminal Procedure as of a criminal, not of a Civil, nature and apply to them the criminal law of procedure. The Code of Criminal Procedure does not authorise an order for payment of costs in this connection, and it is not possible to justify one with reference to any inherent power of the Court.

A petition to revise the proceedings of a Civil Court under S. 195 of the Crim. Pro. Code should be filed under S. 439 of the Code of Criminal Procedure and not under S. 115 of the Code of Civil Procedure (a). *Nallapparaaju Yenkataramaraju v. Mediseti Achayya*, 17 Cr. L.J. 184=33 Ind. Cas. 824.

OLDFIELD and SADASIYA IYER, JJ.

References:—(a) 30 M. 311=2 M.L.T. 84=17 M.L.J. 123=5 Cr. L.J. 298, F.; 26 M. 189=2 Weir 197. *Disa*.

Crim. Pro. Code—(Continued).

(156) *Ss. 195, 439 and 537—Sanction granted by the successor of the Munsif before whom the alleged offence was committed—Notice—Power of Chief Court—Revision.*

There is no Court of a Munsif of the 1st Class as a permanent Court with a perpetual succession of Judges, and on the transfer of a Munsif from a District, the Court of the Munsif who takes over the pending work is not identical with the Court of the Munsif who has been transferred (a).

There is no Court of a Magistrate of the 1st Class as a permanent Court with a perpetual succession of Judges and therefore a Magistrate before whom an offence was committed cannot grant sanction to prosecute under S. 195, Crim. Pro. Code, merely because he succeeded a Magistrate in that particular place or district (b).

S. 439, Crim. Pro. Code, gives the Chief Court full power to examine the record and to pass such orders as may be necessary, although the petitioner did not appeal in proper time as against the order granting sanction for his prosecution.

No doubt when there has been inordinate delay in moving the Chief Court in revision it would not be considered necessary or advisable to take any action under S. 439, Crim. Pro. Code, but where, as in this case, the circumstances were such that the Court considered it necessary to examine the record of the proceedings in order to ascertain how far the sanction accorded was "legal, the Chief Court may well interfere.

Held that, in cases like the present, before giving sanction to prosecute under S. 195, notice should invariably be issued to the party concerned (c).

The fact that the Judge in granting sanction acted without the jurisdiction to grant it is an illegality which would probably not be cured by S. 537 of the Crim. Pro. Code (d). *Maula Bakhsh v. Lal Chand*, 23 P.R. 1916 (Cr.).

BROADWAY, J.

References:—(a) 29 P.R. 1889; 7 P.R. 1913 (Cr.), F. (b) 25 P.R. 1889 (Cr.); 30 P.R. 1901 (Cr.); 7 P.R. 1904 (Cr.); 6 P.R. 1909 (Cr.); 7 P.R. 1913 (Cr.), F.; 29 M. 331; 32 B. 184; 37 C. 642 (F.B.); 5 A.L.J. 17, R. (c) 89 C. 463 (466); 29 P.R. 1879 (Or.), D. (d) 25 M. 61 (P.C.), R.

(157) *Ss. 195, 476—Sanction for prosecution for perjury—Granted by Munsif—Omission to specify the statements for which prosecution ordered—Civil revision, power of High Court—Code of Civil Procedure, 1908, S. 115—Delay in making application for sanction.*

The omission by a Munsif to specify the false statements in regard to which he directs the prosecution of a certain person for perjury and also to mention the forged portion of a document for which he directs him to be prosecuted for forgery amounts to material irregularity within the meaning of S. 115 of the Code of Civil Procedure, and his direction to the Magistrate that such person may be convicted of any other offences that may be proved against him is

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without jurisdiction. In such cases the High Court has power to interfere under S. 115 of the Code of Civil Procedure.

In a case where steps under S. 476, Crim. Pro. Code, are to be taken, it is highly desirable that they should be taken as soon as possible and not delayed for several months after the trial of the suit. *Kashi Shukla v. King-Emperor*, 14 A.L.J. 814=38 A. 695=36 Ind. Cas. 836.

RAFIQ, J.

(158) Ss. 195, 476—*Order of Small Cause Court refusing sanction—Appeal to District Judge—Maintainability—Position and powers of District Judge.*

A sued B in a Court exercising the powers of a Small Cause Court and got an *ex-parte* decree. B then sued to have the *ex-parte* decree set aside on the ground that it had been obtained by fraud and got a decree. He then applied to the Court which tried the first mentioned case for sanction to prosecute A. This application was rejected. B appealed to the District Judge under S. 195 (6), Crim. Pro. Code. The District Judge was of opinion that it was not a case in which sanction should be given, but he passed an order under S. 476, Crim. Pro. Code, for prosecution of A, for offences under Ss. 209, 210, 193, 471, I.P.O.

Held that the District Judge had no jurisdiction to entertain either an appeal or an application under S. 195 (6), Crim. Pro. Code, and the matter did not come to his notice, "in the course of a judicial proceeding" within the meaning of S. 476, Crim. Pro. Code. Held also that cl. (c) of sub-S. (7) of S. 195, Crim. Pro. Code, cannot be construed as if it were an independent sub-section. *Ambica Tewary v. King-Emperor*, 1 Pat. L.J. 206=17 Cr. L.J. 208=34 Ind. Cas. 320.

CHAMBER, C.J. and JWALA PRASAD, J.

Reference:—34 A. 197, F.

(159) Ss. 195, 476—*Sanction to prosecute—Contradictory statements—Opportunity to explain to be given.*

An application for sanction when made under S. 195, Crim. Pro. Code, must be carefully considered before the sanction is given (a).

Applications asking for sanction stand on quite a different footing from action taken under S. 476, Crim. Pro. Code.

Before granting a sanction in respect of contradictory statements it would be necessary and proper to allow the person against whom sanction is asked for an opportunity to explain the statements fully and to state the circumstances under which they came to be made. *Iqbal Hussain v. Wiliyat Hussain*, 17 Cr. L.J. 95=32 Ind. Cas. 685.

KNOX, J.

References:—(a) A.W.N. (1893) 104; A.W.N. (1897) 142, F.

(160) Ss. 195 and 476—*Sanction to prosecute—Scope of the sections.* *Kidha Singh v. Emperor*, 18 A.L.J. 1111=16 Cr. L.J. 817=31 Ind. Cas. 998. See Final Part, 1915, Col. 85.

Crim. Pro. Code—(Continued).

(161) Ss. 195, 476, 537—*'Sanction' in S. 195—What it implies.*

The term 'sanction' in S. 195, Crim. Pro. Code, implies an application for sanction and not a mere general and vague order. *Nga Kyaw Zan v. Nga Kyi Dan*, U.B.R. (1915), 3rd Qr., 91=32 Ind. Cas. 651=17 Cr. L.J. 59.

SAUNDERS, J.C.

References:—18 A. 219; U.B.R. (1907) 1st Qr., Crim. Pro. Code, 1, R.

(161-a) S. 197. See SANCTION TO PROSECUTE.

(162) S. 197—*Penal Code, S. 409—Public servant—Offence.*

Where the Chairman of a Union Panchayat was prosecuted for an offence under S. 409, Penal Code, of criminal breach of trust in respect of Union funds: Held (1) that the Chairman is a public servant not removable from his office without the sanction of the local Government, even though the power to remove has been delegated by the Government to the President of the District Board; (2) that the offence is not one which is committed by him in his capacity of public servant to necessitate the previous sanction under S. 197 of the Crim. Pro. Code; (3) that, even if that sanction were required, the document sent by the President of the Taluk Board to his subordinate clerk in the Taluk Board office directing him to take charge of the union accounts and records pertaining to the collections, to find out the actual amount collected but not remitted into the Treasury and prepare a complaint to the police, initiated by him, fulfilled the requirements of the section; and (4) that the sanction of the President of the Taluk Board was quite sufficient within the meaning of the section.

The delegation by the local Government of its power to a special officer only means that the local Government performs that act itself through the medium of a particular officer as the channel through which it is done. It is an ordinary case of *qui facit per alium facit per se*.

Where a Judge commits an offence from the Bench which could be committed by anybody and which entails consequences neither in the way of penalty nor anything else in the least different, because a Judge committed it, from what it would entail if committed by anybody else, sanction is not required for his prosecution under S. 197, Crim. Pro. Code.

S. 197 is intended to apply to those cases in which the offence is an offence which can be committed by a public servant only, that is, cases in which his being a public servant is a necessary element in the offence.

The sanctioning officer must in terms specify the exact charge to be brought and not leave it in general language to be inferred what the charge should be. It is a great pity that the officers who issue documents of this kind do not take the precaution to specify, in the language of the Code with which they must be a great deal more familiar, the offence for

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which they wish and direct the prosecution to take place.

The words "empowered in this behalf" in S. 197 of the Crim. Pro. Code, mean empowered to give sanction for the prosecution.

The Chairman of the Union is within the meaning of this section a public servant subordinate to the President of the Taluk Board and he is the proper person to give sanction under the section. *Sheik Abdul Kadir Saheb v. Emperor*, (1916) M.W.N. 384=17 Cr. L.J. 168=33 Ind. Cas. 648.

COUTTS-TROTTER, J.

(163) S. 197—*Carts with unyoked oxen left across the street—Obstruction to public thoroughfare—Union Chairman removing obstruction, use of insulting and abusive language by—Offence, if committed 'as such public servant'—Sanction, if necessary—Indian Penal Code (Act XLV of 1860), S. 95—Complainant's obstructiveness to lawful exercise of authority—Provocation—Plea of triviality, if available—Apology, tender of, by accused—Effect.*

Where the accused, a Union Chairman, while removing the obstruction to the public thoroughfare caused by the complainant leaving carts across the street, used insulting and abusive language under provocation caused by the complainant's obstructiveness to the lawful exercise of his authority.

Held that the act of the accused was covered by S. 95 of the Indian Penal Code, and did not constitute an offence under the Code.

Where the accused expresses his willingness to tender an apology to the complainant, it is unfair for the Magistrate to treat this circumstance as an indication of the accused's guilt.

It could not be said to be part of the functions of a Union Chairman to use abusive language in a public street though he would undoubtedly be acting as a public servant in removing the obstruction to the road and no sanction was therefore necessary under S. 197, Crim. Pro. Code, for a prosecution for using such abusive language (a). *In re Abdul Rahiman Khan Sahib*, 4 L.W. 556=17 Cr. L.J. 462=36 Ind. Cas. 142.

SPENCER, J.

References:—(a) 8 Cr. L.R. 234; 9 M. 439, D.

(163-a) S. 197. See **PUBLIC SERVANT**, No. 1, 17 Cr. L.J. 394.

(164) S. 197. See Nos. 66, 158, *supra*.

(164-a) Ss. 197, 254, 439—*Scope of—Protection afforded by section, applicability of—'Acting as such public servant,' meaning of.*

It cannot be stated that whenever a Judge or public servant exceeds the limit of his power, he is not within the protective provisions of S. 197, Crim. Pro. Code.

In all cases where a public servant purports to exercise his functions as such, he must be deemed to be acting "as such, public servant." The test is not whether the particular act is within his powers, but whether he acted in the capacity with which he is clothed. If he

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simply uses his position as public servant to commit an illegal act he will not be acting as such public servant (a).

Where an official has the initial jurisdiction to take cognizance of a matter, and in professedly exercising that jurisdiction commits an offence, it cannot be said that he is not acting as such public servant or Judge. *Sankaralinga Tevan v. Avudal Ammal*, 17 Cr. L.J. 394=35 Ind. Cas. 826.

SESHAGIRI AIYAR, J.

References:—(a) 2 Weir 221; 3 Ind. Cas. 387; 32 M. 255; 4 M.L.T. 373; 9 Cr.L.J. 89; 25 M. 15; 23 M. 540; 7 Cr. L.R. 466, R.

(164-b) S. 197 (1)—*Village Munsif—Public servant not removable from office—Authentication of vakalatnama—Civil Rules of Practice, rr. 77 and 276.*

A Village Munsif and Magistrate, not being a public servant not removable from his office except with the sanction of the Government, may be prosecuted of an offence of having received bribes in the exercise of his judicial functions.

Rule 23 of the rules framed by the High Court on the appellate side which provides that the judicial functionary, etc., shall certify by his signature that the *vakalatnama* has been duly executed means that there "shall" be such a signature in the *vakalatnama* or affidavit to constitute it a valid certificate of authentication.

The object of judicial functionaries such as Village Munsiffs and Village Magistrates being given powers of authentication is only for the purpose of enabling Court, before whom the *vakalatnamas* and affidavits are produced, to treat such authentication as *prima facie* evidence of the genuineness of the signatures of the alleged executors of the affidavits or *vakalats*; it does not, however, follow that such *vakalats* and affidavits become the judicial records of the Court of Village Munsiff or Magistrate acting as a judicial functionary in judicial proceedings instituted before him or that they are produced before the Village Munsiff in his capacity, as a Court of justice. *Vadakke Peediyakkal Unnan Kutty v. Yallapally Govindan Nair*, 36 Ind. Cas. 869.

SADASIVA AIYAR, J.

(165) S. 199—"In his absence," meaning of—*Right of father of girl enticed away to complain, when husband stands by—Penal Code (Act XLV of 1860), Ss. 498, 499.*

S. 199 of the Code of Criminal Procedure should be read thus:—"No Court shall take cognizance of an offence under S. 497 or S. 498 of the Indian Penal Code, except upon a complaint made by the husband of the woman (who had care on such woman) or, in his absence, by some person who had care of such woman on his behalf." If the wife was under the care of her husband at the time of the offence, and the husband does not want that proceedings should be instituted, it is not open to a person, whether he be the father or the brother, to institute a complaint. But where at the time of the

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offence, the wife was left under the care of another, the fact that the husband stands by will not prevent the temporary guardian from preferring the complaint. The words "in his absence" in the said S. 199, Crim. Pro. Code, refer to the original entrustment and not to the time of the complaint.

It is true S. 199, Crim. Pro. Code, is designed to protect the rights of the husband; but that is not its sole aim. The violation of the rights of guardianship is also entitled to its protection. The object of the law is not so much to afford protection to the husband or the guardian, as to inflict punishment on those who interfere with the sacred relation of marriage.

The restriction in S. 199 is not intended to afford immunity to the offender, but to prevent a person unconnected with the woman from giving publicity to a matter which neither the husband nor the guardian is willing to agitate. *In re Rathna Padayachi*, 17 Cr. L.J. 363=35 Ind. Cas. 667.

SESHAGIRI AIYAR, J.

(165) S. 199, 238 (3)—Complaint—Jurisdiction. See PENAL CODE, No. 221, 24 A.L.J. 239.

(167) S. 200—Practice—Criminal case—Accused summoned without the complainant being examined—Irregularity—Proceedings not vitiated—Hurt both simple and grievous—Cumulative sentence—Legality of. *Bateshar v. Emperor*, 13 A.L.J. 840=16 Cr. L.J. 663=30 Ind. Cas. 653=37 A. 628. See Final Part, 1915, Col. 86.

(168) S. 202—Magistrate's duty to record reasons before directing local investigation—Accused if should be allowed to be represented when Magistrate considers the report of the local investigation.

It is most desirable that Magistrates should follow the procedure which is quite clearly laid down in Chap. XVI dealing with complaints to Magistrates.

Under S. 202, if the Magistrate on examining the complainant, distrusts the statement of the complainant, he must record his reasons before directing a local investigation.

It is irregular and quite inconsistent with the scheme of the Code of Criminal Procedure to allow the accused to be represented by a lawyer to argue the case for the defence when the Magistrate is considering under S. 202, Crim. Pro. Code, the report of the local investigation ordered by him. *Bala Lal Mukerjee v. Pasupati Chatterjee*, 21 O.W.N. 127=17 Cr. L.J. 396=35 Ind. Cas. 829.

SANDERSON, C.J. and WALMSLEY, J.

(169) S. 203—Subsequent complaint can be entertained by same or another Magistrate though previous order of dismissal not set aside.

When a complaint has been dismissed under S. 203, Code of Criminal Procedure, the same or another Magistrate can entertain the same complaint although the order of dismissal is

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not set aside by a competent authority. *Pampalli Subbareddi v. Chauduboyigari Kamal Balb*, 16 Cr. L.J. 814=31 Ind. Cas. 830.

PHILLIPS, J.

References:—28 M. 255=2 Weir 247=2 Cr. L.J. 752, Diss.; 3 Cr. L.J. 274=29 M. 126 (F.B.)=1 M.L.T. 81=16 M.L.J. 79; 28 C. 211=5 C.W.N. 169, R. & F.

(170) Ss. 203, 204, 439—Criminal case, abatement of—Death of complainant—Another complaint on the same facts, maintainability of. *In re Ramasamier*, 16 Cr. L.J. 713=30 Ind. Cas. 1001. See Final Part, 1915, Col. 87.

(171) Ss. 203, 435 and 439—Complaint dismissed by District Magistrate under S. 203, Crim. Pro. Code—No revision to Sessions Court—Revision to High Court direct, if competent. *Basaavanna Gowd v. Krishna Rao Naidu*, 2 L.W. 1126=16 Cr. L.J. 794=31 Ind. Cas. 660. See Final Part, 1915, Col. 87.

(172) Ss. 203, 437—Dismissal of complaint—Order for further enquiry by District Magistrate, grounds for—Landlord and tenant—Questions of Civil nature—Penal Code (Act XLV of 1860), S. 379.

Unless the District Magistrate can come to some definite conclusion upon the materials, he ought not to set aside the order of dismissal on the bare ground that it is possible on a further enquiry that the accused may be convicted.

It would be better to leave questions involving disputes between landlord and tenant to the Revenue Courts than that it should be taken up by Criminal Courts. *In re Bakir Ali Khan Sahib*, 17 Cr. L.J. 406=35 Ind. Cas. 966.

SESHAGIRI AIYAR, J.

(173) S. 204. See No. 170, *supra*.

(173-a) S. 209. See MAGISTRATE, JURISDICTION OF.

(174) S. 209—Committing Magistrate—Inquiry—Magistrate's power to look into the credibility or otherwise of the prosecution evidence—Discharge of accused—Order to commit cannot be made without preliminary inquiry. *Emperor v. Bai Mahalaxmi*, 17 Bom. L.R. 910=3 Bom. Cr. C. 124=16 Cr. L.J. 747=31 Ind. Cas. 347. See Final Part, 1915, Col. 89.

(175) Ss. 221, 222, 223. See PENAL CODE, No. 154, 17 Cr. L.J. 411.

(176) Ss. 221 (7), 537—Previous convictions, to be set forth in charge—Irregularity, when curable.

A Magistrate is bound by S. 221 (7), Code of Criminal Procedure, to state the fact, date and place of previous conviction on the charge. The omission to take such an extent is however not material where the previous convictions were put to the accused and admitted by him before judgment was passed. It would then be covered by S. 537, Crim. Pro. Code.

Where it is intended to prove the previous conviction "for the purpose of affecting the punishment which the Court is competent to award," Criminal Form 79 should invariably be used. There is no objection to using Criminal Form 80 as a Supplementary form in such cases. *Nga Hla v. King-Emperor*, 8 L.B.R. 461.

TWOMEY, J.

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(177) S. 222. See No. 175, *supra*.

(178) Ss. 222 (2), 233—*Misjoinder of charges—Falsification of accounts and embezzlement—Penal Code, Ss. 409, 477-A—Irregularity. Kalka Prasad v. Emperor*, 13 A.L.J. 1059=39 A. 42=16 Cr. L.J. 813=31 Ind. Cas. 829. See Final Part, 1915, Col. 90.

(179) Ss. 222 and 234—*Commitment by a Magistrate for joint trial of three distinct charges of criminal breach of trust and falsification of accounts—Discretion of the Sessions Judge.*

The trying Magistrate committed the accused for trial to the Sessions Court on six charges, three of criminal breach of trust and three of falsification of accounts, all the offences having been committed within a year. This petition was to revise the order of committal of the Magistrate as illegal.

Held, that the Magistrate had framed three distinct charges, each one containing a case of criminal breach of trust and one of falsification of accounts in respect of that breach of trust, and that the committal is in respect of those three charges. Although the trial of all these charges together by the Sessions Judge would be illegal under Ss. 222 and 234, the Sessions Judge can exercise his discretion of trying separately each of the three charges and that the High Court should not interfere with the discretion of the Sessions Judge in this matter (a). *T. S. Krishnamurthi Iyer v. Emperor*, (1916) 2 M.W.N. 179=17 Cr. L.J. 369=25 Ind. Cas. 801.

SESHAGIRI AIYAR, J.

Reference:—(a) 26 M. 592, F.

(180) Ss. 222, 234, 403—*Misappropriation—Joint trial—Separate trials for misappropriating different items of money during the same period, whether allowed.*

If a person entrusts a sum of money to more than one person, and those persons in collusion commit criminal breach of trust or dishonestly misappropriate the amount, a joint trial of such persons is not bad.

In such a case the transaction is one and the same, and the evidence would probably be the same. Such a matter is also covered by S. 239, Crim. Pro. Code, which expressly authorises the joint trial of more than one person who are accused of the same offence committed in the course of one transaction (a).

Where the accused has already been tried and convicted for misappropriating a gross sum of money during a particular period, the charge in the previous case should be taken to include all the items misappropriated by him in the course of the same transaction during that period (b).

What the Legislature apparently intended was that where there is to be a trial for misappropriation of a gross sum, there should be only one trial for such an offence committed within the period covered by the defalcation. *In re Appadurai Ayyar*, 17 Cr. L.J. 30=32 Ind. Cas. 158.

ABDUR RAHIM and AYLING, JJ.

Crim. Pro. Code—(Continued).

References:—(a) 15 Ind. Cas. 650=13 Cr. L.J. 506=16 O.W.N. 600, R.; 80 B. 49=7 Bom. L.R. 633; 2 Cr. L.J. 678, F.

(181) S. 223. See No. 175, *supra*.

(182) Ss. 226, 233, 235 and 269 (3)—*Offences under Ss. 395, 396 and 397, I.P.C.—Jury case and assessor case—One trial—Charge to Jury—Misdirection. In re Sennimalai Goundan*, 2 L.W. 933=16 Cr. L.J. 717=30 Ind. Cas. 1005. See Final Part, 1915, Col. 91.

(183) S. 227—Ss. 143, 426, 451, Penal Code—*Charge under Ss. 426, 451, I.P.C.—Addition of charge under S. 143, I.P.C., by the appellate Court—Legality—Carrying of "Savali Kalis"—Whether unlawful.*

The addition of S. 143, I.P.C., by the appellate Court to the charges under Ss. 426 and 451, I.P.C., is not permissible, as such addition would have the effect of imposing a constructive responsibility for individual acts of all persons who were members at the time of the assembly, whereas it would be necessary to prove the guilt of each of the persons charged for his individual acts if the charges were only under Ss. 451 and 426, Penal Code.

Ordinarily, there would be no presumption that the mere carrying of *Savali Kalis* would be unlawful, and in determining the object of an unlawful assembly, the Court must find that the accused had an intention to use criminal force or commit some other offence at all costs and were not acting in self-defence. *In re Mukka Muthiriyen*, 16 Cr. L.J. 737=31 Ind. Cas. 337.

SPENCER and SESHAGIRI AIYAR, JJ.

(184) Ss. 227, 231, 232—*Charge, amendment of, by Sessions Court, after expression of opinion by assessors, whether legal—Court, duty of—Penal Code (Act XLV of 1860), Ss. 302, 460—Murder—Death caused in lurking house trespass.*

An alteration of a charge by a Court of Session under S. 227, Crim. Pro. Code, is only permissible up to the time of the taking of the opinion of the assessors.

Under S. 231 of the Crim. Pro. Code it is imperative that a Court when it alters or adds to a charge after the commencement of a trial, should allow the prosecutor and the accused to re-call or re-summon and examine, with reference to such alteration or addition, any witness who may have been examined, and also to call any further witness whom it may think to be material.

If the Chief Court thinks that in consequence of material errors in a charge the accused has been misled, it is bound to direct a new trial to be had upon a charge framed in the proper manner.

The accused was one of a party of burglars who invaded the house of one M. robbed his widow, ransacked his house, and on his seizing the accused as he was escaping, a scuffle ensued and the latter dealt him a mortal blow with a spear-head. The accused was tried by the Court of Session under S. 460, Indian Penal Code, but after the assessors had given their

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opinion to the effect that the accused was caught in the house of M. in the act of committing burglary and struck him a blow from which he died, the Sessions Judge recorded an order to the effect that the accused should have been charged under S. 302, Indian Penal Code, as well as under S. 460, and amending the charge under S. 227, Crim. Pro. Code, convicted the accused under S. 302, Indian Penal Code.

Held, that the alteration of the charge by the Sessions Judge after the assessors had given their opinion was illegal.

Held, further, that the accused was guilty of causing the death of M. under S. 460, Indian Penal Code, but that the offence committed by him did not amount to murder. **Harbans v. The Crown**, 50 P.W.R. 1916 (Cr.)=33 P.R. 1916 (Cr.)=17 Cr. L.J. 454=36 Ind. Cas. 134.

JOHNSTONE, C.J. and BROADWAY, J.

(185) S. 231. See No. 181, *supra*.

(186) S. 232. See No. 184, *supra*.

(197) S. 233. See Nos. 178 and 182, *supra*.

(188) Ss. 233, 234, 235, 236, 239—*License—Breach of conditions—Every breach a distinct offence—Joinder of charges. In re Gontla Krishnamma*, 16 Cr. L.J. 717=30 Ind. Cas. 1005. See Final Part, 1915, Col. 91.

(189) Ss. 233, 537—*Omission to frame two separate charges for two offences if bitantes trial—Distinct offence, meaning of—S. 537, irregularity cured by—Scope of section. Ram Subhask Singh v. The King Emperor*, 19 C.W.N. 972=16 Cr. L.J. 641=30 Ind. Cas. 465. See Final Part, 1915, Col. 93.

(190) Ss. 233, 537—*Two calendar cases—Joint trial—Legality—Division Bench of High Court hearing criminal cases—Admission Court also sitting—Power of Division Bench to entertain appeals—Rule 1 (i) (b), Appellate Side Rules—Ss. 13, 14, Charter Act—Scope and applicability of S. 537, Crim. Pro. Code. Public Prosecutor v. Mallyakkal Kadir Koya Haji*, 29 M.L.J. 101=18 M.L.T. 95=(1915) M.W.N. 504=16 Cr. L.J. 593=30 Ind. Cas. 145=39 M. 527 (F.B.). See Final Part, 1915, Col. 94.

(191) S. 234—*Joinder of charges—Offences committed within one year, against different individuals—Whether can be tried together—“Offences of the same kind,” meaning of.*

Three offences of the same kind committed within a year can be tried together whether it be against one or separate individuals.

The expression “offences being of the same kind” in S. 234, Crim. Pro. Code, means offences punishable under the same section of the Indian Penal Code.

Held, therefore, joinder of three charges in three cases of theft which took place in three different places and in the house of three different persons within one year, was not illegal. *In re Raja Rao*, 20 M.L.T. 234=4 L.W. 837=(1916) 2 M.W.N. 252=17 Cr. L.J. 479=36 Ind. Cas. 159.

SESHAGIRI Aiyar, J.

Crim. Pro. Code—(Continued).

(192) S. 234—*Joinder of cases—Offences against different persons by the same accused—Legality of joint trial—Practice.*

The words “offences of the same kind” used in S. 234 of the Code and as defined by sub-ol. (2) of the said section do not imply that the offences should necessarily have been committed against the same person. Where there were six persons accused of having been jointly concerned in carrying on a systematic swindle, and three joint charges were framed against all the accused, *held* that there was nothing illegal in the procedure. **Emperor v. Bechan Pande**, 14 A.L.J. 700=38 A. 457=36 Ind. Cas. 579.

PIGGOTT and WALSH, JJ.

References:—43 O. 13, F.; 4 A. 147, Not F.

(193) S. 234—*Misjoinder of charges.*

Two accused persons were tried together on two charges, namely, theft in a building (S. 380, I.P.C.) and theft of paddy in a field (S. 379, I.P.C.) committed on two different days, the property in the building and the paddy belonging to one and the same complainant.

Held—that there was a misjoinder of charges under S. 234, Crim. Pro. Code. **Rahman Bibi v. Mobarak Mondal**, 20 C.W.N. 672=17 Cr. L.J. 224=34 Ind. Cas. 336.

CHITTY and WALMSLEY, JJ.

(194) S. 234—*Section if applies to offences against different persons. Chattadhari Mian v. King-Emperor*, 19 C.W.N. 557=16 Cr. L.J. 332=28 Ind. Cas. 668=43 O. 13. See Final Part, 1915, Col. 94.

(194-a) S. 234. See Nos. 179, 180 and 188, *supra*.

(195) S. 235. See Nos. 182 and 188, *supra*, and 279, *infra*.

(196) S. 236. See Nos. 188, *supra*, and 279, *infra*.

(196-a) S. 234—*Joinder of charges—Offences of same kind—Two acts of theft in same night—Legality of single trial for both offences.*

“Offences of the same kind” referred to in S. 234 of the Code need not necessarily have been committed against the same person (a).

The accused was tried at one trial in respect of two acts of theft committed in the course of the same night. It was alleged that he stole bajra from one man's field and rice from the field of another. He appealed to the Sessions Judge, who being of opinion that the trial was illegal, directed a re-trial of the accused. *Held* that there was no illegality in trying the accused at one trial in respect of both the charges. **Emperor v. Jagardeo**, 36 Ind. Cas. 873=36 A. 455 (Note).

PIGGOTT and WALSH, JJ.

References:—(a) 4 A. 147=A.W.N. (1881) 156, *Overruled*; 7 A. 174=A.W.N. (1884) 321, R.

(196-b) S. 237. See JOINT TRIAL.

(197) S. 237—*Practice and Procedure?*

When a Court finds it necessary to make use of S. 237, Crim. Pro. Code, in order to convict an

Crim. Pro. Code—(Continued).

accused person of an offence with which he has not been charged, the Court should be particularly careful to formulate to its own mind the charge upon which, had it been duly framed, it would be prepared to convict. *Abdul Rab v. Emperor*, 17 Cr. L.J. 64=32 Ind. Cas. 656.

PIGGOTT, J.

(198) S. 237 (2). See PENAL CODE, No. 180, 1 Pat. L.J. 391.

(199) Ss. 237, 238 and 423—*Alteration of conviction from one section to another by appellate Court—No charge originally framed—Crim. Pro. Code, S. 423 (b) (2)—Alteration, if legal—S. 423 (b) (2) if controlled by Ss. 237 and 238—Opium Act, S. 9, cl. (c)—Possession of opium by servant on behalf of master, if an offence.*

The fourth accused in the case was convicted for illegal possession of opium under S. 9, cl. (c) of the Opium Act. In appeal the Sessions Judge altered the finding to the offence of abetting the illegal sale of opium under S. 9, cl. (f) of the Opium Act and S. 114, I.P.C., maintaining the sentence. It was contended that this alteration was illegal.

Held, that apart from Ss. 237 and 238, Crim. Pro. Code, S. 423 (b) (2) unqualifiedly gives the power to the appellate Court to alter the finding on appeal, and the High Court in revision will not interfere unless material prejudice is shown or an injustice has been done to the accused (a).

Under S. 9, cl. (c) of the Opium Act, illegal possession of opium is an offence even though the possession might be that of a servant on behalf of his master. *Krishnan Chetty v. Emperor*, (1916) 2 M.W.N. 267=4 L.W. 373=17 Cr. L.J. 384=35 Ind. Cas. 816.

SADASIVA AIXAR, J.

References :—(a) 30 C. 288, F.; 21 M.L.J. 805, D.

(199-a) S. 238. See JOINT TRIAL.

(200) S. 238—*Penal Code, Ss. 456, 457—Conviction under S. 456 when charged under S. 457, propriety of—Criminal intention if should be specified in the charge in a case under S. 456—Intention of accused how may be determined by Court.*

The view that under no circumstances can a conviction be made under S. 456 of the Penal Code, when the accused has been charged with the commission of an offence under S. 457, cannot be maintained.

The accused in the middle of the night entered the house of the complainant while she was asleep, was caught but ultimately ran away. The motive alleged by the prosecution was to commit theft of the complainant's ornaments. The accused was summarily tried for offences under Ss. 457 and 380, I.P.C., and the trying Magistrate finding that the intention of the accused was really to make immoral proposals to the complainant and thus to annoy her convicted him under S. 456, I.P.C.

Held—That, although the specific intent, namely, the intent to commit theft was not established, yet it was competent to the Court

Crim. Pro. Code—(Continued).

to convict the accused under S. 456, I.P.C., S. 238, Crim. Pro. Code, being clearly applicable to a case of this character, and the accused not having in any way been prejudiced by such conviction (a).

That it is well settled that to sustain a conviction under S. 456, it is not necessary to specify the criminal intention in the charge; it is sufficient if a guilty intention is proved such as is contemplated by S. 441, I.P.C.

That the intention may be determined as well from direct evidence as from the conduct of the party concerned and the attendant circumstances, and in the circumstances of the case the Court could presume that the accused effected the entry with an intent such as is provided for by S. 441, I.P.C. *Kavali Prasad Guru v. King-Emperor*, 20 C.W.N. 1075=17 Cr. L.J. 424=35 Ind. Cas. 984.

MOOKERJEE and SHEEPHANKS, JJ.

Reference :—(a) 16 C.W.N. 696, D.

(201) S. 238. See No. 199, *supra*.

(202) S. 238 (3). See No. 166, *supra*.

(202-a) S. 239. See JOINT TRIAL.

(203) S. 239—*Joint trial—Same transaction—Penal Code, Ss. 409, 411.*

Held that a person committing theft and a person who receives the stolen property may under certain circumstances be tried jointly without contravening the provisions of S. 239, Crim. Pro. Code. *Emperor v. Bhima*, 14 A.L.J. 314=38 A. 311=17 Cr. L.J. 159=33 Ind. Cas. 639.

KNOX, J.

Reference :—6 Bom. L.R. 517, F.

(204) S. 239—*Joint trial—Receiving stolen property—Transactions different—Procedure—Objections to joint trial when to be taken.*

Unless the receiving of stolen property is joint, persons cannot be tried jointly under S. 239, Crim. Pro. Code, for receiving, merely because the goods were stolen in one theft. The acts of receiving in such a case by different persons on different occasions at different places are not only different offences but different transactions in themselves, and it is really not right to try certain persons for receiving one set of stolen goods at the same time as other persons for receiving wholly independently another set of stolen goods.

Objections to joint trials, or any other kind of procedure which is alleged to prejudice the accused, should be taken when the charge is made, before the Judge goes into the merits. It is an objection relating to the charge and ought to be made when the accused are charged. If it is wrongly refused, if the objection is wrongly overruled, the accused have an appeal; but if the Judge agrees with the objection, he can separate the parties and try them separately; and no Judge can be expected to take these objections from the Bench itself and unless they are taken at the trial, the Judge's mind is

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never directed to them. **Emperor v. Balgobind**, 17 Cr. L.J. 477 = 86 Ind. Cas. 157.

WALSH, J.

(205) S. 239. See No. 188, *supra*.

(205-a) S. 247. See TRIAL.

(206) Ss. 247, 438 — *Complainant, non-appearance of, though present in Court—Transfer of case, complainant not aware of—Penal Code (Act XLV of 1860), S. 426.*

On a complaint, the accused was summoned for trial under S. 426 of the Indian Penal Code. On the date of hearing both parties appeared with their witnesses before the Deputy Magistrate who, however, transferred the case to another Bench of Magistrates. Later on in the day the case was taken up by that Bench but the complainant, though he was present in the Court with his witnesses, could not appear as he was not aware of the transfer of his case. The Magistrates acquitted the accused under S. 247 of the Code of Criminal Procedure.

Held, that S. 247 of the Code of Criminal Procedure does not apply in such a case. **Elim Haji v. Hamid**, 24 C.L.J. 444.

MUKERJEE and SHEEP SHANKS, JJ.

(207) Ss. 247, 438—Scope of S. 247 — Death of complainant—Application by his son to proceed with the case—Acquittal under S. 247—Legality—Interference in revision. See PENAL CODE, No. 40, 20 C.W.N. 862.

(208) Ss. 248, 345—*Wrongful confinement case—Petition filed by the complainant praying that the case may be struck off without hearing—Such petition, whether compromise or withdrawal—Procedure in warrant cases for withdrawal—Meaning of compromise and withdrawal.*

"Compromise" is a word which in itself contemplates an arrangement to which there are two parties. "Withdrawal" has no such meaning. A case is compromised if with the consent of the accused it is withdrawn. A case is withdrawn under S. 248, Crim. Pro. Code, without the consent of the accused.

When a petition is filed by the complainant praying for striking off the case, it is clearly open to the Magistrate to satisfy himself under what section the petition is before him. Where the answers of the complainant clearly indicate that the case had not been compromised but was being withdrawn without the consent of the accused, and the subsequent action of the accused shows that he had never consented to the compromise of the case: .

Held, that the petition was not a petition made under S. 345, Crim. Pro. Code, and that the subsequent proceedings resulting in the trial and conviction of the accused were in order. **Bayan Ali v. King-Emperor**, 20 C.W.N. 1209.

ROSE and JWALA PRASAD, JJ.

References:—21 C. 103; 8 C.W.N. 332; 13 B. 600, R.

Crim. Pro. Code—(Continued).

(209) S. 350—*Complaint to Village Magistrate—Discharge of accused—Compensation, award of—Validity—Practice.*

It is competent to a Magistrate to award compensation to an accused person when the charge against him is found to be frivolous or vexatious even though such charge originated in a complaint made to a Village Magistrate. **Thonikadavath Awalla v. Amman Mannil Kuttiall**, 4 L.W. 73 = 17 Cr. L.J. 503 = 86 Ind. Cas. 471.

OLDFIELD and SADASIVA AIYAR, JJ.

Reference:—27 M.L.J. 37, F.

(210) S. 250—*Order for compensation when illegal.*

Where proceedings were instituted against the accused persons, not upon any complaint or information given by the petitioner to a police officer or Magistrate as required by S. 250, Crim. Pro. Code, but on evidence which was obtained by the police on an enquiry instituted by them, in the course of which, however, the petitioner's statement was taken along with that of others, *held*, that the institution of proceedings against the accused was not due to any action taken by the petitioner, and the order to pay compensation under S. 250 must be set aside. **Sarjug Prasad Singh v. The King Emperor**, 1 Pat. L.J. 106 = 17 Cr. L.J. 336 = 85 Ind. Cas. 512.

CHAMIER, C.J. and JWALA PRASAD, J.

(211) S. 250. See No. 14, *supra*.

(211 a) S. 250—*Prosecution launched as result of information given to Village Magistrate—Discharge of accused—Order of compensation as against informant—Validity—Magistrate if includes Village Magistrate.*

Under S. 250 of the Code of Criminal Procedure, a Magistrate can, when discharging the accused, order compensation to be paid to him by the person who gave information to the Village Magistrate as the result of which the prosecution was launched (a).

The term "Magistrate" in S. 250 does not include Village Magistrates. **Gandla Nadiabba v. Margasahaya Chetty**, 32 M.L.J. 78 = 36 Ind. Cas. 842 = (1917) M.W.N. 86.

OLDFIELD and KRISHNAN, JJ.

References:—(a) (1914) M.W.N. 804, F.; 25 M. 667; 22 M.L.J. 138; 32 M. 258, R.

(212) Ss. 250, 537—*Discharge of accused—Compensation, order for, in a separate proceeding—Validity of order—Imprisonment in default, when awardable.*

There is nothing in S. 250 of the Crim. Pro. Code to show that the levy of compensation from the complainant cannot be subsequent to the order discharging the accused, but the Magistrate should make up his mind to call upon the complainant to pay compensation before delivering the order of discharge (a).

An order of compensation contained in a separate proceeding amounts to a mere irregularity which is cured by S. 537 of the Code (b).

The order of compensation should not contain an alternative direction awarding imprisonment in default of payment of same, and such

Crim. Pro. Code—(Continued).

a provisional order for imprisonment is beyond the jurisdiction of the Magistrate, since steps must first be taken to recover the amount before any such order can be made under the provisions of S. 250. *Proviso 2. Dhanukodi Asari v. Muthusami Aiyar*, 4 L.W. 32=(1916) 2 M.W.N. 159=17 Cr. L.J. 314=35 Ind. Cas. 490.

SESHAGIRI AIYAR, J.

References :—(a) 25 A. 315, R. (b) 36 A. 182; 22 Ind. Cas. 526, F.

(213) S. 253. See No. 320, *infra*.

(214) Ss. 253, 259—*Warrant case—Discharge of accused for absence of complainant.*

In a warrant case an order discharging an accused person on account of the absence of the complainant cannot be made under S. 253, Crim. Pro. Code. Such an order can only be made under S. 259 and in a case where the offence may be lawfully compounded. *Y. R. Alexander v. R.W. Connors*, 20 C.W.N. 698=17 Cr. L.J. 193=34 Ind. Cas. 305.

CHITTY and WALMSLEY, JJ.

(214-a) S. 254. See No. 161-a, *supra*.

(215) S. 256—*Application of the section to inquiries into cases triable by Sessions Court—Accused's right to cross examine prosecution witnesses after framing of charge.*

Held, that S. 256 of the Crim. Pro. Code, provides, in the trial of warrant cases, for the recall of witnesses for the prosecution for cross-examination, after the charge has been framed. The section does not apply to the enquiry into cases triable by the Sessions Court. In such cases the evidence of each witness will ordinarily be concluded as each witness is examined and the accused has no right to have his cross-examination conducted after the charge has been framed. *Baldeo Prasada v. King-Emperor*, 19 O.C. 239.

KENDALL, A.J.C.

(216) S. 256. See No. 63, *supra*.

(217) Ss. 256, 257—*Cross-examination of prosecution witnesses—Charges framed, reasonable opportunity after, should be given.*

Where the charges framed are complicated and the accused are ignorant persons, a reasonable time should be given to the accused to get proper legal advice and assistance before they are called upon to cross-examine the prosecution witnesses (a).

It is not giving an accused person reasonable opportunity to ask him immediately, after the charge is framed, to cross examine witnesses, and a reasonable time should be granted to enable the accused to engage a pleader. *In re Rangasami Padayachi*, 16 Cr. L.J. 786=31 Ind. Cas. 642.

KUMARASWAMI SASTRI, J.

References :—(a) 12 Ind. Cas. 524; (1911) 2 M.W.N. 192; 12 Cr. L.J. 548, F.

(218) Ss. 256 and 537—*Summons case and warrant case, joint trial of—Warrant case dismissed—Summons case proceeded with—Refusal of Magistrate to re-call prosecution witnesses for further cross-examination, if legal—Prejudice to*

Crim. Pro. Code—(Continued).

accused—Presumption—Burden of proof. In re Rallabandi Sobhanadri, 2 L.W. 574=18 M.L.T. 92=16 Cr. L.J. 540=(1915) M.W.N. 546=29 Ind. Cas. 668=39 M. 503. See Final Part, 1915, Col. 100.

(219) S. 257. See No. 217, *supra*.

(220) S. 259. See No. 214, *supra*.

(221) S. 260 (1) (d)—*Paddy cut and carried away by landlord from tenant's land—Value—Summary trial for theft—Jurisdiction. See PENAL CODE, No. 141, 20 C.W.N. 1212.*

(222) Ss. 260 and 530—*District Magistrate, Bangalore, whether can try a European British subject summarily—Crim. Pro. Code, extent of application of, to Bangalore. In re Jeremiah*, 2 L.W. 1078=29 M.L.J. 758=(1915) M.W.N. 1023=16 Cr. L.J. 773=31 Ind. Cas. 373=39 M. 942. See Final Part, 1915, Col. 101.

(223) S. 263, cl. (h)—*Summary trial—Judgment—Contents—Necessity to state facts forming the offence and reasons for conviction. Ram Karaka v. The Crown*, 9 S.L.R. 89=16 Cr. L.J. 713=30 Ind. Cas. 1001. See Final Part, 1915, Col. 101.

(224) S. 269 (3). See No. 182, *supra*.

(225) S. 271—*Sessions case—Committal for offences under Ss. 457 and 75, I.P.C.—Charge under S. 75, I.P.C., omission of, by Sessions Court—Conviction under Ss. 457 and 511, I.P.C.—Previous convictions put to prisoner, and admitted and taken into consideration in passing sentence—Sentence passed, legal even without proof of previous convictions—Interference in appeal—Practice—Procedure.*

In a case in which the prisoner was committed to the Sessions on Charge under Ss. 557 and 75, I.P.C., the Sessions Judge omitted the charge under S. 75, I.P.C., and after trying the prisoner on the other charges, convicted him under Ss. 457, 511, I.P.C. He then put to the prisoner the previous convictions and on his admitting them, took into consideration the existence of such previous convictions and passed a sentence which was legal even without proof of the said previous convictions.

Held that the sentence was legal, even though the same was influenced by a consideration of the gravity of the offence for which the prisoner had been previously convicted.

The desirability of Magistrates and Judges taking the ordinary precaution of charging prisoners under S. 75 also, pointed out. *In re Subramanian*, 3 L.W. 403=(1916) M.W.N. 327=17 Cr. L.J. 238=34 Ind. Cas. 1008.

COUTTS TROTTER, J.

Reference :—39 B. 326, R.

(225-a) Ss. 276, 277, 299—*Jury—Deficiency in number made up by selection and not by lot—Trial, if vitiated.*

Where a sufficient number of jurors not having been present at the day of trial, the Sessions Judge selected the jury from among those present, but did not do so by lot.

Held, that the trial was not vitiated thereby. The provision as to choosing by lot applies only to summoned jurors.

Crim. Pro. Code—(Continued).

Where the accused did not object to the choosing of jurors but expressly acquiesced in the choice he could not afterwards urge the objection in appeal. *Anilpe Pellada v. Emperor*, (1917) M.W.N. 1=36 Ind. Cas. 847=5 L.W. 927.

OLDFIELD and KRISHNAN, JJ.

(226) Ss. 284, 326, 327—*Trial by assessors—Summoning of assessors for particular date—Selection on another date.*

Where a person was summoned to serve as an assessor on a particular date in a particular case, and he failed to appear in Court on that date but appeared on a subsequent date when another trial had to commence, and he was selected to act as one of the assessors in that trial, his selection would not be improper, and the trial in which he took part cannot be held invalid on that account. *Chutta v. Emperor*, 17 Cr.L.J. 17=32 Ind. Cas. 145.

PIGGOTT, J.

(227) S. 287—*Jury—Charge to Jury—Non-direction—Misdirection—Interference by High Court—Evidence Act, S. 24—Person in authority—Village Police Patil. Emperor v. Fakira Appaya*, 17 Bom.L.R. 1059=3 Bom. Cr. C. 135=40 B. 220=17 Cr.L.J. 133=33 Ind. Cas. 309. See Final Part, 1915, Col. 101.

(227-a) S. 288. See CONFESSION.

(228) S. 288—*Confession—Retracted—Transfer—Identification of dead body based on articles of clothing—Transfer of statements under S. 288—Their value. Ghanwara v. The Crown*, 35 P.W.R. 1915 (Cr.)=16 Cr.L.J. 612=30 Ind. Cas. 436. See Final Part, 1915, Col. 102.

(229) S. 289. See No. 230, *infra*.

(230) Ss. 292, 299—*Construction—Documents exhibited on behalf of accused during cross-examination of prosecution witnesses—Prosecution whether has right of reply—Test under S. 292.*

S. 292, Crim. Pro. Code, must be read in connection with S. 289 and must be construed accordingly. Reading the two sections together the right to reply which is given by S. 292 arises only if the accused or any of the accused takes advantage of the right to adduce evidence at the time and in the manner specified by the Act, viz., after the case for the prosecution is concluded.

So, where, during the cross-examination of certain of the witnesses for the prosecution and before the close of the case for the Crown, the counsel for the accused put to the witnesses certain letters as having been written by them or their employers, and the witnesses identified the letters which were then tendered as evidence and admitted, held, the prosecution had not the right to reply.

Held also that the correct test for deciding this matter was not whether the prosecution was taken by surprise. *Emperor v. Sreenath Mahapatra*, 49 O. 426=20 C.W.N. 976=17 Cr.L.J. 423=35 Ind. Cas. 983.

SANDERSON, C.J.

Crim. Pro. Code—(Continued).

(231) Ss. 293 and 309 (2)—*View of place of occurrence of offence by Judge and jury or assessors—Notice to parties—Evidence Act, S. 143, leading questions in cross-examination—Procedure when Judge disallows question to witness—Oaths Act (X of 1873), Ss. 6 and 13—Affirmation by Hindu witness—Deliberate omission to administer oath.*

If a Sessions Judge thinks it necessary to visit the place of occurrence of an offence under trial, he should give notice to the parties and the assessors. He should not go without such notice, nor after the trial has been completed by delivery of the assessor's opinion.

When a Judge disallows a question, counsel, if he wants to make it a ground of appeal, should have the question and the order disallowing it recorded.

The words "omission to take an oath or make an affirmation" in S. 13 of the Oaths Act include only an accidental not a deliberate omission to take an oath or make an affirmation. *Deya v. King-Emperor*, 9 Bur. L. T. 133=17 Or.L.J. 500=36 Ind. Cas. 468.

TWOMEY and FARLETT, JJ.

References:—10 A. 207; 11 A. 183, F.; 2 L. B. R. 322, Overruled.

(232) S. 297—*Charge to Jury—Rioting—Unlawful assembly—Penal Code, Ss. 141, 147—Evidence Act, S. 114—Presumption.*

The omission to mention the common object in the charge-sheet for an offence of rioting does not necessarily vitiate the trial (a).

The Sessions Judge in his charge to the jury should draw the attention of the jury to the case set up by the defence and should also point out to them that the non-production by the prosecution of witnesses who were admittedly present at the time of the alleged occurrence, created a presumption under S. 114 of the Evidence Act which did not help the case for the prosecution.

In a charge of rioting the Jury must be told that a rioting can only take place when there is an unlawful assembly consisting of at least five men with one of the common objects mentioned in S. 141, Indian Penal Code. In cases of riot it is essentially necessary to mention what an unlawful assembly is. The jury are not experts in law. They might not be able to distinguish between a collection of five or more men without a common object and a collection of the same number of men with a common object. *Abdul Sheikh v. Emperor*, 17 Cr. L. J. 92=32 Ind. Cas. 684.

SHARFUDDIN and CHAPMAN, JJ.

References:—(a) 11 C. 106; 22 C. 276; 33 O. 295=2 C.L.J. 516=3 Cr. L.J. 153, D.

(233) Ss. 297, 298, 299—*Charge to Jury—Trial of several accused, together—Omission to place defence evidence regarding each accused before Jury, effect of—Misdirection.*

Ss. 297 to 299 of the Code of Criminal Procedure make it imperative on a Sessions Judge to place in his summing up to the jury the evidence both for prosecution and defence.

Crim. Pro. Code—(Continued).

The fact that the pleaders for the accused thought it unnecessary to place much reliance upon the defences of the accused would not absolve the Sessions Judge from his duty. Ss. 297, 298 and 299 of the Crim. Pro. Code make this clear.

In a case where the case for prosecution entirely rested on the identification of the dacoits at night, the failure of the Sessions Judge to deal with the defences and the evidence in support of the defence must be deemed to have prejudiced the accused.

In a case where a number of accused persons were concerned and the question was purely one of identification, it would be of much help to the Jury if the Sessions Judge should sum up the evidence for the prosecution against each accused separately and draw the special attention of the Jury to the facts alleged against each accused person. *In re Sangam*, 17 Cr. L. J. 19=32 Ind. Cas. 147.

ABDUR RAHIM and AYLING, JJ.

(234) S. 298. See No. 233, *supra*.

(235) S. 299. See No. 233, *supra*.

(236) S. 299, *ill.* (a)—*Misdirection of Jury*—Ss. 299, 300, 301, *Penal Code—Illustration to sections of the Penal Code—Interpretation. Nga Mya v. King-Emperor*, 8 Bur. L.T. 220=8 L.B.R. 306=32 Ind. Cas. 641=17 Cr. L.J. 49. See Final Part, 1915, Col. 103.

(237) S. 309—*Trial before Sessions Court—Addition of charges at the trial—Conclusion of the case—Opinion of assessors—Sessions Judge cancelling trial on the ground that charges were wrongly added—Subsequent fresh trial—Second trial not legal. Emperor v. Nathu Rewa*, 17 Bom. L.R. 1074=3 Bom. Cr. C. 150=16 Cr. L.J. 824=31 Ind. Cas. 1000. See Final Part, 1915, Col. 105.

(238) S. 309 (2). See No. 231, *supra*.

(239) S. 326. See No. 226, *supra*.

(240) S. 327. See No. 226, *supra*.

(240-a) S. 337. See APPROVER.

(241) Ss. 337, 338—*Offences not triable by Court of Session also committed—Pardon whether can be granted—Object of construing Penal and other Statutes—Rule of strict construction—Applicability. Hafamal Parmamand v. The Crown*, 9 S.L.R. 43=16 Cr. L.J. 632=30 Ind. Cas. 456. See Final Part, 1915, Col. 105.

(242) Ss. 337, 339—*Pardon how forfeited—Approver, whose pardon is alleged to have been forfeited, procedure in trying.*

In discharging an approver at the close of the Sessions trial in which he was examined as a witness, it is open to the Sessions Judge to express his opinion on the question whether the approver had forfeited his conditional pardon under S. 339. It would then be for the District Magistrate on behalf of the Crown to take action for the prosecution of such approver if he thought fit. On being brought before the Magistrate with a view to committing to Sessions he could plead his pardon in bar and thereupon the

Crim. Pro. Code—(Continued).

Magistrate would have to proceed as indicated in 7 L.B.R. 1 and in 37 A. 331.

The Magistrate would have to satisfy himself that there was *prima facie* ground for holding that approver has forfeited his pardon and to include in his commitment order a statement of the evidence on which he relied as establishing this fact. On the case reaching the Sessions Court the accused could again plead his pardon and the Sessions Judge would have to entertain this plea and decide it before putting the accused on his trial for the substantive offence. *King-Emperor v. Po Ket*, 8 L.B.R. 447=17 Cr. L.J. 337=35 Ind. Cas. 513.

TWOMEY, J.

References:—(a) 5 L.B.R. 1; 30 B. 611; 37 C. 346; 37 A. 331, R.

(243) Ss. 337 (3) and 339—*Pardon—Procedure on grant of pardon—Omission to keep approver in custody—Wilfully concealing anything essential—Absconding before conclusion of cross-examination—Forfeiture of pardon.*

When an accomplice has been granted and has accepted a pardon he should, unless he is on bail, be detained in custody till the termination of the trial by the Court of Sessions or High Court. A pardon once tendered and accepted is forfeited only by wilfully concealing anything essential, or by giving false evidence. Absconding before conclusion of cross-examination does not amount to wilful concealment. *Mang Po Hia v. King-Emperor*, 9 Bur. L.T. 76=8 L.B.R. 357=17 Cr. L.J. 391=35 Ind. Cas. 823.

TWOMEY, J.

(244) S. 338. See No. 241, *supra*.

(245) S. 339. See Nos. 242 and 243, *supra*.

(246) S. 339 (2)—*Statement made under promise of pardon retracted—Want of corroborative evidence—Conviction whether legal. See EVIDENCE ACT, No. 4, 6 P.W.R. 1916 (Cr.).*

(247) Ss. 340, 344, 339—*Adjournment—Accused entitled to—For securing services of pleader for cross-examining prosecution witnesses—Revision.*

Held, that an accused is entitled to have an adjournment of his case so as to enable him to secure the services of a pleader whom he wants to engage for the purpose of cross-examining the prosecution witnesses.

So where a magistrate refused in such a case to give time, the Chief Court stayed the proceedings and directed him to re-summon the prosecution witnesses for cross-examination by the accused or his Counsel. *Sher Singh v. The Crown*, 14 P.W.R. 1916 (Cr.)=17 Cr. L.J. 278=34 Ind. Cas. 998.

RATTIGAN, J.

(248) S. 341—*Deaf and dumb accused—Procedure.*

Though great caution and diligence are necessary in the trial of a deaf and dumb person, yet if it be shown that such person had sufficient intelligence to understand the character of his criminal act, he is liable to punishment.

Crim. Pro. Code—(Continued).

Emperor v. A Deaf and Dumb Accused, 18 Bom. L.R. 558—8 Bom. Cr. C. 197—40 B. 598.

BATCHELOR and SHAH, JJ.

(249) S. 342—*Evidence of the prosecution—Not implicating accused—Statement of accused—Not admissible against him.* **Ablulla Royuthan v. Kabib Royuthan**, (1916) M.W. N. 418—2 L.W. 999—16 Cr. L.J. 623—30 Ind. Cas. 447—39 M. 770. See Final Part, 1915, Col. 108.

(250) S. 342—*Questioning the accused—Omission, an illegality.* **Emperor v. Basapa Ningapa**, 17 Bom. L.R. 892—3 Bom. Cr. C. 104—16 Cr. L.J. 765—31 Ind. Cas. 365. See Final Part, 1915, Col. 108.

(251) S. 342 (4). See No. 361, *infra*.

(252) S. 343. See No. 361, *infra*.

(253) S. 344—*Remands to custody when to be ordered—Amount of evidence necessary.* **Ahmadali v. Emperor**, 11 N.L.R. 162—16 Cr. L.J. 705—30 Ind. Cas. 993. See Final Part, 1915, Col. 109.

(254) S. 344. See Nos. 66 and 247, *supra*.

(255) Ss. 344, 439. See **STAY OF CRIMINAL PROCEEDINGS**, No. 2, 8 P.W.R. 1916 (Cr.).

(256) Ss. 344, 439—*Power of Court under S. 344.* See **STAY OF CRIMINAL PROCEEDINGS**, No. 3, 4 P.W.R. 1916 (Cr.).

(257) S. 345—*Compoundable offence—Compromise out of Court—Subsequent resulting by one party—Effect of compromise—Procedure to be followed.* **Mahomed Kanni Rowther v. Inayathulla Sahib**, 2 L.W. 1200—18 M.L.T. 502—16 Cr. L.J. 803—31 Ind. Cas. 819—39 M. 946. See Final Part, 1915, Col. 109.

(258) S. 345—*Criminal trespass—Possession must be actual not juridical.* See **PENAL CODE**, No. 192, 8 L.B.R. 425.

(259) S. 345. See Nos. 208, *supra*, and 329, *infra*.

(260) Ss. 345, 433 (1) (d), 439—*Scope of S. 345—Power of compounding when may be exercised—Matter pending before High Court in revision—Compounding whether can be allowed.* **Sankar Rangayya v. Sankar Ramayya**, 29 M.L.J. 521—18 M.L.T. 381—16 Cr. L.J. 750—39 M. 604—31 Ind. Cas. 350. See Final Part, 1915, Col. 110.

(261) S. 346. See No. 8, *supra*.

(262) Ss. 348, 349—*Procedure, when previous conviction of accused brought to Magistrate's notice.*

It is not illegal or irregular for a Magistrate of the 2nd or 3rd class acting under S. 349, Crim. Pro. Code, to frame a charge against the accused person (a). **Emperor v. Po Yin**, 17 Cr. L.J. 201—34 Ind. Cas. 313.

TWOMEY, J.

References:—(a) 2 L.B.R. 285—10 Bur. L. R. 306—1 Cr. L.J. 1010, F.

(263) S. 349. See No. 263, *supra*.

(263-a) S. 350. See **MAGISTRATE, JURISDICTION OF**.

(264) S. 350—*Interpretation of—"Cease to exercise jurisdiction and is succeeded by*
8 Cr.

Crim. Pro. Code—(Continued).

another Magistrate," meaning of—Right to accused to recall prosecution witnesses—Practice.

The words "Ceases to exercise jurisdiction and is succeeded by another Magistrate," in S. 350 of Crim. Pro. Code, should not be confined to the case of a Magistrate who is transferred and whose place is taken by another Magistrate.

S. 350 of the Code of Criminal Procedure may apply to cases withdrawn under S. 528 of the Code of Criminal Procedure.

It is necessary for the Magistrate to acquaint the accused with the fact that he is entitled to have the prosecution witnesses recalled. **Barachi v. King-Emperor**, U.R.R. (1916), 2nd Q., p. 108—17 Cr. L.J. 401—35 Ind. Cas. 961.

SAUNDERS, J.

(264-a) Ss. 350, 366, 367, 476, 494 and 528—*Magistrate on leave—Effect of judgment written and signed by Magistrate after availing himself of leave—Sanction by District Magistrate after withdrawal of prosecution.*

Where a Magistrate who had proceeded on leave and had thus ceased to exercise jurisdiction in a case tried by him wrote and signed a document purporting to be his judgment in the case, it would not amount to a judgment.

The accused in a case under S. 47, I.P.C., produced a certain document as evidence on his behalf. The Magistrate who tried the case, having proceeded on leave without writing or pronouncing judgment as required by law, the District Magistrate, being of opinion that the so-called judgment written by him was no judgment under the law transferred the case to his own file, and proceeded to deal with it under the provisions of S. 350, Crim. Pro. Code. Having examined the record the District Magistrate thought it proper to permit the public prosecutor to withdraw the prosecution. The Magistrate, however, after satisfying himself that there were grounds for believing that the document produced by the accused was a forgery, and after giving the accused an opportunity of showing cause, gave sanction to prosecute the accused under Ss. 469, 471 and 474, I. P. C. Held that the Magistrate of the District having transferred the case to his own file and proceeded to deal with it, the case was before him in his judicial capacity and the proceedings before him were judicial proceedings. Held also, that the offence against the accused having been brought to the notice of the District Magistrate in the course of his judicial proceedings it was competent to him to take action under S. 476 of the Code. **Chandra Kishore Ray v. Emperor**, 36 Ind. Cas. 812.

TEUNON and CHAUDHURI, JJ.

(265) S. 350. See **BENCH OF MAGISTRATES**, No. 1, 8 L.B.R. 463.

(266) Ss. 350, 366 and 367—*Case tried and judgment written, signed and dated by one Magistrate, but not pronounced owing to absence of accused—Change of Magistrate—*

Crim. Pro. Code—(Continued).

De novo trial claimed and granted—Procedure, of legal—New Magistrate, if bound to pronounce the judgment of his predecessor.

S. 367, Crim. Pro. Code, requires the dating and signing of a judgment to be in open Court at the time of its pronouncement.

Where a Magistrate who has tried a case and written out his judgment is succeeded by another before he has actually pronounced the same, it is not obligatory on the succeeding Magistrate to pronounce the same and much less can he be compelled to do so, though he may, if he chooses, date, sign and pronounce it, in which case he will be adopting it as his own.

Quære.—Whether it will be legal for the succeeding Magistrate to date, sign and pronounce a judgment written by his predecessor, when the accused demand a *de novo* trial? *In re Savarimuthu Pillai*, 3 L.W. 496 = (1016) M.W.N. 371 = 34 M.L.J. 81 = 17 Cr. L.J. 166 = 33 Ind. Cas. 646.

AYLING and NAPIER, JJ.

(267) Ss. 350, 435 and 439—*De novo* trial if cancels charge previously framed—Order subsequently passed in favour of accused whether amounts to a discharge or acquittal—Revision against acquittal by a private party, whether competent. *Simhadri Naidu v. Sitharama Patrudu*, 2 L.W. 1244 = 17 Cr. L.J. 1 = 32 Ind. Cas. 129. See Final Part, 1915, Col. 111.

(168) S. 366. See No. 266, *supra*.

(269) S. 367—Charge to jury—Heads of charge—Object of—What it should contain—Duty of Judge.

Under S. 367, Crim. Pro. Code, a Judge is not required to write out *in extenso* the charge which he addresses to the jury.

The term "heads of charge" means that the judge must faithfully record the lines upon which he addressed the jury, both on the evidence and on the law, and the object of these heads of charge is to inform the High Court, should occasion arise, of what direction he gave in law to the jury and the nature of his summing up of the evidence not only for the prosecution but also for the defence.

The Judge need not in every particular and in every detail address himself to every suggestion put forward by the defence. His duty is fairly and candidly to point out the main and salient features of the case from the point of view of the prosecution and of the defence respectively.

The headings of charge should record in an intelligible form and with sufficient fulness, the points of law and directions given by the Judge to the jury and the record should represent with accuracy the substance of the charge by the Judge(s).

The method of expression and its form may be unsatisfactory, but if in substance one can see from the frame of the heads of charge what were the directions which the learned Judge gave to the jury and that they were right and proper, there can be no ground of complaint even though the phraseology and form adopted might be open to question (L).

More informality in expression or form would not be sufficient to invalidate the conviction.

Crim. Pro. Code—(Continued).

Eknath Sahay v. King Emperor, 1 Pat. L.J. 317 = 17 Cr. L.J. 353 = 35 Ind. Cas. 657.

ATKINSON and J WALA PRASAD, JJ.

References:—(a) 34 C. 698 and 36 C. 281, *Ref. to*. (b) 21 I.A. 686, *Ref. to*.

(270) S. 367. See Nos. 266, *supra*, and 297, *infra*.

(271) Ss. 367, 424—*Appellate judgment, what should be*.

The petitioners were convicted all under Ss. 147 and 342, I.P.C., and some also under S. 354 and some under S. 459, I.P.C.; the convictions were affirmed in appeal by the Sessions Judge.

Held.—That there ought to be sufficient materials in the appellate judgment itself to enable the High Court to form a conclusion as to the propriety of the conviction of each of the accused having regard to the various offences with which he was charged, and to enable it to come to a conclusion as to the correctness of the sentence which has been passed upon each of the accused having regard to the nature of the offence with which each of the accused was charged.

The High Court directed a re hearing of the appeal by the same Sessions Judge. *Arindra Rajbanshi v. The King Emperor*, 20 C.W.N. 1296.

SANDERSON, C.J., and WALMSLEY, J.

(272) S. 369—*Review of judgment of High Court—Finality of order—Order not sealed*.

The High Court has no power, under S. 369 of the Code of Criminal Procedure, to review an order dismissing an application for revision made by an accused person (a).

But inasmuch as the order had been signed by the Judge rejecting the petition but not sealed, it was open to the applicant to come to the High Court with an application in revision, and the Judge who had passed the order was not precluded from entertaining it (b). *Gobind Sahai v. Emperor*, 14 A.L.J. 61 = 38 A. 131 = 32 Ind. Cas. 335 = 17 Cr. L.J. 47.

TUDBALL and WALSH, JJ.

References:—(a) 14 C. 42; 7 A. 672, *F*. (b) 21 A. 177; 27 A. 92, *F*.

(273) S. 369—*Review of judgment by Sessions Court—Incompetency*.

A Sessions Judge cannot review an order or judgment once passed by him. S. 369, Crim. Pro. Code, 1898, is quite clear on the point (a). *Official Receiver, Karachi v. Ganga Ram Shankar Das*, 25 P.R. 1916 (Cr.).

BROADWAY, J.

References:—8 P.R. 1909 (Cr.); 35 C. 350; 22 B. 949; 30 Ind. Cas. 136; 38 A. 134; 21 Ind. Cas. 447, *Ref. to*; 2 P.W.R. 1910 (Cr.), *Dist*.

(274) S. 370 (i)—*Presidency Magistrate—Judgment, contents of*. *Emperor v. Shankar Ramdas*, 17 Bom. L.R. 890 = 3 Bom. Cr. C. 102 = 10 Cr. L.J. 771 = 31 Ind. Cas. 871. See Final Part, 1915, Col. 112.

(275) S. 374—*High Court—Confirmation of sentence—Practice*. *Emperor v. Daji Yesaba*,

Crim. Pro. Code—(Continued).

17 Bom. L.R. 1072=3 Bom. Cr. O. 148=16 Cr. L.J. 818=31 Ind. Cas. 994. See Final Part, 1915, Col. 112.

(276) Ss. 380, 562, 407, 408—*First offenders—Submission of proceedings by a second class Magistrate to a first class Magistrate—Sentence passed by first class Magistrate—Appeal from sentence—Court of Session. Emperor v. Bhimappa Ulivappa*, 17 B.M.L.R. 896=3 Bom. Cr. O. 101=16 Cr. L.J. 738=31 Ind. Cas. 388. See Final Part, 1915, Col. 113.

(276-a) S. 397. See SENTENCE.

(277) S. 397—'Concurrent sentences'—*Sentence of imprisonment, what is implied—Detention in civil prison whether amounts to imprisonment—Prisons Act (IX of 1894), S. 42.*

A sentence of imprisonment under the Prisons Act must commence from the date on which it was passed.

A prisoner cannot be further detained in the civil prison for the period for which he was kept out of it, for the object of his commitment to the civil prison was to keep him under detention for a specified period or until he paid up the debt, whichever event occurred sooner, and his detention in the criminal jail may, consequently, be taken to serve the purpose of his detention in the civil prison.

Even a person committed to prison under S. 123 of the Code of Criminal Procedure is not undergoing a "sentence" of imprisonment, and when such a person is convicted for an offence and sentenced to a term of imprisonment, such term cannot, under S. 397 of the Code of Criminal Procedure, be made to commence on the expiry of the period for which he has been committed to prison under S. 123, but must commence from the date of the order (a).

A sentence of imprisonment implies the punishment awarded on conviction of an offence (b). *Shin Taung v. Emperor*, 17 Cr. L.J. 480=36 Ind. Cas. 160.

MAUNG KIN, J.

References:—(a) 31 M. 515=4 M.L.T. 223=8 Cr. L.J. 404; 27 M. 525=1 Cr. L.J. 1090; 2 Weir 452=20 M. 444; 5 Bom. L.R. 26; 6 Bom. L.R. 1098=1 Cr. L.J. 1114; 14 P.R. 1895 (Cr.). F.; 30 A. 334=A.W.N. (1908) 133=5 A.L.J. 318=7 Cr. L.J. 427=4 M.L.T. 41, Not F.; 13 Ind. Cas. 1005=8 N.L.R. 20=13 Cr. L.J. 189, App. (b) 14 P.R. 1895 (Cr.). F.

.. (277-a) S. 397. See Nos. 13 and 74, *supra*.

(278) S. 403—*Previous acquittal, how far a bar to subsequent trial—First trial not proper as not instituted on a proper complaint—Penal Code, Ss. 366, 368, 376 and 498, Emperor v. Tikaram Sakharam Kasar*, 17 Bom. L.R. 678=3 Bom. Cr. O. 91=16 Cr. L.J. 557=30 Ind. Cas. 641. See Final Part, 1915, Col. 114.

(278-a) S. 403. See No. 180, *supra*.

(279) Ss. 403, 35, 195, 235, 236—*Previous acquittal—Bar to subsequent trial—Penal Code, Ss. 467, 109, 471. Emperor v. Jivram Dankarji*, 17 Bom. L.R. 881=3 Bom. Cr. O.

Crim. Pro. Code—(Continued).

93=16 Cr. L.J. 761=40 B. 97=31 Ind. Cas. 861. See Final Part, 1915, Col. 115.

(280) S. 406. See No. 41, *supra*.

(281) S. 407. See No. 276, *supra*.

(281-a) S. 408. See APPEAL.

(282) S. 408—*Sentences passed by Assistant Sessions Judge—Appeal, if lies to Session Court or to High Court.*

Where an Assistant Sessions Judge passes sentences upon an accused each of which is four years or under, and they are ordered to run concurrently, the appeal from the conviction and sentence lies to the Sessions Court and not to the High Court. *Lakhlmi v. King-Emperor*, 23 C.L.J. 595=17 Cr. L.J. 265=34 Ind. Cas. 956.

MOOKERJEE and SHEEPSHANKS, JJ.

References:—11 Bom. L.R. 544; (1901) P.R. 25, F.

(283) S. 408. See No. 276, *supra*.

(284) Ss. 408 (b), 20—*Magistrate exercising powers under S. 30—Conviction by such Magistrate—Appeal—Maintainability by Sessions Court—Proper forum—Chief Court.*

An appeal against the sentence and conviction passed by a First Class Magistrate exercising enhanced powers under S. 30, Crim. Pro. Code, does not lie to the Court of Sessions, but such an appeal can be presented to the Chief Court under S. 403 (b), Crim. Pro. Code. *Ahmad Khan v. The Crown*, 5 P.R. 1916 (Cr.)=122 P.L.R. 1916=17 Cr. L.J. 299=35 Ind. Cas. 171.

RATTIGAN, J.

Reference:—17 M.L.J. 248, R.

(285) Ss. 408, 413—*Penal Code, S. 379—Several accused convicted at the same trial—Appeal by some—Right of appeal by another on whom non-appealable sentence passed.*

The wording of S. 413 of the Code of Criminal Procedure is open to the interpretation that the legislature intended that the right of appeal exercisable by a person who has received an appealable sentence should carry with it a right of appeal also by any other person convicted at the same trial, even though that particular person may have received a sentence which, if it stood alone, would not have been appealable.

Hence where four persons were convicted at the same trial of an offence under S. 379, Penal Code, three of them receiving a sentence of two months each and the fourth a sentence of one month, and the former appealed to the Sessions Judge who quashed the conviction, held that the fourth person also had a right of appeal, although he received a sentence which by itself was not appealable. *Lal Singh v. Emperor*, 14 A.L.J. 518=38 A. 395=17 Cr. L.J. 513=36 Ind. Cas. 481.

PIGGOTT, J.

(286) Ss. 408, 413—*Several accused tried jointly—One accused awarded appealable sentence—Appeal by others, right of.*

Held, that, where, at the joint trial of two or more persons by a first class Magistrate, an

Crim. Pro. Code—(Continued).

appealable sentence is passed upon any one of them, all the convicted persons have the same right of appeal, even though their sentences may be of the kind against which appeal would have been barred by S. 413, Crim. Pro. Code, if they had been tried singly (a).

The word "cases" in S. 413, Crim. Pro. Code, explained. *Jalaukh v. The Crown*, 21 P.W.R. 1916 (Cr.)=16 P.R. 1916 (Cr.)=17 Cr. L.J. 173=33 Ind. Cas. 653.

SHADI LAL and LESLIE-JONES, JJ.

References:—(a) 3 Cr. L.J. 356 (F.B.)=4 L.B.R. 354; 3 Cr. L.J. 496=17 M.L.J. 248, F.; 5 B.H.C.R. Cr. C. 24; 7 B.H.C.R. Cr. C. 35, Diss.

(287) Ss. 408, 413—*Scope—Several accused sentenced at one trial—Some awarded imprisonment—Others awarded fine of less than Rs. 50—Right of appeal of latter. The Crown v. Musammatt Naurati*, 30 P.R. 1915 (Cr.)=17 Cr. L.J. 27=32 Ind. Cas. 155. See Final Part, 1915, Col. 115.

(287-a) S. 413. See APPEAL.

(288) S. 413—*Appeal—Right of—Joint trial—Non appealable sentence against some accused and appealable sentence against one—Appeal at instance of former—Maintainability.*

No appeal lies to the Sessions Judge or the District Magistrate at the instance of a person against whom a non-appealable sentence has been passed, merely because an appealable sentence has been passed against others jointly tried with him.

S. 413 of the Code of Criminal Procedure speaks of an "appeal by a convicted person in cases in which a Court of Session or the District Magistrate or other Magistrate of the first class passed a sentence of imprisonment not exceeding one month only, or of fine not exceeding fifty rupees only, or of whipping only." Although for the sake of convenience the Code, under certain restrictions, provides that there can be a joint trial it must be taken that there is a separate case as against each of the accused dealt with in the joint trial. Therefore the reference in S. 413 to a case is not to what in ordinary language is regarded for statistical and other purposes as one case, but to the adjudication as against each of the accused. There can be no question that each of the convicted accused is entitled to prefer separate appeal. There can be a number of appeals in that way. The moment that sentences are passed against each of the accused, the one case is split into a number of cases within the meaning of S. 413 of the Code (a). *In re Yenkatarkrishnayya*, 31 M.L.J. 837.

OLDFIELD and SESHAGIRI AYYAR, JJ.

References:—(a) 38 A. 395; 17 M.L.J. 248, Diss.; 5 B.H.C.R. Cr. C. 24; 7 B.H.C.R. Cr. C. 35, F.*

(289) S. 412. See Nos. 285, 286 and 287, *supra*.

Crim. Pro. Code—(Continued).

(289-a) S. 417. See ACQUITTAL.

(289-b) S. 417. See APPEAL.

(289-c) S. 417. See REVISION.

(290) S. 417—*Acquittal, revision of order of—Local Government refusing to appeal—Jurisdiction of High Court.*

In cases of acquittal of an accused, the revisional jurisdiction of a High Court should ordinarily be exercised sparingly and only where it is urgently demanded in the interests of public justice, and a High Court should not entertain an application by a complainant to revise an order of acquittal after the Local Government has declined to direct an appeal against it. *J. & F. Graham & Co. v. H. C. Eisey*, 9 Bur. L.T. 47=8 L.B.R. 856=17 Cr. L.J. 91=32 Ind. Cas. 683.

FOX, C.J.

References:—27 Ind. Cas. 186; 19 C.W.N. 184=21 O.L.J. 53=16 Cr. L.J. 122=42 C. 612, F.

(291) S. 417, appeal from an acquittal—*Distinction if any between such appeal and appeal from conviction with regard to consideration of evidence—General rule applicable to criminal cases—Appellate Court's duty to give due weight to decision of lower Court—Penal Code, Ss. 141, 147, 430—Rioting and mischief by injury to works of irrigation—Bona fide claim of right—Written statement, filing of, by accused, propriety of. Deputy Legal Remembrancer, Behar and Orissa v. Matukdhari Singh*, 20 C.W.N. 128=17 Cr.L.J. 9=32 Ind. Cas. 137. See Final Part, 1915, Col. 116.

(292) Ss. 417, 439 — Acquittal—Circumstances not justifying interference with acquittal—High Court's power to acquit a prisoner without appeal. See ACQUITTAL, No. 1, 7 P.W.R. 1916 (Cr.).

(293) S. 423 — Appeal — Conviction under Ss. 145, 325, I.P.C.—Separate sentences by Magistrate — Setting aside conviction under S. 325—Enhancing sentence under S. 145 to aggregate term passed by Magistrate—Whether 'maintaining' sentence — Illegality. See PENAL CODE (1860), No. 32, 31 P.R. 1916 (Cr.)

(293 a) S. 423—*Practice—Right of appellant to reply to public prosecutor.*

There is nothing in the language of S. 423, Crim. Pro. Code, to preclude the appellant or his pleader from replying to the arguments of the public prosecutor, and as a matter of principle, such right of reply should be conceded to him. The practice of the Allahabad High Court has been uniformly in favour of allowing this right to the appellant or his pleader. *Buta Singh v. Emperor*, 36 Ind. Cas. 835.

SHAH DIN and CHEVIS, JJ.

(294) S. 423. See PENAL CODE, No. 32, 31 P.R. 1916 (Cr.)

(294-a) S. 423. See Nos. 199, *supra*, and 330 and 334, *infra*.

(294-b) S. 423. See APPEAL.

Crim. Pro. Code—(Continued).

(295) *S. 423 (b)—Sentence of three months' imprisonment—Altered to one month's imprisonment and a fine of Rs. 100—Whether amounts to enhancement of sentence.* *Kirpa Ram v. Crown*, 7 P.R. 1915 (Cr.)=16 Cr.L.J. 603=3C Ind. Cas. 155=26 P.L.R. 1916. See Final Part, 1915, Col. 118.

(296) *S. 423 (1) (d).* See No. 260, *supra*.

(297) *Ss. 423, 367, 537 (a)—Disposal of appeal after issue of notice—Judgment, necessity of.* *Emperor v. Devendra Shivappa Limbanavar*, 17 Bom. L.R. 1085=3 Bom. Cr. O. 161=16 Cr.L.J. 831=31 Ind. Cas. 1008. See Final Part, 1915, Col. 118.

(298) *Ss. 423, 428—Appellate Court setting aside conviction and sentence, ordering re-trial and directing the Magistrate to take additional evidence and to record a fresh decision on the original and additional evidence—Legality—Prejudice to accused—Procedure.*

In this case, the petitioners were convicted by the Sub divisional Magistrate of offences under Ss. 117, 148, Penal Code. On appeal to the Sessions Judge, it was contended that the Magistrate had omitted to record important evidence for the prosecution, and so the Sessions Judge set aside the convictions and sentences, remanded the case to the Magistrate and directed him to take additional evidence for the prosecution as well as for the accused, and record a fresh decision on the entire evidence. The Sessions Judge also ordered a "re trial from the point at which the additional evidence should have been taken." The Magistrate accordingly took additional evidence and again convicted the petitioners who again appealed to the Sessions Court. This appeal came before a different Sessions Judge and both parties asked him to disregard the additional evidence as of no value to them, and to try the case on the evidence originally recorded. This was done and the convictions were upheld. On revision to the High Court, *held* :

Per Chamer, C.J.—That, even if the order of the original Sessions Judge was not merely irregular but illegal, it was not necessary for the High Court to order a re-trial by the Magistrate. Ordinarily the proper course to take would have been to set aside all the proceedings subsequent to the alleged illegal order and to require the Sessions Judge to record a fresh judgment on the evidence originally recorded or send the case to another Sessions Judge for that purpose, but as both sides had asked the Sessions Judge to disregard entirely all the additional evidence, and the Sessions Judge had already recorded his findings on the original evidence only, it was unnecessary to return the case to the Sessions Judge in order that he might record a fresh judgment.

Held also, that the accused were in no way prejudiced by the failure of the first Sessions Judge to make an order in strict compliance either under S. 423 or under S. 428, Crim. Pro. Code.

Per Jwala Prasad, J.—The order of the Sessions Judge setting aside the convictions and

Crim. Pro. Code—(Continued).

sentences, ordering a re-trial of the accused, and directing the Magistrate to take additional evidence, but at the same time requiring him to record a fresh decision on evidence already on the record of the case and upon the additional evidence which he was directed to take, was wholly illegal (a). *Gajanand Thakur v. The King-Emperor*, 1 Pat. L.J. 99=17 Cr. L.J. 333=35 Ind. Cas. 508.

CHAMIER, C.J. and JWALA PRASAD, J.
Reference :—(a) 3 C.L.J. 303, R.

(299) *Ss. 423, 439—What amounts to enhancement of sentence?* See SENTENCE, No. 1, 5 P.W.R. 1916 (Cr.).

(299-a) *S. 424.* See APPEAL.

(300) *S. 424—Judgment on appeal—Rioting case against eleven accused—Omission to consider the case of each accused separately—Legality.* *In re Bapu Naidu*, 2 L.W. 958=16 Cr. L.J. 735=31 Ind. Cas. 175. See Final Part, 1915, Col. 118.

(301) *S. 424.* See No. 271, *supra*.

(302) *S. 427.* See No. 331, *infra*.

(303) *S. 428.* See Nos. 115 and 298, *supra*.

(304) *S. 429.* See No. 154, *supra*.

(304-a) *S. 435.* See HIGH COURT, JURISDICTION OF.

(304 b) *S. 435.* See REVISION.

(305) *S. 435—Revision—High Court, powers of.*

It is competent to the High Court to call for the record of any proceeding in an inferior Criminal Court, and if necessary or expedient, to revise any order passed by such Court, whether of a preliminary or final nature.

Hence, where a District Magistrate called upon a witness who gave evidence before him to show cause why he should not be prosecuted for perjury under S. 193, Penal Code. *Held* that the High Court was competent to revise the order inasmuch as the statement had been made with reference to his recollection and belief. *T. N. Chadha v. Emperor*, 14 A.L.J. 851=36 Ind. Cas. 878.

PIGGOTT, J.

Reference :—(1892) A.W.N. 102, F.

(306) *S. 435—Revision, power of Sessions Judge to review orders passed in.*

Where a Sessions Judge, of his own motion, called for proceedings in which a Magistrate had discharged certain accused persons, but finding on the record no cause for interference returned the proceedings to the Magistrate without taking further action, and where subsequently the complainant, applied to him to have the case reopened, and, the Sessions Judge, holding himself to be barred from taking further action, returned the application to be presented to the Chief Court.

Held, (1) that the Sessions Judge was not barred from dealing with the application himself;

(2) The Sessions Judge was not necessarily precluded from, hearing him and, if the arguments led him to do so, from altering his view:

Crim. Pro. Code—(Continued).

(3) *Held* also, that the Sessions Judge should have heard complainant's advocate, and if he was of opinion that there were grounds for re-opening the case against any of the accused, he should have given him or them an opportunity to show cause against that being done. The application was therefore returned to the Sessions Judge for disposal accordingly. **Tun Myaing v. Kauk San**, 8 L.B.R. 377.

PARLETT, J.

(307) S. 435—*Revision*—Records called for by Sessions Judge on his own motion and returned without interference—Subsequent application by complainant to re-open the case—Duty of Sessions Judge. **Mg Tun Myaing v. Nga Kauk San**, 16 Cr. L.J. 711=30 Ind. Cas. 999=8 Bur. L.T. 243. See Final Part, 1915, Col. 119.

(308) S. 435. See Nos. 14, 66, 108, 171, and 267 *supra*, and 351, *infra*.

(309) S. 435 (4)—*Revision*. concurrent jurisdiction of Sessions Judge and District Magistrate in.

Where a District Magistrate called for the proceedings of a case in which the accused had been discharged, and, where the complainant subsequently presented an application to have the order of discharge set aside to the Sessions Judge, and the Sessions Judge sent for the proceedings to the District Magistrate, who before submitting them to the Sessions Judge and without notifying the Sessions Judge of his action signed his name on a printed form bearing the words "On a perusal of the record no cause" appearing for interference, it is ordered that the record be returned," and, where, subsequently the Sessions Judge passed orders directing that the accused be committed for trial: *Held*, that the District Magistrate's action in calling for the record was not equivalent to entertaining an application, and that there was nothing in S. 435 (4) of the Crim. Pro. Code to render the Sessions Judge's order invalid (a). **King Emperor v. Po Gyl**, 8 L.B.R. 361=17 Cr. L.J. 497=36 Ind. Cas. 465.

PARLETT, J.

Reference:—(a) 36 M. 477, D.

(310) Ss. 435, 436—*Commitment to the Court of Sessions by the High Court in revision*—Arms Act, Ss. 19 F. 20.

Where in a case proceeded with under S. 19 F, the evidence recorded by the Magistrate disclosed an offence under S. 20 of the Arms Act, the High Court directed the commitment of the case to the Court of Sessions. **Nishi Kanta Lahiri v. The Crown**, 20 C.W.N. 732=17 Cr. L.J. 202=34 Ind. Cas. 314.

CHITTY and WALMSLEY J.J.

(311) Ss. 435 and 437—*Chatter Act*, S. 15—*Criminal proceedings, pending in subordinate Court—Interference of High Court, if legal*—Civ. Pro. Code (1908), O. V. r. 10, and O. XVI, r. 5—*Service of summons on witnesses, when complete*—*Process server, if entitled to a general right of entry—Summons directed to one address—Process server entering without permission another house at a different address, if legal—Owner of house asking the person to get out, if*

Crim. Pro. Code—(Continued).

amounts to an offence—'Badava, Rasal,' use of, whether evince an intention to provoke a breach of the peace—Penal Code, Ss. 189 and 504, ingredients necessary to constitute offences under. In re S. Kuppuswami Aiyar, 28 M. L.J. 505=2 L.W. 463=17 M.L.T. 398=(1915) M.W.N. 365=16 Cr. L.J. 477=29 Ind. Cas. 109=39 M. 561. See Final Part, 1915, Col. 120.

(312) Ss. 435, 438—*Reference to High Court—District Magistrate—Decision by Sessions Judge*.

A District Magistrate has no power, under Ss. 435 and 438 of the Crim. Pro. Code, to make a reference to the High Court questioning the propriety of a judgment of the Sessions Judge (a). **Emperor v. Lob**, 18 Bom. L.R. 796=3 Bom. Cr. C. 215=17 C.L.J. 529=36 Ind. Cas. 577.

BEAMAN and HEATON, JJ.

Reference:—23 C. 250, F.

(313) Ss. 435, 439—*Penal Code, S. 406—Criminal breach of trust—Article given to accused under written agreement—Competency of Criminal Courts to decide whether agreement was real or nominal*.

Where a person is accused of criminal breach of trust in respect of articles delivered under a written instrument which expressly recites that they were returned to him after money received, it is not open to a Magistrate to launch into an enquiry whether the instrument represents a real transaction between the parties or a mere benami arrangement constituting the accused a trustee in respect of those articles. **Gokavarapu Perayya v. Emperor**, (1916) 2 M.W.N. 168=4 L.W. 198=36 Ind. Cas. 866.

SESHAGIRI AIYAR, J.

(313-a) S. 436 See HIGH COURT, JURISDICTION OF.

(313-b) S. 436, See REVISION.

(314) S. 436—*Discharge of accused—Grounds for commitment to Sessions Court—Duty of District Magistrate while ordering commitment*.

Where an accused person is discharged by an inferior Court, the District Magistrate, before ordering his committal to the Sessions Court, should come to a finding, with reference to the evidence, that the accused had been improperly discharged.

The fact that the charge is, in the opinion of the District Magistrate, of such an important character that it should be considered by a Court of Session, is not a sufficient reason for interfering with the order of discharge. **Sri Krishnan Lal v. The King Emperor**, 1 Pat. L.J. 97=17 Cr. L.J. 330=35 Ind. Cas. 506.

CHAMIER, C.J., and JWALA PRASAD, J.

(315) S. 436. See Nos. 7 and 810, *supra*, and 320, *infra*.

(315-a) S. 457. See HIGH COURT, JURISDICTION OF.

(315-b) S. 437. See REVISION.

Crim. Pro. Code—(Continued);

(316) S. 437—*Discharge on full consideration of evidence—Further enquiry, if proper—Complainant's remedy—Resort to civil suit.* Where a Magistrate discharges an accused after due consideration of the evidence on record, and where his order is not manifestly perverse or foolish or based on an incomplete record of the evidence, it is not open to the District Magistrate to set aside the order of discharge merely because he himself is of a contrary opinion (a).

It is competent to the complainant under such circumstances to maintain a civil suit for injunction, but he is not entitled to have further enquiry made into his complaint (b). *Nasiruddin v. Abdul Aziz*, 20 P.W.R. 1916 (Cr.) = 17 Cr. L.J. 161 = 33 Ind. Cas. 641.

SCOTT SMITH, J.

References:—(a) 97 P.R. 1913 = 166 P.W.R. 1912 = 15 Ind. Cas. 116, R.; 10 P.R. 1911 = 24 P.W.R. 1911 = 11 Ind. Cas. 137 = 12 Cr. L.J. 364 (F.B.); 91 P.R. 1913 = 8 P.W.R. 1913 (Cr.) = 17 Ind. Cas. 796 = 13 Cr. L.J. 860, F. (b) 13 Ind. Cas. 927 = (1912) M.W.N. 85 = 13 Cr. L.J. 175, F.

(317) S. 437—*Order of discharge amounting to acquittal—Sessions Judge has no jurisdiction to order further enquiry.*

The Sessions Judge has no jurisdiction to order any further enquiry in a case where the so-called discharge by the First Class Magistrate was in effect an acquittal (a). *In re Pothuri Venkataramayya*, 17 Cr. L.J. 95 = 32 Ind. Cas. 687.

SRINIVASA AYYANGAR, J.

References:—(a) 25 Ind. Cas. 1001 = 27 M.L.J. 589 = (1914) M.W.N. 646 = 16 M.L.T. 303 = 38 M. 585 = 15 Cr. L.J. 673, F.

(318) S. 437—*Further inquiry—Court's discretion in issuing notice to respondent—Must be exercised judicially and fairly.* M. P. Y. Vaidyanath Iyer v. King-Emperor, 8 Bur. L.T. 133 = 16 Cr. L.J. 696 = 30 Ind. Cas. 744. See Final Part, 1915, Col. 121.

(319) S. 437. See Nos. 152, 172 and 311, *supra*.

(320) Ss. 437 and 438—*High Court's power of interference—Further enquiry.*

The revisional jurisdiction of Court under S. 437, Crim. Pro. Code, in cases of orders of discharge may be exercised on the ground of misapprehension of evidence, and the Court of revision is justified in ordering a re-consideration of evidence already taken (a).

The "further enquiry" which the District Magistrate may order under S. 437 is identical with the "fresh inquiry" referred to in S. 436 and implies a setting aside of the order of discharge. *Begraj v. The Crown*, 10 S.L.R. 69 = 17 Cr. L.J. 349 = 35 Ind. Cas. 525.

PRATT, J.C. and HAYWARD, A.J.C.

Reference:—(a) 32 M. 230, F.

(321) S. 438. See ACT XIV OF 1874 (SCHE-DULED DISTRICTS), No. 1, 18 Bom L.R. 789.

(322) S. 438. See PENAL CODE, No. 10, 24 C.L.J. 137.

(323) S. 439. See Nos. 206, 207 and 312 *supra*, and 328, *infra*.

Crim. Pro. Code—(Continued).

(323-a) S. 439. See HIGH COURT, JURISDICTION OF.

(323-b) S. 439. See REVISION.

(324) S. 439—*Revision—Time within which High Court must be moved—Practice of Court.*

According to the practice of the High Court, an application for revision in criminal cases must be made within sixty days from the date of the order complained of, exclusive of the time necessary for obtaining copies. This is not an inflexible rule and in exceptional circumstances the rule may be departed from. *Kshetra Mohon Giri v. Darpanarain Giri*, 20 C.W.N. 1170 = 43 C. 1029 = 17 Cr. L.J. 419 = 35 Ind. Cas. 979.

SANDERSON, C.J. and WALMSLEY, J.

(325) S. 439—*Laches of prosecution—Previous convictions not placed before trying Magistrate—No ground for revision—Duty of prosecution to place all materials before the Court.* *Crown v. Usman wd. Dato*, 9 S.L.R. 95 = 17 Cr. L.J. 3 = 32 Ind. Cas. 131. See Final Part, 1915, Col. 122.

(326) S. 439—*Finding of fact—First report by the Police for using abusive language—Subsequent development of the case into assault—Conviction under S. 323, Penal Code—Revision.* See PENAL CODE, No. 112, 1 P.W.R. 1916 (Cr.).

(327) S. 439. See Nos. 14, 47, 62, 109, 111, 115, 154, 155, 156, 164-a, 170, 171, 247, 255, 256, 260, 267, 292, 299, and 313, *supra*, and 334 and 351, *infra*.

(328) Ss. 439, cl. 3, 438—*Reference for enhancement of sentence—Proposal to enhance beyond limits of trying Magistrate's power—Practice of accepting findings of fact as conclusive—Non-applicability—Interference in revision—Enhancement of sentence—Extent of the power.* *Crown v. Kamal wd. Shahu Khoso*, 9 S.L.R. 82 = 16 Cr. L.J. 712 = 30 Ind. Cas. 1000. See Final Part, 1915, Col. 124.

(329) Ss. 439, 345—*High Court in revision if can grant leave to compound offence—Penal Code, S. 417—Criminal trespass, elements necessary to constitute offence.*

The accused were charged under Ss. 447 and 504, I.P.C. The trying Magistrate held that the evidence was not sufficient to justify a conviction under S. 504, I.P.C., and convicted the accused under S. 447, I.P.C., only and passed a non-appealable sentence. The Sessions Judge on being moved in the matter called for the record and on the date fixed for hearing the complainant filed a petition, to the effect that the case had been compromised and asked for leave to withdraw the case. On a reference by the Sessions Judge under S. 438, Crim. Pro. Code, recommending that permission might be given to the parties to compound the case.

Held—That, when an accused has been convicted of a compoundable offence, the High Court, in the exercise of its revisional jurisdiction under S. 439, Crim. Pro. Code, is not competent to grant leave to compound the offence under S. 345, Crim. Pro. Code, when

Crim. Pro. Code—(Continued).

such composition has been entered into after the conviction of the accused.

That to sustain a conviction under S. 447, I.P.O., it is necessary to prove as required by S. 441 not only that the accused entered upon the property in the possession of the complainant but that they did so with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property; and no such intent having been proved in the case, which was one of civil dispute, the conviction under S. 447, I.P.O., should be set aside. *Akshoy Singh v. Rameswar Bagdi*, 20 C.W. N. 1071=43 C. 1148=17 Cr. L.J. 339=35 Ind. Cas. 515.

MOOKERJEE and SHEEPSHANKS, JJ.

(330) Ss. 439, 443, 253—*Presidency Magistrate, order of discharge by—Revision by High Court.*

The High Court has power under S. 439 read with S. 423 of the Crim. Pro. Code to revise an order of discharge passed by a Presidency Magistrate and to direct a further enquiry, if there are good reasons for doing so, although no question of jurisdiction arises in the case.

Where *N*, one of several accused persons, was discharged by the Magistrate under S. 253, Crim. Pro. Code, and the High Court, at the hearing of the appeal of the other accused persons who were convicted by the Magistrate, directed that the evidence of *N* should be recorded, and in disposing of the appeal took into consideration the evidence so recorded, and being of opinion that that evidence could not in some respects be accepted, issued a rule to show cause why the order of discharge should not be set aside:

Held—That the mere fact that *N* was called upon to give his evidence in the case did not convert the order of discharge into one of acquittal and did not deprive the High Court of its revisional jurisdiction.

That, in the circumstances of the case, the High Court should not set aside the order of discharge inasmuch as the evidence of *N* which was recorded under orders of the High Court and which was used by that Court for the purpose of coming to the conclusion as to the guilt of the other accused, might afford material to the prosecution to support or frame the charge against *N*, and to allow this would be contrary to the traditions of justice in criminal cases. *The King-Emperor v. Nanda Gopal Roy*, 20 C.W. N. 1128=17 Cr. L.J. 428=35 Ind. Cas. 988.

SANDERSON, C.J. and WALMSLEY, J.

(331) S. 446—*Bangalore Civil and Military Station—District Magistrate and Justice of the Peace, powers of—European British subject.*

The District Magistrate of Bangalore has, with reference to a European British subject, all the powers under the Crim. Pro. Code of a District Magistrate, not limited by the special provisions applicable to European British subjects.

Crim. Pro. Code—(Continued).

Effect of the various Government notifications conferring powers on the District Magistrate of Bangalore considered (a). *In re Bob Dore*, 4 L.W. 405=17 Cr. L.J. 293=35 Ind. Cas. 165.

AYLING and NAPIER, JJ.

Reference:—34 M. 346, F.

(332) Ss. 454 (2), 534—*Omission to ask accused if he is an European British subject—Revision.* *In re Victor D. Souza*, 16 Cr. L.J. 616=30 Ind. Cas. 440. See Final Part, 1915, Col. 124.

(333) S. 469. See No. 17, *supra*.

(334) Ss. 471 (1) 423, 427, 439—*Lunacy Act (IV of 1912), S. 24—Act X of 1914—Court's power to direct reception of criminal lunatic into asylum—Warrant of arrest—Order, if prejudicial.* *Emperor v. Nga E Moun*, 16 Cr. L.J. 670=30 Ind. Cas. 654=6 Bur. L.T. 286=8 L. B.R. 290. See Final Part, 1915, Col. 124.

(334-a) S. 476. See HIGH COURT, JURISDICTION OF.

(334-b) S. 476. See REVISION.

(335) S. 476—*Civ. Pro. Code, S. 115—Proceedings taken while a suit is pending—If material irregularity.*

Where in the course of a civil suit before the District Munsif, the petitioner made a statement which the Court had reason to believe to be untrue and contradicted a statement made by him in its presence before the case was taken up and the Court proceeded against him under S. 476 immediately after the statement was made without waiting for the completion of civil suit:

Held, per *Sadasiva Iyer* and *Oldfield, JJ.*, (*Seshagiri Iyer, J.*, contra): That the Court was not bound to wait till substantive proceedings were over before it could initiate action under S. 476, Crim. Pro. Code, and that its failure to do so did not constitute material irregularity in the exercise of its jurisdiction under S. 115 (c) of the Civ. Pro. Code.

Per *Seshagiri Iyer, J.*—Under S. 476, Crim. Pro. Code, proceedings must be taken at or immediately after the termination of the trial of the suit or case and the action taken before the suit is closed, although not without jurisdiction, is a material irregularity in the exercise of jurisdiction.

Per *Oldfield, J.*—An accused is not entitled as of right to insist on all his evidence being taken in the substantive proceeding, before sanction is granted against him. And there is nothing in the wording of S. 476, Crim. Pro. Code, inconsistent with this conclusion.

Per *Sadasiva Iyer, J.*—The words of S. 476 are very wide and an order under it may be based on materials which have not been strictly made legal evidence.

Per *Seshagiri Iyer, J.*—Before a person is asked to stand his trial, it must be fairly clear to the sanctioning authority that there is a probability of a conviction being had.

Crim. Pro. Code—(Continued).

King-Emperor v. Karri Venkanna Patrudu, 20. M.L.T. 352=31 M.L.J. 440=4 L.W. 383= (1917) M.W.N. 130=17 Cr. L.J. 515=36 Ind. Cas. 483.

OLDFIELD, SADASIVA IYER and SESHAGIRI IYER, JJ.

(336) S. 476—*Sanction granted in respect of false statements made before a Revenue Court—Civ. Pro. Code (Act V of 1908), S. 70—Revisional power of High Court.*

Sale of ancestral immoveable property was transferred to the Collector who, in his turn, directed his subordinate, Mr. Anthony, to carry out the sale. Before Mr. Anthony the judgment-debtor asked for an adjournment of the sale on the ground that the decree had been adjusted. The application was rejected on the ground that notice could not be taken of this without an intimation to that effect from the Civil Court. On a subsequent date the Civil Court called back the papers of the execution case. The judgment-debtor then presented an application to Mr. Anthony for sanction to prosecute the decree-holder for certain false statements made by him at the time the case was before that officer exercising the functions of a Revenue Court. This was granted, and an order was passed which purported to be under S. 476 of the Code of Criminal Procedure. Upon an application for revision to the High Court, held that the High Court could not revise the order as the order was and could be passed by the officer in question as a Revenue Court under S. 70 of the Civ. Pro. Code. **Asharfi Lal v. Emperor**, 14 A.L.J. 1077.

KNOX, J.

(337) S. 476—*Sanction to prosecute—Passing of order before close of trial—Impropriety—No ground for quashing proceedings.*

A Magistrate ought not to take proceedings under S. 476, Crim. Pro. Code, against a witness in the case until the close of the trial. The reason is that such action is eminently calculated to intimidate subsequent witnesses and defeat the object of the trial. But that is a consideration which affects the accused under trial, and is no ground for quashing the proceedings under S. 476, Crim. Pro. Code. **Nadirshah v. The Crown**, 9 S.L.R. 176=32 Ind. Cas. 669=17 Cr.L.J. 77.

PRATT, J.C. and BOYD, A.J.C.

Reference:—8 B.H.C. 126, R.

(338) S. 476—*Sanction for prosecution—False evidence given before the Sessions Judge during trial before him—Appeal to Chief Court in the main case—Sanction to prosecute after the disposal of appeal—Legality—Evidence given before committing Magistrate read as evidence before Sessions Court—Sanction in respect of such statement—Grant of—Legality.*

In a certain case, the Sessions Judge convicted certain persons of murder and sentenced them to death. Then he waited till the appeal against his judgment had been decided by the Chief Court. Directly the record was returned to him from the Chief Court, he issued notice

Crim. Pro. Code—(Continued).

to the nine petitioners to show cause why they should not be prosecuted for having committed offences under S. 194, I. P. C., and granted sanction under S. 476, Crim. Pro. Code. In the case of eight of the petitioners, the alleged false evidence was given before the Sessions Judge himself and in the case of the ninth petitioner, M, the evidence was given before the committing Magistrate which evidence, on account of M's inability to attend the Sessions Court owing to illness, was read out as evidence at the trial. The petitioners appealed.

Held that there is nothing in S. 476, Crim. Pro. Code, which requires the Court to take action, if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any time fixed thereafter and that in the present case, the Sessions Judge was fully justified in waiting until the appeal had been decided before he took action under S. 476, Crim. Pro. Code (a).

Held further, that in the case of the ninth petitioner, the offence, if any, committed by him was 'brought under the notice' of the Sessions Judge in the trial before him and that the Sessions Judge's order was not *ultra vires* (b). **Attar Singh v. The Crown**, 29 P.R. 1916 (Cr.).

SCOTT-SMITH and BROADWAY, JJ.

References:—(a) 32 B. 184; 13 A.L.J. 466, F.; 34 C. 551 (F.B.); 31 M. 140 (F.B.) and 32 M. 49 (F.B.), *Not F.* (b) 6 A.L.J. 392, F.; 6 P. R. 1909 (Or.), *Dist.*

(339) S. 476—*Offence committed before one Magistrate—Succeeding Magistrate, jurisdiction of—Penal Code (Act XLV of 1860), S. 193.*

S. 476 of the Code of Criminal Procedure lays down that the offence in respect of which the proceedings are to be taken under that section must have been committed before the Court or brought to the Court's notice in the course of a judicial proceeding.

Hence a succeeding Magistrate has no jurisdiction to institute proceedings under the said section where an offence under S. 193, Penal Code, was neither committed before him nor was brought to his notice in the course of any judicial proceeding. **Ajuchia Saram Singh v. Emperor**, 17 Cr.L.J. 40=32 Ind. Cas. 328.

LINDSAY, J.C.

(340) S. 476, nature of—*Examination of accused—Thumb-impressions and opinion of experts on such impressions inadmissible—Evidence Act (I of 1872), S. 73.*

Proceedings in inquiries under S. 476, Crim. Pro. Code, are judicial proceedings, and the person against whom they are directed is in the position of an accused person (a).

To examine such a person as a witness in the course of such proceedings is *ultra vires* (b).

In such proceedings the person against whom they are directed can only be examined in accordance with the provisions of S. 342, Crim. Pro. Code. He cannot properly be asked questions merely to elicit a statement as a foundation for ordering his prosecution, nor can he be compelled to make any thumb-impressions

Crim. Pro. Code—(Continued).

under S. 73 of the Evidence Act. The impressions so taken and the expert's opinions regarding those impressions are not properly admissible in evidence. Such an order is, therefore, open to revision under S. 115, Civ. Pro. Code. **Maung Po Nyun v. Mutu Kurpen Chetty**, 17 Cr. L.J. 316 = 35 Ind. Cas. 492.

PARLETT, J.

References:—(a) 5 Ind. Cas. 62 = 37 C. 52 = 14 C.W.N. 132 = 11 Cr. L.J. 45, F. (b) 2 Weir 598, *Not F.*

(341) S. 476, scope of—*Person not party to proceeding nor examined as witness, not to be sent to nearest Magistrate—Penal Code (Act XLV of 1860), S. 196—Offence under, what constitutes—Abortive attempt to secure medical certificate, no offence under S. 196, Penal Code.*

It is doubtful whether a Magistrate has jurisdiction to send a person, who has not been a party to any proceeding before him and who has not been examined as a witness in the case, to the nearest Magistrate under S. 476, Crim. Pro. Code.

In order to support a conviction under S. 196, Penal Code, there must be some evidence in existence which the party is either using or attempting to use.

Where the evidence shows that the accused has been attempting to get from the Medical Officer a certificate which may be used on a subsequent occasion, and that the certificate was never given; in such a case, there is no evidence in existence which could be utilised by the accused for improper purposes.

In such a case a conviction under S. 196, Penal Code, is not sustainable. *In re Katarl Yeranna*, 17 Cr. L.J. 398 = 35 Ind. Cas. 820.

SESHAGIRI AIYAR, J.

(342) S. 476—"Judicial proceeding—Penal"—Code, S. 211—*Statement made to Magistrate in his executive capacity. Bhole Singh v. Emperor*, 13 A.L.J. 1050 = 38 A. 32 = 16 Cr. L.J. 807 = 31 Ind. Cas. 823. See Final Part, 1915, Col. 126.

(343) S. 476—*Perjury—Action taken before suit ended—Suit dismissed—Material irregularity—Revision—Civ. Pro. Code, S. 115—Charter Act, S. 15—Difference between Judges of Division Bench—Judgment of the Senior prevails—Letters Patent, cl. 36—Civ. Pro. Code, S. 98 (2). In re Karli Venkanna Patrudu*, 18 M.L.T. 591 = 17 Cr. L.J. 42 = 32 Ind. Cas. 930. See Final Part, 1915, Col. 127.

(344) S. 476—"Naraji" petition filed in Court impugning Police report declaring information false if can be made over to another Magistrate for enquiry and report—Proper procedure to be followed—Order for prosecution, when and by whom should be made—S. 637, scope of—Irregularity not occasioning failure of justice. *Gangadhar Pradhan v. King Emperor*, 20 C.W.N. 63 = 43 C. 173 = 17 Cr. L.J. 146 = 33 Ind. Cas. 636. See Final Part, 1915, Col. 128.

(345) S. 476—Statement made by a person in the course of proceedings under—No right to cross-examine the witness—Statement cannot

Crim. Pro. Code—(Continued).

go into evidence at the trial if the witness is not forthcoming. See EVIDENCE ACT, No. 20, 18 Bom. L. R. 284.

(346) S. 476—See Nos. 2, 3, 84, 157, 158, 159, 160 and 161, *supra*.

(347) Ss. 476, 195—*False statements made by witness before committing Magistrate in the mofussil—High Court's power to direct prosecution for perjury—Case sent to nearest first-class Magistrate.*

An accused person was committed to the Sessions of the High Court by a Magistrate sitting at Barrackpore within the district of Alipore and was acquitted. During the course of the trial, one of the witnesses went back on the material statements which he had made before the committing Magistrate and, when examined, he admitted that several of the statements which he had made on oath to the committing Magistrate were false to his knowledge. On application made to the High Court for sanction under S. 195, Crim. Pro. Code, to prosecute the witness for perjury, held that the proper course was to send the case of the witness for inquiry to the nearest First Class Magistrate at Alipore, under S. 476, inasmuch as the case came from Alipore District. *Emperor v. Donaldson*, 43 C. 542 = 17 Cr. L.J. 475 = 36 Ind. Cas. 155.

SANDERSON, C.J.

References:—3 C.L.J. 357; 37 C. 648, D.

(348) Ss. 476, 195—*Sanction to prosecute—Order directing prosecution—Revision—"Criminal cases—When order may be passed—Prima facie case.*

Held, that an order under S. 476, Crim. Pro. Code, should be passed either during the judicial proceedings with which it is connected or at least so soon after that it might be considered to be a part of the same judicial transaction. When judgment on appeal was passed on 2nd December 1915, and order under S. 476 was passed on the 29th February 1916, the Chief Court on revision set aside the order as technically unsound. *Ram Nath v. The Crown*, 88 P.L.R. 1916 = 53 P.W.R. 1916 (Or.) = 17 Cr. L.J. 470 = 36 Ind. Cas. 150.

JOHNSTONE, C.J.

(349) Ss. 476, 195—*Whether controlled by S. 195, Crim. Pro. Code—Execution proceedings—Forgery suspected as regards promissory notes forming consideration for a sale deed on which claim was based—Proceedings initiated under S. 476—Crim. Pro. Code, against the executant and witnesses of the promissory notes—Legality of the proceedings. Kalluru Ramalingam v. Thupill Subbarmayya*, 2 L.W. 1135 = 18 M.L.T. 488 = 16 Cr. L.J. 797 = 31 Ind. Cas. 653. See Final Part, 1915, Col. 129.

(350) Ss. 476, 195, 177—*Offence committed in another province but brought to notice of Court in a judicial proceeding—Sanction to prosecute—Whether can be given—S. 476 not controlled by S. 195.*

R instituted a suit in the Small Cause Court at Bilaspur in the Central Provinces against K, a resident of Arrah in Behar and obtained an *ex parte* decree.

Crim. Pro. Code—(Continued).

The decree was at R's instance transferred for execution to the Court of the Subordinate Judge of Arrah and an application was made for K's arrest. K then brought a suit in the Court of the 1st Munsif of Arrah to have the Bilaspur decree set aside on the ground of fraud and obtained a decree which was confirmed on appeal by the District Judge of Arrah. The District Judge directed the prosecution of R and two others for offences under Ss. 209 and 210 of the Indian Penal Code as he found on the evidence that they had combined together to bring a false suit against K and had obtained a decree against him by concealing from him the institution of the proceedings and tampering with the service of summons. An appeal was presented to the High Court against the decision of the District Judge in the Civil Case and has been admitted. R and two others applied under S. 439, Crim. Pro. Code, to revise the order of the Sessions Judge directing their prosecution.

Held that the order of the District Judge was right. The hearing of the appeal by the District Judge was a judicial proceeding and the offences alleged to have been committed by the three applicants were brought to his notice in the course of that proceeding.

Held further that the District Judge had jurisdiction to take action under S. 477, Crim. Pro. Code.

S. 476, Crim. Pro. Code, does not appear to restrict the action of the Court to offences committed within its own jurisdiction or even within the province in which the Court is situated (a).

S. 476, Crim. Pro. Code, is a self contained section and the reference made to S. 195, Crim. Pro. Code, is only for the purpose of avoiding the enumeration of the sections mentioned in S. 195 (b). *Rajkumar Singh v. King Emperor*, 1 Pat. L.J. 298.

CHAMBER, C.J., and SHARFUDDIN, J.

References:—(a) & (b) 1 Ind. Cas. 306 and 33 A. 396; 37 A. 189; 18 B. 581; 17 Ind. Cas. 520; 22 C. 1004; 15 M. 224; 37 O. 250, *Ref. to*.

(351) Ss. 476, 435, 439—*Civil Court taking action under S. 476, Crim. Pro. Code—Interference of High Court in revision under S. 439, Crim. Pro. Code—Legality—High Court's interference under S. 115, Civ. Pro. Code, when justifiable—Sanction to prosecute—Whether notice necessary.*

• A High Court could not interfere, under S. 439, Crim. Pro. Code, in revision, with the proceedings of a Civil Court taken under S. 476 of the Code of Criminal Procedure, on the ground that S. 439 must be read with S. 435 of the Code of Criminal Procedure, and the power of revision is expressly confined to the records of inferior Criminal Courts (a).

Where the order of the lower Court was passed under S. 476, Crim. Pro. Code, it can only be interfered with by the High Court in the exercise of its civil jurisdiction under the provisions of S. 115 of the Code of Civil Procedure.

Crim. Pro. Code—(Continued).

Sanction to prosecute may be granted without the issue of a notice and is not vitiated by the absence of such notice. But notice should ordinarily be issued, and in a case of non-attendance where a person may be prevented from attending by illness or any other sufficient cause, it appears to be clearly desirable that notice should issue. *Nga San Cheln v. Sookaram*, U.B.R. (1915), 3rd Qr., 83=32 Ind. Cas. 674=17 Cr. L.J. 82.

SAUNDERS, J.C.

References:—(a) 4 L.B.R. 359; 40 O. 477, *Appr.*; U.B.R. (1907–1909), Vol. I, Crim. Pro. Code, 1, R.

(351-a) Ss. 476, 537—*Dismissal of complaint by a Magistrate—Sanction given by him under S. 476, to prosecute complainant for giving false complaint—Successor in office referring the matter for enquiry to a subordinate Magistrate—Report by latter—Conviction on receipt thereof—Irregularity—Proceedings not vitiated—S. 537, Crim. Pro. Code.*

On 11th October 1915, the petitioner preferred a complaint before a Sub-Divisional Magistrate against certain Police officers. The Magistrate, after examining the petitioner on the same date recorded an order to the effect that the complaint was false and called on the petitioner to show cause why he should not be prosecuted under S. 182, Penal Code. This officer was transferred and his successor, when the petitioner appeared before him with his witnesses, referred the matter to a subordinate Magistrate 'for hearing complainant and witnesses and report.' On receipt of the report, the Sub-Divisional Magistrate recorded on 6th December 1915 an order dismissing the complaint under S. 203, Crim. Pro. Code. On the 4th February 1916, upon an application made by one of the Police Officers, the Sub-Divisional Magistrate passed an order under S. 476, Crim. Pro. Code, in consequence of which the petitioner was put on his trial under S. 211, I.P.C., and sentenced to six months' rigorous imprisonment.

Held the conviction was proper. 'The delay of about two months which occurred between the order of 11th October and that of 6th December did not deprive the Magistrate of jurisdiction (a).

It may be that the procedure of the Magistrate in referring the matter to a Subordinate Magistrate was irregular and the Magistrate should have held the inquiry himself. But if this was an irregularity, it was cured by the provisions of S. 337, Crim. Pro. Code (b). *Baynath Singh King-Emperor*, 1 Pat L.J. 553.

KINGSFORD and ATKINSON, JJ.

References:—(a) 31 M. 140; 32 M. 49; 37 C. 642, *Ref. to*. (b) 14 O. 141; 13 B. 600; 38 C. 68, *Ref. to*.

(352) S. 488—*Order for maintenance—Subsequent decree for restitution of conjugal*

Crim. Pro. Code—(Continued).

rights, effect of refusal to comply with decree.

A refusal by a wife to comply with a decree for restitution of conjugal rights terminates a Magistrate's order of maintenance under S. 488 of the Crim. Pro. Code, passed before the suit for restitution of conjugal rights, and the Magistrate ought to treat his order as determined by the decree (a). **Maung Tha U v. Maung Mya Khin**, 9 Bur. L.T. 162=17 Cr. L. J. 412=35 Ind. Cas. 972.

PARLETT, J.

Reference:—(a) 29 B. 484, F.

(353) S. 488—Child entitled to maintenance from its mother's tarwad—Father not liable—The words "unable to maintain," meaning of.

A child possessing a legally enforceable right to maintenance from its mother's tarwad and being actually maintained by that tarwad is not entitled to an order for maintenance against its father under S. 488, Crim. Pro. Code.

The words "unable to maintain itself" in the section cannot be interpreted to mean only physical inability to earn a livelihood. The ability contemplated by the section applies as much to the case of a child which has got means of its own or which is entitled in law to be maintained and is being maintained as to a child which is able to earn a living by its own exertions. **Chanta v. Chakkapayyan Mathu**, 19 M.L.T. 23=(1916) M.W.N. 111=32 Ind. Cas. 144=17 Cr. L.J. 16=39 M. 957.

ABDŪR RAHIM and AYLING, JJ.

References:—(1913) M.W.N. 997, Overruled; 19 M. 451, R.

(354) S. 488—Application for maintenance—Allegations of cruelty—Dismissal of application on failure to prove cruelty—Subsequent application on the same allegations—Not maintainable.

A woman applied under S. 488, Crim. Pro. Code, for maintenance alleging cruelty as an excuse for not living with her husband. Her application was dismissed by the Magistrate on the ground that she had failed to prove the alleged cruelty. She then brought a fresh application alleging the same cruelty before another Magistrate who held the said allegations proved and ordered the husband to pay maintenance at a certain rate.

Held that it is not competent to hold a second enquiry into the same allegations which have once been already enquired into and adjudicated upon by a competent Court (a). **Sadr-uddin v. Mussammat Musahib Khanam**, 24 P. R. 1916 (Cr.)=38 Ind. Cas. 439.

CHEVIS, J.

References:—5 A. 224, Foll.; 1 C.L.R. 89, Dist.; 9 Cr. L.J. 21; Nct Appr.

(355) S. 488—Maintenance application for, dismissed—Order, final—Magistrate not competent to entertain another application on same facts.

Where an application for maintenance under S. 488 of the Code of Criminal Procedure is dismissed by a Magistrate, his order is final, so far as he and his Court are concerned. It is not competent for such Magistrate to entertain

Crim. Pro. Code—(Continued).

another application on the same facts. **Musamat Mutesari v. Nand Kumar Singh**, 17 Cr. L.J. 106=32 Ind. Cas. 842.

CHITTY and WALMSLEY, JJ.

(356) S. 488—Maintenance of children living with mother—Father's liability. **A. Murgesan Mudallar v. Sodiamma**, 8 Bur. L.T. 134=16 Cr. L.J. 656=20 Ind. Cas. 480. See Final Part, 1916, Col. 131.

(357) S. 488. See No. 66, *supra*

(358) Ss. 488, 490—Maintenance—Jurisdiction of Civil and Criminal Courts—Illegitimate child—Decree of Civil Court on question of marital or filial relationship supersedes Magistrate's previous maintenance order—High Court, Revisionary power of—Revision, power exercisable in. **Raghubar v. Emperor**, 16 Cr. L.J. 609=30 Ind. Cas. 433. See Final Part, 1916, Col. 132.

(359) S. 490. See No. 358, *supra*.

(360) S. 491. See No. 16, *supra*.

(361) Ss. 494, 342 (4), 343—Public Prosecutor specially appointed—Power to withdraw from the prosecution of an accused impleaded into the case subsequently—'Accused,' meaning of—Accused against whom prosecution is withdrawn can be examined as a witness for the prosecution—Inducement offered by the prosecution to the witness—Evidence is admissible though its credit is affected—Accomplice evidence—Corroboration, how far material.

Two persons G and N were charged jointly for offences punishable under S. 161, Penal Code, in two cases, known as 'horse case' and 'hundi case.' The prosecution was conducted by two lawyers specially appointed by Government as Public Prosecutors. At the commencement of the trial, the two cases were ordered to be tried separately at the instance of the prosecution. The trial of the 'horse case' was taken up first. The Public Prosecutor withdrew from the prosecution of N in the 'horse case,' and examined N as a witness for the prosecution on the 6th and 15th July 1915. On the 17th idem, he withdrew from the prosecution of N in the 'hundi case' also, and N was further cross-examined in the 'horse case' on the 30th July and the 2nd August 1915. The trial ended in the conviction of G. On G's appeal, it was contended that the withdrawal from the prosecution of N was not valid; that N was accordingly an incompetent witness, as no oath could be administered to him under S. 342, (cl.) 4 of the Crim. Pro. Code; and that N's testimony was tainted, for he was given an inducement by responsible authorities that unless he told what the Crown believed to be the truth, he was liable to be prosecuted in the 'hundi case':—

Held, (1) that the appointment of the Public Prosecutor having been for the whole case, it was competent to him to withdraw from the prosecution of N who was implicated into the case subsequent to the appointment.

(2) That N could not be regarded as "accused" within the meaning of cl. 4 of S. 342 of the Crim. Pro. Code, for the term referred to

Crim. Pro. Code—(Continued).

the accused then under trial and examination by the Court.

Held, by *Batchelor, J.*, that N's testimony was admissible, S. 343 of the Crim. Pro. Code having no application, the inducement offered to N being offered to him not as an accused in the 'hundā case,' but as a witness in the 'horse case;' though the credit to be attached to the testimony was diminished.

Held, by *Shah, J.*, without expressing any opinion as to the applicability of S. 343 and assuming that the section was applicable, that the admissibility of N's evidence as a witness in the 'horse case' was not in any way affected.

Per Batchelor, J.—"An accomplice is a suspect witness, whose evidence must be received with great caution and should be materially corroborated before it is accepted. But the scales must be held even; for, while it is essential that accused persons should be protected from conviction on the mere evidence of an untrustworthy accomplice, it is also important that the requirements of the Legislature in this respect should not be so exaggerated by the Court as to offer a practical guarantee of immunity to persons guilty of grave offences which are in their very nature difficult of detection. When all legal precautions have been taken and all relevant considerations duly weighed, there remains the plain question whether the Judge or Magistrate does or does not believe the particular accomplice. That is a question which it is the Judge's or Magistrate's duty to answer. If after all cautions have been observed, the Judge or Magistrate is convinced that the accomplice's evidence is true, it is his duty to say so and to give effect to his mental conviction. This process is in direct conformity with the definition of the word 'proved' given in the Evidence Act."

Per Shah, J.—"It would be proper and necessary to insist upon corroboration in respect of all material particulars connected with the story of the prosecution (as evolved by the accomplice witness N). I should certainly hesitate to rely on such a witness on points on which he may not be independently corroborated and which might affect the accused." *Emperor v. Govind Balvant Laghate*, 18 Bom. L.R. 266=3 Bom. Cr. C. 171=17 Cr. L.J. 256=34 Ind. Cas. 976.

BATCHELOR and SHAH, JJ.

(362) S. 495.—*Complainant, right of, to conduct prosecution—Complainant being also Prosecuting Inspector—Permission, grant of—Discretion of Court.*

The fact that a particular person is also a Prosecuting Inspector does not deprive him of his rights as a private citizen and he may in his private capacity ask for permission to prosecute in his case.

Where he is a complainant and alleges that the accused persons have committed criminal trespass in his house, under the provisions of S. 495, Crim. Pro. Code, the trying Magistrate would have to decide whether there were sufficient grounds for withholding the permission

Crim. Pro. Code—(Continued).

asked for. *Maung Pu v. Emperor*, 17 Cr. L.J. 486=36 Ind. Cas. 166.

TWOMEY, J.

(363) S. 499. See *STAY OF CRIMINAL PROCEEDINGS*, No. 1, 9 P.W.R. 1916 (Cr.).

(364) S. 501. See No. 21, *supra*.

(365) S. 512.—*Accused absconding—No finding by Magistrate to the effect that there was no immediate prospect of arrest—Conviction bad.* *Rustom v. Emperor*, 13 A.L.J. 1043=38 A. 29=16 Cr. L.J. 801=31 Ind. Cas. 817. See Final Part, 1915, Col. 133.

(366) S. 512. See No. 121, *supra*.

(367) S. 514.—*Appearance of accused—Surety for appearance—Failure to appear—Suicide by accused—Forfeiture of surety-bond.*

Pending the trial of the accused, the applicants stood sureties for his appearance in the Magistrate's Court. The accused having failed to appear at an adjourned hearing, the surety-bonds were called in. It appeared that the accused had committed suicide before the date of hearing; but the sureties in ignorance of the fact admitted before the Court that the accused was living on the date in question. The surety-bonds were consequently forfeited. On application to the High Court.

Held, that, under the circumstances, there were no sufficient grounds for penalizing the sureties.

Per Beaman, J.—"Surely the object of these surety-bonds is as far as possible to ensure that the accused person shall not evade justice in the ordinary sense, that is to say, by flying from the country or the jurisdiction of the Court. But if he elects to die sooner than face his trial, that can hardly be a sufficient reason for forfeiting the surety-bonds, since that was an event which his sureties could not have had in contemplation and which is not of the kind which would impose upon them any moral obligation or responsibility to the Courts." *In re Rama Bapu Pujari*, 18 Bom. L.R. 683=3 Bom. Cr. C. 204=17 Cr. L.J. 393=35 Ind. Cas. 825.

BEAMAN and HEATON, JJ.

(368) S. 517.—*Disposal of property—Order can be revised by High Court—Currency note—Property passes by delivery.* *In re Pandharinath Pundlik Revankar*, 17 Bom. L.R. 922=40 B. 186=16 Cr. L.J. 783=31 Ind. Cas. 883. See Final Part 1915, Col. 134.

• (369)—S. 517 (1)—*Order as to disposal of property—Order, not justifiable when no offence committed.*

S. 517 (1) of the Crim. Pro. Code empowers the Magistrate to pass an order as regards the disposal of the property only in cases where it appears that any offence has been committed with respect to such property or that it has been used for the commission of an offence.

Where there is no finding that an offence has been committed with respect to such property an order of confiscation under S. 517 is not proper. *In re Govindaraja Padayachi*, 16 Cr. L.J. 811=31 Ind. Cas. 827.

ABDUR RAHIM and AYLING, JJ.

Crim. Pro. Code—(Continued).**(370) S. 520—Confiscation—Notice.**

An order for the confiscation of property which is the subject-matter of an offence cannot be made without first giving notice and hearing the complainant, to whose prejudice the order of confiscation would be ;

Want of notice would be good ground to set the order aside. *Ambica Tewari v. Emperor*, 17 Cr. L.J. 207=34 Ind. Cas. 319.

PARLETT, J.

(371) S. 520 — Powers of High Court—Disposal of property.

The High Court has got ample powers under S. 520 of the Crim. Pro. Code to pass any order which may be just on the facts of the case with regard to the disposal of property. *Ramamani v. Kanakasabai*, 16 Cr. L.J. 813=31 Ind. Cas. 829.

ABDUR RAHIM and AYLING, JJ.

(371-a) S. 522. See No. 112, *supra*.

(372) S. 526. See No. 66, *supra*.

(372-a) S. 527. See No. 66, *supra*.

(373) S. 528—*Transfer of criminal case—Reasons to be recorded.* *Yenkatachalam Chetti v. Chairman, Municipal Council*, 16 Cr. L.J. 626=30 Ind. Cas. 450. See Final Part, 1915, Col. 138.

(374) S. 528. See No. 66, *supra*.

(375) S. 530. See No. 222, *supra*.

(375 a) S. 534. See No. 332, *supra*.

(376) S. 537. See MISDIRECTION TO JURY, Nos. 1 and 2, 24 C.L.J. 400.

(377) S. 537. See PENAL CODE, No. 214, 30 P.W.R. 1916 (Cr.).

(378) S. 537. See ACT XI OF 1878 (ARMS), No. 4, 8 L.B.R. 452.

(379) S. 537. See Nos. 17, 21, 156, 161, 176, 189, 190, 212, 218, *supra*.

(380) S. 537 (a). See No. 297, *supra*.

(381) S. 556. See No. 66, *supra*.

(382) S. 562—*Illicit manufacture of liquor—Conviction—Applicability of principle of S. 562, Crim. Pro. Code—Sentence to be awarded—Deterrent—Punjab Act I of 1914 (Excise), S. 61.*

A, B and C were charged under S. 61 of the Excise Act of 1914 with manufacturing liquor contrary to law and being in possession of it and were convicted and sentenced to undergo four months' rigorous imprisonment each and a fine of Rs. 50 each. On appeal, the Sessions Judge held that the principle of S. 562, Crim. Pro. Code, applied and reduced the sentences.

Held that the principle of S. 562, was not applicable to the present case.

S. 562, Crim. Pro. Code, was intended to apply to offenders (especially youthful offenders) who, without being persons of depraved character, may on occasions succumb to sudden temptation, and the legislature very humanely and very properly allows the Magistrate in such cases to give the young man a chance and to deal with him under S. 562.

The offence of manufacturing illicit liquor implies a good deal of preparation, and cannot be said that it is done in consequence of succumbing to sudden temptation. Further it is

Crim. Pro. Code—(Concluded).

an offence which probably escapes detection 9 times out of ten and it deprives Government of revenue, besides demoralising people. Deterrent sentences in such circumstances are absolutely necessary, and the legislature by passing the Excise Act, 1914, intended that substantial terms of imprisonment should be awarded in these cases. *The Crown v. Sujjan Singh*, 19 P.R. 1916 (Cr.)=41 P.W.R. 1916 (Cr.)=144 P.L.R. 1916=17 Cr. L.J. 310=35 Ind. Cas. 486.

JOHNSTONE, C.J.

(383) S. 562—*Scope.*

S. 562, Crim. Pro. Code, is not restricted to juvenile offenders only. *The Crown v. Salim*, 11 P.R. 1916 (Cr.)=17 Cr. L.J. 254=34 Ind. Cas. 974.

RATTIGAN, J.

References:—2 Bom. L.R. 817 ; 2 L.B.R. 314, R.

(384) S. 562—*First offenders—Penal Code, S. 420.* *Emperor v. Rainjan Dadubhai*, 17 Bom. L.R. 921=3 Bom. Cr. C. 133=16 Cr. L.J. 781=31 Ind. Cas. 381. See Final Part, 1915, Col. 140.

(385) S. 562. See No. 276, *supra*.

Criminal Proceedings.

See STAY OF CRIMINAL PROCEEDINGS.

Criminal petition—Dismissal for default—Right to restore—Principle of res judicata. *Kanakasabhai v. Emperor*, (1915) M.W.N. 786=16 Cr.L.J. 697=30 Ind. Cas. 745. See Final Part, 1915, Col. 50.

Criminal Trespass.

See HOUSE-TRESPASS.

See PENAL CODE, Ss. 441, 442, 447, 456, 457, 460.

(1) *House trespass—Indian Penal Code, S. 441—Crim. Pro. Code, S. 106—Breach of peace.*

The *Panat-chut* or outer verandah where shoes are taken off is part of a Burmese dwelling house, and a person who commits criminal trespass on a *panat-chut* under the circumstances set forth in S. 441, Indian Penal Code, commits house trespass.

Criminal trespass may be an offence involving a breach of the peace within the meaning of S. 106 of the Crim. Pro. Code (a).

Where it is clear that the criminal trespass was committed with the sole object of causing hurt to one of the persons in the house it would be correct to hold that the particular offence committed by the accused in such case was one "involving a breach of the peace" within the meaning of S. 106, Crim. Pro. Code. *Sit Hon v. King-Emperor*, 8 L.B.R. 463.

TWOMEY, J.

Reference:—(a) 7 C.W.N. 25, F.

Criminal Tribes Act.

See ACT III OF 1911.

Cross-Examination.

See CRIM. PRO. CODE, S. 256.

(1) Persons against whom security proceedings are taken—Witnesses giving evidence

Cross-Examination—(Concluded).

against them—No right to recall them for further cross-examination. See CRIM. PRO. CODE, No. 63, 1 P.R. 1916 (Cr.).

(2) Evidence Act, S. 143, leading questions in. See CRIM. PRO. CODE, No. 231, 9 Bur. L. T. 133.

(3) See CRIM. PRO. CODE, No. 215, 19 O.O. 239.

(4) Of prosecution witnesses—Charges framed, reasonable opportunity after, should be given. See CRIM. PRO. CODE, No. 217, 16 Cr. L.J. 785.

Cruelty.

(1) Application for maintenance—Allegations of—Dismissal of application on failure to prove cruelty—Subsequent application on the same allegations—Not maintainable. See CRIM. PRO. CODE, No. 354, 24 P.R. 1916 (Cr.).

Culpable Homicide.

(1) Accused pointing out places of occurrence of offence—Presumption of guilt of murder. See PENAL CODE, No. 100-a, 36 Ind. Cas. 838.

Deaf and Dumb Accused.

See ACCUSED.

See CRIM. PRO. CODE, Ss. 340, 341.

Procedure in cases of. See CRIM. PRO. CODE, No. 248, 19 Bom. L.R. 553.

Death.

(1) Murder—Death caused in lurking house-trespass. See CRIM. PRO. CODE, No. 184, 50 P.W.R. 1916 (Cr.).

(2) Intending, of one and causing death of another—Murder. See PENAL CODE, No. 89-a, 15 A.L.J. 13.

Defamation.

(1) Complaint to Police Constable not privileged—Privilege. See PENAL CODE, No. 224, 17 Cr. L.J. 381.

Delegation of Powers.

(1)—, to Local Government—Notification of Local Government not *ultra vires*. See ORDINANCE, III OF 1914 (FOREIGNERS), No. 3, 17 Cr. L.J. 67.

(2) See SANCTION TO PROSECUTE, No. 4, 52 P.W.R. 1916 (Cr.).

De Novo Trial.

See RE-TRIAL.

See CRIM. PRO. CODE, No. 8, 12 N.L.R. 146.

Discharge.

(1) Discharge—Order for—Not to be set aside except when perverse—Civil dispute—Crim. Pro. Code, Ss. 435 and 439—Dispute of a mosque between Hindus and Muhammadans—Complainant not wishing to produce evidence. *Burat Singh v. Ahmad Beg*, 19 P.W.R. 1915 (Cr.)—16 Cr. L.J. 662—30 Ind. Cas. 646, See Final Part, 1915, Col. 142.

(2) By Presidency Magistrate—Revision by High Court. See CRIM. PRO. CODE, No. 330, 20 C.W.N. 1128.

Discharge—(Concluded).

(3) Discharge of accused—Grounds for commitment to Sessions Court—Duty of District Magistrate while ordering commitment. See CRIM. PRO. CODE, No. 314, 1 Pat. L.J. 97.

(4) Order of, when cannot be set aside. See CRIM. PRO. CODE, No. 316, 20 P.W.R. 1916 (Cr.).

(5) Order of,—amounting to acquittal—Sessions Judge has no jurisdiction to order further enquiry. See CRIM. PRO. CODE, No. 317, 17 Cr. L.J. 95.

Discretion of Court.

(1) Commitment by a Magistrate for joint trial of three distinct charges of criminal breach of trust and falsification of accounts—Discretion of the Sessions Judge. See CRIM. PRO. CODE, No. 179, (1916) 2 M.W.N. 179.

(2) Discretion of sanctioning Court, whether absolute and unqualified. See CRIM. PRO. CODE, No. 138, 4 L.W. 615.

(3) Complainant, right of, to conduct prosecution—Complainant being also Prosecuting Inspector—Permission, grant of. See CRIM. PRO. CODE, No. 362, 17 Cr. L.J. 486.

Discretion of Magistrate.

(1) See CRIM. PRO. CODE, No. 109, 17 Cr. L.J. 348.

Dismissal for Default.

(1) Sanction petitions—Power to dismiss for default by original Courts and on appeal. See CRIM. PRO. CODE, No. 135, (1916) M.W.N. 8.

(2) See SANCTION TO PROSECUTE, No. 2, 34 P.W.R. 1916 (Cr.).

Dismissal of Complaint.

See CRIM. PRO. CODE, Ss. 203, 247.

(1) Order for further enquiry by District Magistrate, grounds for. See CRIM. PRO. CODE, No. 172, 17 Cr. L.J. 406.

(2) By a Magistrate—Sanction given by him under S. 476, to prosecute complainant for giving false complaint—Successor in office referring the matter for enquiry to a Subordinate Magistrate—Report by latter—Conviction on receipt thereof—Irregularity. See CRIM. PRO. CODE, No. 351-a, 1 Pat. L.J. 553.

Disposal of Property.

See CRIM. PRO. CODE, S. 517.

(1) See CRIM. PRO. CODE, No. 369, 16 Cr. L.J. 811.

(2) See CRIM. PRO. CODE, No. 371, 16 Cr. L.J. 813.

District Magistrate.

See CRIM. PRO. CODE, S. 435.

(1) Reference to High Court—Decision by Sessions Judge. See CRIM. PRO. CODE, No. 312, 18 Bom. L.R. 796.

(2) Power of, to commit accused for trial on evidence recorded by Subordinate Magistrate. See CRIM. PRO. CODE, No. 8, 12 N.L.R. 146.

(3) See CRIM. PRO. CODE, No. 331, 4 L.W. 405.

(4) Revision, concurrent jurisdiction of Sessions Judge and, in. See CRIM. PRO. CODE, No. 309, 8 L.B.R. 361.

District Magistrate—(Concluded).

(5) Inferiority of, to Sessions Judge for purposes of revision. See REVISION, No. 2, 19 O.C. 108.

District Municipalities Act (Madras).

See MAD. ACT IV OF 1884.

District Police Act (Bombay)

See BOM. ACT IV OF 1890.

Drain.

(1) No right to dig up road or—. See U.P. ACT I OF 1900 (MUNICIPALITIES), No. 3, 17 Or. L.J. 401.

Duty of Criminal Court.

Certainty of offence to be made sure of before conviction. See PRACTICE AND PROCEDURE, No. 1, 14 A.L.J. 1222.

Dying Declarations.

See EVIDENCE.

See EVIDENCE ACT, 1872.

(1) Admissibility, proof and evidentiary value of. See EVIDENCE ACT, No. 19, 16 Cr. L.J. 759.

(2) Suicide committed owing to ill-treatment by accused—Statement of deceased whether admissible. See EVIDENCE ACT, No. 18, 20 P.R. 1916 (Cr.).

Electricity Act.

See ACT IX OF 1910.

Emergency Legislation Continuance Act.

See ACT I OF 1915.

Enticing away Married Woman.

See PENAL CODE, S. 498.

Right of father of girl enticed away to complain, when husband stands by.—Penal Code (Act XLV of 1860), Ss. 498, 499. See CRIM. PRO. CODE, No. 165, 17 Cr. L.J. 363.

European British Subject.

See CRIM. PRO. CODE, Ss. 446, 454.

See CRIM. PRO. CODE, No. 331, 4 L.W. 405.

Evidence.

See CONFESSION.

See REVISION.

(1) *Relevancy—Civil judgment between the parties with reference to certain items—Charge of criminal breach of trust as to the same items—Admissibility of the Civil judgment into the criminal case—Practice and Procedure.*

The complainant filed a Civil suit against the accused to recover moneys due on certain items. He next filed a complaint charging the accused with criminal breach of trust with reference to some of the items covered by the Civil suit. The suit terminated into a dismissal of the plaintiff's case, it having been disbelieved by the trial Judge on all items. The accused then applied to admit the judgment in the Civil case in evidence and to obtain a discharge on the strength of it. The Magistrate having declined to receive it in evidence, the accused applied to the High Court:

Evidence—(Continued).

Held, that the judgment in the Civil case was relevant and ought to have been admitted in evidence, because where the civil liability was determined by a competent Court, the judgment of that Court would be the best evidence of the Civil rights of the parties. *In re N.F. Markur*, 18 Bom. L.R. 186=3 Bom. Cr. Cas. 165=17 Cr. L.J. 153=33 Ind. Cas. 633.

HEATON and SHAH, JJ.

(2) *Circumstantial evidence — Conviction based on such evidence alone—When legal — Murder — Nature of circumstantial evidence.*

A conviction for murder based purely on circumstantial evidence is not illegal.

Circumstantial evidence must be exhaustive and exclude the possibility of guilt of any other person or must point conclusively, to the complicity of the accused (a).

The term 'exhaustive' must not be taken to mean that every incident short of the actual killing must be proved by positive evidence; and the term 'possibility' must not be treated as signifying 'physical possibility.' The word 'possibility' must be taken to mean a high degree of probability that is, so high a degree of probability that a prudent man, considering all the facts and realising that the life or liberty of the accused person depends upon the decision, feels justified in holding that the accused committed the crime. *Thakar Das v. The Crown*, 32 P.R. 1916 (Cr.).

JOHNSTONE, C.J., and BROADWAY, J.

Reference:—(a) 18 C.W.N. 114, F.

(3) *Evidence extracted by torture by Police—Evidence, value of—Duty of Police Officers.*

Conduct of Police Officers torturing persons for the purpose of extracting information from them strongly condemned and the worthlessness of evidence so obtained indicated. *Gokul Singh v. Emperor*, 17 Cr. L.J. 351=35 Ind. Cas. 527. WALSH, J.

(4) *Entries in account books—Books not proved to be kept in regular course of business—Objection as to admissibility, when to be taken* See ACCOUNTS BOOKS, No. 1, 17 Cr. L.J. 73.

(5) *Appellate Court setting aside conviction and sentence, ordering re-trial, and directing the Magistrate to take additional evidence and to record a fresh decision on the original and additional evidence—Legality—Prejudice to accused—Procedure.* See CRIM. PRO. CODE, No. 298, 1 Pat. L.J. 99.

(6) *Security for good behaviour.* See CRIM. PRO. CODE, No. 155, 17 Cr. L.J. 184.

(7) *Examination of accused—Thumb-impressions and opinion of experts on such impressions inadmissible—Evidence Act (I of 1872), S. 73.* See CRIM. PRO. CODE, No. 340, 17 Cr. L.J. 316.

(8) *Evidence of forgery—Proof of similar other forgeries when proper.* See PENAL CODE, No. 213, 20 O.W.N. 262.

(9) *Rioting, charge of—Common object, mention of.* See PENAL CODE, No. 29, 16 Cr. L.J. 809.

Evidence—(Concluded).

(10) Abetment of murder—Proof. See PENAL CODE, No. 17, 17 Cr. L.J. 175.

(11) Of house-breaking—Surrender of stolen articles by accused—Possession unexplained—Offence. See PENAL CODE, No. 174, 17 Cr. L.J. 179.

Evidence Act.

(1) S. 3—Consent—Misrepresentation of fact—Effect. See PENAL CODE, No. 136, 17 P.R. 1916 (Cr.).

(2) Ss. 8, 24 and 27—Admissibility in evidence—Conduct—Recovery of stolen property.

Where it appears that the accused person accompanied the Police Officers to the place where the stolen property was recovered, and it was apparently due to his pointing out the place that the property was recovered. *Held*, that this was conduct on the part of an accused person proof of which is admissible under the provisions of S. 8 of the Evidence Act.

S. 27 of the Evidence Act does not make a confession which would otherwise be inadmissible, admissible to prove the fact discovered in consequence of information contained in it, unless the person who confesses is a person accused of any offence and also in the custody of the Police. *King-Emperor v. Nga Aung Ba*, U.B.R. (1916), 2nd Cr., p. 114=17 Cr. L.J. 402=35 Ind. Cas. 962.

SAUNDERS, J.

(3) S. 10—Evidence of abetment of conspiracy—Admissibility. See PENAL CODE, No. 19, 20 C.W.N. 292.

(4) S. 24—Statement made under promise of pardon retracted—Want of corroborative evidence—Conviction, whether legal—*Crim. Pro. Code*, S. 339 (2).

Held, that, in the absence of corroboration in material particulars, it is not safe to convict on a retracted confession, unless, from the peculiar circumstances in which it was made and judging from the reasons alleged or apparent, of the retraction, there remain a high degree of certainty that the confession, notwithstanding its having been resiled from, is genuine.

Held, also, that a conviction is bad in law where an accused has been convicted on a retracted statement made by him under promise of pardon, which so far from being corroborated by any other evidence whatsoever, was contradicted in important particulars by other prosecution evidence. *Khushi v. The Crown*, 6 P.W.R. 1916 (Cr.)=16 Cr. L.J. 815=31 Ind. Cas. 831.

RATTIGAN and SCOTT-SMITH, JJ.

References:—30 P.R. 1914 (Cr.)=50 P.W.R. 1914 (Cr.)=25 Ind. Cas. 634=15 Cr. L.J. 636, F.

(5) S. 24—Confession before village *Salish*—'Person in authority'—Validity. See PENAL CODE, No. 105, 20 C.W.N. 512.

(6) S. 24. See No. 2, *supra*.

(7) Ss. 24, 25—Confession to *saidar* in consequence of inducement, whether admissible

10 Cr.

Evidence Act—(Continued).

—Retracted confession, value of—Corroboration necessary.

Where a person suspected of having committed a murder made a confession to the *saidar*, in consequence of the latter dropping a remark to the effect that his own brother had committed a murder but had got off on making a clean breast of the matter:

Held, that (a) the *saidar*, although not in charge of the investigation, was a leading man holding a responsible post, and that this remark of his case was a distinct inducement to the accused to make a confession which rendered the confession inadmissible in evidence;

(b) That inasmuch as the Police were in the immediate vicinity at the time of the confession, and the accused, though not handcuffed, was in Police detention as a suspect, he was to all intents and purposes in Police custody and the confession could not be proved unless made to a Magistrate.

Held, also that (1) where a retracted confession is the sole evidence against an accused, it can be of but little value, especially remembering the race for a pardon which sometimes occurs when a number of persons are suspected of an offence and others have already confessed or are believed to have already confessed.

(2) As against a co-accused, a confession which has been retracted at the first opportunity should not be relied upon, unless corroborated by independent testimony.

Held, further, that the mere fact that a blood-stained garment is found in a house is not sufficient proof that any particular member of the family residing in that house is guilty of a murder which has recently been committed in the village. *Karm Singh v. The Crown*, 32 P.W.R. 1916 (Cr.)=153 P.L.R. 1916=26 P.R. 1916=17 Cr. L.J. 226=34 Ind. Cas. 642.

JOHNSTONE, C.J. and CHEVIS, J.

(8) Ss. 24, 27—Information by accused to Police officer on threat, admissibility of—Confession, retracted effect of.

Even in cases where certain words used by the police officer to the accused amounted to a threat, that fact would not render inadmissible in evidence the information given by the accused which led to the recovery of articles which are the subject matter of the offence.

Value of retracted confession commented on. *Emperor v. Tilak*, 17 Cr. L.J. 33=32 Ind. Cas. 324.

LINDSAY, J.C. and KANHAIYA LAL, A.J.C.

(9) S. 25. See ACT XI OF 1878 (ARMS), No. 1, 17 Cr. L.J. 512.

(10) S. 25. See No. 7, *supra*.

(11) S. 27—Two persons giving information leading to discovery—Information given by each to be proved specifically—Information first given alone admissible.

Two men cannot make a statement leading to a discovery. Both no doubt may give information to the police, but it is only the information first given which can be admitted under S. 27 of the Evidence Act.

Evidence Act—(Continued).

Where two prisoners are alleged to have given information leading to discovery, it is of the essence of things that what each prisoner said should be precisely and separately stated. **Ram Singh v. The Crown**, 7 P.R. 1916 (Cr.) = 35 P.W.R. 1916 (Cr.) = 17 Cr. L.J. 273 = 34 Ind. Cas. 993.

LESLIE JONES, J.

References:—6 A. 509 (533); 92 P.L.R. 1902, R.

- (12) S. 27—*Arms Act (XI of 1878), S. 20—Arms—Concealment from police—Evidence—Statement by accused under police custody—Discovery of property in consequence of statement.*

A statement made by the accused while in Police custody in consequence of which arms are found buried on a field is admissible in evidence against the accused. **Isaher Singh v. Crown**, 72 P.L.R. 1916 = 24 P.W.R. 1916 (Cr.) = 17 Cr. L.J. 183 = 33 Ind. Cas. 823.

SCOTT SMITH and SHADI LAL, JJ.

Reference:—14 B. 260, F.

- (13) S. 27—*Information given by two accused persons leading to discovery—Admissible against both—Police Mashirnamas—Crim. Pro. Code, S. 103—Police Mashirnamas to be exhibited.*

The history of the police investigation is always important and particularly so in a case where the main arguments for the defence arise out of the course of that investigation. Police Mashirnamas sometimes include irrelevant matter, but these portions can always be excluded, and, subject to the exclusion, these documents are always very important as a contemporaneous record of events occurring in the investigation (a).

If two persons give information which leads to discovery of a fact so much of the statement of each person which relates distinctly to the fact discovered may be proved. The exclusion of confessional statements under S. 26 is based on the presumption arising from the custody of the police that they are untrustworthy. As soon as a circumstance is proved which rebuts that presumption, e.g., the presence of a Magistrate or confirmation by subsequent discovery the confession becomes admissible either in toto if there is the guarantee of a Magistrate's presence, or to the extent to which it is confirmed. If therefore two persons give information which leads to discovery, the statements of both have been confirmed and are admissible. Statements of co-accused subsequent to the discovery are irrelevant (b).

It is not proper that the police after having made discovery from one accused should enact the force of inviting the other accused to point out the same place (c). **Crown v. Bulleman**, 10 S.L.R. 7 = 17 Cr. L.J. 506 = 36 Ind. Cas. 474.

PRATT, J. C. and CROUCH, A. J. C.

References:—(a) 5 S.L.R. 31, F. (b) 24 W. R. 36 (Cr.), F. (c) 2 Bom. L.R. 1089, F.

- (14) S. 27—*Evidence—Statement made by prisoners—Information not leading to discovery—*

Evidence Act—(Continued).

Admissibility. Emperor v. Panchu, 18 A.L.J. 1077 = 17 Cr. L.J. 8 = 32 Ind. Cas. 186. See Final Part, 1915, Col. 147.

- (15) S. 27. See Nos. 2, and 8, *supra*.

- (16) Ss. 30, 114, *illus. (b)*, 133—*Accomplices evidence of—Corroboration—Identification by strangers, value of.*

The evidence of an accomplice is unworthy of credit unless it is corroborated in material particulars. Where there are more than one accused persons, there must be corroboration against each of the accused showing his connection with the offence alleged against him.

The identification of the particular accused by witnesses to whom they were strangers is not valueless. **Nika v. The Crown**, 19 P.W.R. 1916 (Cr.) = 17 Cr. L. J. 156 = 33 Ind. Cas. 636.

JOHNSTONE, C.J., and SCOTT SMITH, J.

- (17) Ss. 30, 114, *Ill. (b)*, 133—*Approver, evidence of—Corroboration in material particulars.*

Held, that Courts should not ordinarily depart from the well-recognized practice of accepting the evidence of an approver as against an accused person, only when it is corroborated in material particulars by other independent evidence. It is the more necessary to follow this rule where the accused belong to a low class and it is a matter of no difficulty for the approver to include the name of any person of that class among the offenders, even though he has no connection with the offences and it might be difficult for him to establish his innocence.

Held, also, that, in exceptional cases the Courts might, for reasons stated, act upon the evidence of an approver as a whole, though uncorroborated in particular details by independent evidence, but this is not such a case. **Ghulam Rasool v. The Crown**, 31 P.W.R. 1916 (Cr.) = 17 Cr. L.J. 220 = 34 Ind. Cas. 332.

RATTIGAN and CHEVIS, JJ.

References:—11 P.W.R. 1915 = 17 P.R. 1915 = 28 Ind. Cas. 738 = 16 Cr. L.J. 354, R.

- (18) S. 32 (1) and *il. (a)*—*Suicide committed owing to ill-treatment by accused—Statement of deceased whether admissible.*

Accused caused hurt to R with a view to extort a confession and R committed suicide in consequence of the ill-treatment. Accused were not charged with causing R's death, but were charged only under S. 380, I.P.C., for causing the hurt.

Held that the suicide was the result of the ill-treatment received at the hands of the convicts, and so that treatment was the cause though not the direct cause of the death, and though the convicts are not legally responsible for the suicide, the cause of death comes into question in this case, the whole affair, the ill-treatment and subsequently suicide, being all one transaction, and therefore the statement made by R as to the cause of wounding himself with a razor which caused his death was admissible under S. 32 (1), Evidence Act (*Vide*

Evidence Act—(Continued).

also ill. (a) to S. 32). **The Crown v. Falz**, 20 P.R. 1916 (Cr.) = 42 P.W.R. 1916 (Cr.) = 17 Cr. L.J. 438 = 85 Ind. Cas. 998.

SHAH DIN and CHEVIS, JJ.

References :—17 P.R. 1901 (Cr.) ; 25 B. 45, D.

(19) Ss. 32, 80, 159—*Dying declaration, admissibility, proof and evidentiary value of*—Ss. 164, 512, *Crim. Pro. Code*.

To prove a dying declaration, the Magistrate who recorded it need not be examined as a witness in the case (a).

An oral statement of a deceased person as to the cause of his death, if made in the absence of the accused, may be proved by any one who heard it made, as well as by the person who recorded it (b).

Whether the dying declarations are treated as written statements of deceased persons or as written records of verbal statements, S. 32 (1), Evidence Act, allows dying declarations which have been reduced to writing to be admitted as relevant facts. They thus become substantive evidence of the circumstances leading to the deceased person's death, when the cause of the death is in question.

When the dying declaration has appended to it a certificate that it has been read over to the deponent and declared to be correct, and this is signed by the Magistrate who recorded the statement, S. 80 of the Evidence Act creates a presumption that the circumstances under which it is stated to have been taken are true, the investigation by the Magistrate being a judicial proceeding. *In re Karruppan Samban*, 16 Cr. L.J. 759 = 31 Ind. Cas. 359.

SPENCER and PHILLIPS, JJ.

References :—(a) 8 C. 211 = 10 C.L.R. 11 ; 6 C.W.N. 72, Diss. (b) 2 Ind. Cas. 841 = 36 C. 659 = 13 C.W.N. 660 = 10 Cr. L.J. 186, R.

(20) S. 33—*Statement made by a person in the course of proceedings under S. 476 of the Crim. Pro. Code—No right to cross-examine the witness—Statement cannot go into evidence at the trial if the witness is not forthcoming*.

In an appeal from a conviction of theft, the Sessions Judge set aside the conviction and entered upon an enquiry for the purpose of ascertaining whether proceedings should not be instituted against the complainant for making a false charge of theft. In the course of those proceedings, the accused in the theft case was examined as a witness and the complainant cross-examined him. Ultimately the Sessions Judge ordered the complainant to be committed for trial on the charge of making a false charge of theft. At the trial, at the presence of the accused in the theft case could not be procured, his statement before the Sessions Judge was allowed to go upon the record. The admission of this statement was objected to as being against the provisions of S. 33, Evidence Act.

Held, that the statement could not go upon the record, inasmuch as the proceedings before the Sessions Judge having been held under S. 476 of the Crim. Pro. Code, the then complainant had no right to cross-examine the

Evidence Act—(Continued).

then accused when he made the statement, **Emperor v. Bakir Saheb Amir Saheb**, 18 Bom. L.R. 284 = 3 Bom. Cr. O. 189 = 17 Cr. L.J. 249 = 34 Ind. Cas. 969.

BACHELOR and SHAH, JJ.

(21) Ss. 33, 155 (3)—*Previous statements made by witness—Use of such statements in a subsequent trial—Practice—Procedure*. **Emperor v. Lakshman Totaram**, 17 Bom. L.R. 590 = 3 Bom. Cr. O. 65 = 16 Cr. L.J. 754 = 31 Ind. Cas. 354. See Final Part, 1915, Col. 148.

(22) S. 80 See No. 19, *supra*.

(23) S. 114—*Circumstantial evidence—Proof—Prosecution, duty of*.

It is a general principle of Criminal law that it is for the prosecution to prove their case and that an accused person should not be convicted merely because he has told lies in his defence. At the same time in cases of circumstantial evidence, where facts are put forward on behalf of the prosecution which, unless explained, justify an inference of guilt being drawn against the accused, then, it is both lawful and proper for the Court to consider the explanation of those facts which the accused puts forward in his defence. This principle is clearly recognised in the explanations to S. 114 of the Indian Evidence Act. **Abdul Aziz v. Emperor**, 17 Cr. L.J. 23 = 32 Ind. Cas. 151.

PIGGOTT, J.

(24) S. 114. See CRIM. PRO. CODE, No. 232, 17 Cr. L.J. 92.

(25) S. 114, ill. (a)—*Possession of stolen property—House-breaking—Presumption*.

Held that where the thief got into the house by house-breaking, the presumption that a person found in possession of stolen property committed not only theft of it but also that he committed house-breaking on the occasion, is justifiable under S. 114 of the Evidence Act.

Illustration (a) to the section is merely an example, and it cannot be read as limiting the presumptions which may be drawn from recent possession of stolen property. **Husain v. Emperor**, 17 Cr. L.J. 32 = 32 Ind. Cas. 160.

FOX, C.J.

(25-a) Ss. 114, ill. (b), 133, 157—*Accomplice—Value of his evidence—Corroboration—Previous statements—Nature of S. 133, and S. 114, ill. (b), Evidence Act*.

S. 133 of the Evidence Act contains the rule of law, S. 114, ill. (b) being merely a sort of guidance to assist the Courts (a).

It is impossible to lay down any hard and fast rule as to when and to what extent an 'accomplice' must be corroborated. The reasons why an accomplice's evidence is to be viewed with suspicion, may be summarised as follows :—

(i) because he has a motive to shift guilt from himself ;

(ii) because he is an immoral person likely to commit perjury on occasion ;

(iii) because he hopes for pardon, or has secured it and so favours the prosecution.

Under S. 157, Evidence Act, previous statements of an accomplice may be corroboration (b)

Evidence Act—(Concluded).

Barkat Ali v. The Crown, 2 P.R. 1917 (Cr.) = 36 Ind. Cas. 861.

JOHNSTONE, C.J. and BROADWAY, J.

References:—(a) 35 M. 247, *Appr.* (b) 35 M. 247; 9 A. 528; 21 W.R. 69 (Cr.), *Appr.*; 9 Ind. Cas. 899; 11 Bom. H.C. Ap. Cas. 196, *Not Appr.*; and 10 C. 970, *Dist.*

(26) S. 114 (b)—Value of approver's or accomplice's evidence. See ACQUITTAL, No. 1, 7 P.W.R. 1916 (Cr.).

(27) S. 114 (b) See APPROVER, No. 1, 2 P.W.R. 1916 (Cr.).

(28) S. 114, *illus.* (b). See Nos. 16 and 17, *supra*.

(29) S. 133. See Nos. 16 and 17, *supra*.

(30) S. 143—Leading questions in cross-examination. See CRIM. PRO. CODE, No. 231, 9 Bur. L.T. 133.

(31) S. 155 (3). See No. 21, *supra*.

(32) S. 159. See No. 19, *supra*.

Examination of Accused.

See CONFESSION.

See CRIM. PRO. CODE, Ss. 164, 342.

(1) Thumb-impressions of accused and opinion of experts on such impressions inadmissible—Evidence Act (I of 1872), S. 73. See CRIM. PRO. CODE, No. 340, 17 Cr. L.J. 316.

Examination of Witnesses.

See EVIDENCE.

(1) Magistrate's refusal to examine witnesses—Declining jurisdiction—Irregularity—Revision. See CRIM. PRO. CODE, No. 100, 17 Cr. L.J. 217.

Exclse Act.

See ACT XII OF 1896.

See PUN. ACT I OF 1914.

Executive Order.

Power of Court to issue *certiorari* when issued—When act judicial—Duty of Magistrate under S. 3, ministerial—Exercise of power by ministerial or executive officer in excess—Remedy—Right of suit. See ACT I OF 1910 (PRESS), No. 3, (1916) 2 M.W.N. 497.

Expert.

See EVIDENCE.

(1) Examination of accused—Thumb-impressions and opinion of, on such impressions inadmissible—Evidence Act (I of 1872), S. 73. See CRIM. PRO. CODE, No. 340, 17 Cr. L.J. 316.

Explosives Rules.

(1) *Explosives Act* (IV of 1884)—*Explosives*, rr. 3, 5, 35—*Lavanqi crackers*—Possession without license.

Lavanqi crackers are toy fireworks within the meaning of r. 3, and as such are exempt from r. 35 of the Indian Explosives Rules imposing the necessity of a license for their possession. **Emperor v. Rachappa Gurappa Hattarvat**, 18 Bom. L.R. 558 = 3 Bom. Cr. C. 200.

SCOTT C.J. and HEATON, J.

Explosive Substances Act.

See ACT VI OF 1908.

Extension of Time.

Sanction to prosecute—Expiry of time—Power of High Court to extend time. See CRIM. PRO. CODE, No. 151, 18 Bom. L.R. 686.

Extortion.

See PENAL CODE, S. 384.

(1) Specific charge, necessity for. See PENAL CODE, No. 154, 17 Cr. L.J. 411.

False Complaint.

Dismissal of complaint by a Magistrate—Sanction given by him under S. 476, to prosecute complainant for giving—Successor in office referring the matter for enquiry to a Subordinate Magistrate—Report by latter—Conviction on receipt thereof—Irregularity. See CRIM. PRO. CODE, No. 351-a, 1 Pat. L.J. 553.

False Evidence.

(1) Proper Court to apply to for sanction for giving—Notice—Order granting sanction. See SANCTION TO PROSECUTE, No. 4-a, 9 Bur. L.T. 203.

(2) See SANCTION TO PROSECUTE, No. 4-b, 9 Bur. L.T. 203.

(3) Sanction granted in respect of, made before a Revenue Court—Civ. Pro. Code (Act V of 1908), S. 70—Revisional power of High Court. See CRIM. PRO. CODE, No. 336, 14 A.L.J. 1077.

(4) Crim. Pro. Code, Ss. 109, 195, 439—Before a judicial officer of one District making inquiry into the sufficiency of security under S. 109, Crim. Pro. Code, taken by a Magistrate of another District. See SANCTION TO PROSECUTE, No. 4, 52 P.W.R. 1916 (Cr.).

False Statement.

See PENAL CODE, Ss. 192, 193, 195 to 198.

False statement in the course of a non-judicial inquiry—Indian Penal Code, S. 193—Reg. VIII of 1827. See ACT X OF 1873 (OATHS), No. 1, 10 S.L.R. 64.

First Report.

To police—When not safe guide—Sentence. See PENAL CODE, No. 31, 107 P.L.R. 1916.

Foreigners Ordinance.

See ORDINANCE III OF 1914.

Forest Act.

See ACT VII OF 1878.

Forest Grass.

'Forest produce,' meaning of—If comprised in the term—Grazing in reserved forest. If amounts to use of forest produce—Conviction for offence. See MADRAS FOREST RULES, No. 1, 4 L.W. 552.

Forest Produce.

Meaning of—Forest grass, if comprised in the term—Grazing in reserved forest, if amounts to use of forest produce. See MADRAS FOREST RULES, No. 1, 4 L.W. 552.

Forfeiture.

See CRIM. PRO. CODE, S. 514.

See SENTENCE.

(1) See ACT I OF 1910 (PRESS), No. 1, (1916) 2 M. W. N. 385.

(2) See ACT I OF 1910 (PRESS), No. 3, (1916) 2 M. W. N. 497.

(3) Appearance of accused—Surety for appearance—Failure to appear—Suicide by accused of surety-bond. See CRIM. PRO. CODE, No. 367, 18 Bom. L.R. 683.

Forfeiture of Pardon.

See CRIM. PRO. CODE, No. 243, 9 Bur. L.T. 76.

Forgery.

See CRIM. PRO. CODE, Ss. 195, 476.

See PENAL CODE, Ss. 463 to 471.

(1) Conviction both for forging document and for using it as genuine, not illegal. See PENAL CODE, No. 208, 17 Cr. L.J. 73.

Fraud.

See ACT I OF 1910 (PRESS), No. 3, (1916) 2 M. W. N. 497.

Fresh Complaint.

See CRIM. PRO. CODE, S. 403.

(1) Subsequent complaint can be entertained by same or another Magistrate though previous order of dismissal not set aside. See CRIM. PRO. CODE, No. 169, 16 Cr. L.J. 814.

Frontier Crimes Regulation.

See REG. III OF 1901.

Further Enquiry.

See CRIM. PRO. CODE, Ss. 403, 435, 437, 439. See REVISION.

(1) When cannot be ordered. See CRIM. PRO. CODE, No. 316, 20 P.W.R. 1916 (Cr.).

(2) See CRIM. PRO. CODE, No. 320, 10 S. L. R. 68.

(3) Order of discharge amounting to acquittal—Sessions Judge has no jurisdiction to order. See CRIM. PRO. CODE, No. 317, 17 Cr. L.J. 95.

(4) Dismissal of complaint—Order for, by District Magistrate, grounds for. See CRIM. PRO. CODE, No. 172, 17 Cr. L.J. 406.

Gambling.

Playing with cards for insignificant stakes—Sentence. See BOM. ACT IV OF 1867 (PREVENTION OF GAMBLING), No. 3, 18 Bom. L.R. 940.

Gaming.

Meaning of. See MAD. ACT III OF 1889 (TOWNS NUISANCES), No. 1, 31 M.L.J. 285.

General Clauses Act.

See ACT X OF 1897.

Good Faith.

See PENAL CODE, No. 223, 9 Bur. L.T. 136.

"Government."

Meaning of. See ACT I OF 1910 (PRESS), No. 1, (1916) 2 M. W. N. 385.

Government of India Act, 1833.

See ST. 3 AND 4 WILL. IV, C. 85.

Government of India Act, 1915.

See ST. 5 AND 6 GEO. V, C. 61.

Governor-General in Council, Powers of.

Emergency Legislation Continuance Act (I of 1915), if *ultra vires*—Ordinances 3 and 5 of 1914—Power of Governor-General in Council to pass Act embodying provisions of ordinances—Ordinance 3 of 1914—S. 11, effect of. See ACT I OF 1915 (EMERGENCY LEGISLATION CONTINUANCE), No. 1, 20 C.W.N. 1327.

Grass.

'Forest produce,' meaning of—Forest grass if comprised in the term—Grazing in reserved forest, if amounts to use of a forest produce. See MADRAS FOREST RULES, No. 1, 4 L.W. 552.

Grievous Hurt.

See PENAL CODE, Ss. 323, 325, 326.

(1) House-breaking with intent to commit theft—Completion of the offence—Causing by stabbing, thereafter—Offence committed. See PENAL CODE, No. 206, 27 P.R. 1916 (Cr.).

Habeas Corpus.

Directions in the nature of—Application to be made to Judge on the original side of the High Court. See CRIM. PRO. CODE, No. 16, 20 C. W. N. 1233.

High Court, Jurisdiction of.

See CRIM. PRO. CODE, Ss. 435, 439.

See LETTERS PATENT.

See REVISION.

(1) *Government of India Act, 1915, S. 107—High Court—Powers of superintendence—Order of Magistrate under S. 145, Crim. Pro. Code—High Court's power to interfere with such order—Magistrate how far bound to respect decrees of Civil Court.*

In exercise of the powers under S. 107, Government of India Act, 1915, the High Court can and will interfere with an order passed under S. 145, Crim. Pro. Code, 1898, where the Magistrate has acted without jurisdiction or has exceeded his jurisdiction. It will not interfere merely because there has been an irregularity in the proceedings or an erroneous decision on a question of fact or law but it can and will interfere, when there has been a material irregularity which amounts to a refusal to exercise, or an usurpation of jurisdiction or which has prejudiced a party to the proceedings (a).

Per *Chamier, C.J.*—In order to establish prejudice, it is not sufficient to show that there has been an erroneous decision on a question of law or fact; but it must be shown that the irregularity has prevented a party from having a fair trial.

No hard and fast rule can be laid down to the effect that a Magistrate in proceedings under S. 145, Crim. Pro. Code, must give effect to a recent decision or proceeding of a Civil or Criminal Court (b).

Per *Sharfuddin, J.*—A Civil Court decree in favour of a party will become infructuous if the

High Court, Jurisdiction of—(Concluded).

Magistrate interferes with it but the Magistrate is not bound to maintain it blindly. If after the passing of the decree the Magistrate finds on evidence that the party's possession has been disturbed or that the possession has changed hands he has jurisdiction but this will be a matter of fact which the Magistrate has to decide. If he comes to a finding, which would be a finding of fact, that such possession has been disturbed since the decree was passed he has jurisdiction in a proceeding under S. 145 to pass orders irrespective of the Civil Court decree. In the case of a Civil Court decree of a very recent date where there is no evidence to shew disturbance or change of possession since the decree the Magistrate is bound to respect the Civil Court decree and if he does not do so he acts without jurisdiction (b).

Per Roe, J.—The power by which English Courts interfere by prohibition and Mandamus, is confined to cases in which the Court has acted without jurisdiction, or in excess of jurisdiction or has refused to exercise a jurisdiction, vested in it by law. The High Court will not interfere merely because there has been an irregularity in the proceedings. It will interfere if the irregularity has been so serious that one of the parties has suffered prejudice. By prejudice is meant disability to lay before the Court that party's version of the facts of the case and the law to be applied. It will not interfere with any decision arrived at after a fair trial however erroneous in law or fact that decision may appear to be. **Parmeshwar Singh v. Kailaspatil**, 1 Pat. L.J. 336=17 Cr. L.J. 369=35 Ind. Cas. 801 (S.B.).

CHAMIER, C.J., SHARFUDDIN and ROE, JJ.

References:—(a) 12 C.W.N. 678; 9 C. 297; 5 W.R. (Mis.) 25; 9 C. 297; 6 W.R. (Mis.) 77; 9 W.R. 309; 7 W.R. 430; 5 W.R. (Mis.) 25; 8 W.R. 26; 8 W.R. 109; 11 W.R. 402; 11 M. 220; 1 A. 101; 7 B. 341; 17 M. 410; 26 C. 188; 33 C. 33; 33 C. 68; 36 C. 994; 41 C. 876, *Ref. to*. (b) 30 C. 155; 7 B. 341; 33 C. 33; 7 B. 241; 20 C.W.N. 796, *Ref. to*.

(1-a) See CRIM. PRO. CODE, No. 94-b, 5 L.W. 165.

(2) See ACT I OF 1910 (PRESS), No. 3, (1916) 2 M.W.N. 497.

(3) Power of—Jurisdiction of Magistrate to cancel order first exempting—Keeping of printing presses and publication of newspapers, legitimate business. See ACT I OF 1910 (PRESS), No. 1, (1916) 2 M.W.N. 385.

(4) Sanction to prosecute—Expiry of time—Power of High Court to extend time. See CRIM. PRO. CODE, No. 151, 18 Bom. L.R. 686.

(5) Perjury committed in judicial enquiry—Jurisdiction of High Court to sanction prosecution. See CRIM. PRO. CODE, No. 136, 16 Cr. L.J. 740.

(6) Revision—, interference by. See CRIM. PRO. CODE, No. 92, 17 Cr. L.J. 286.

High Court Rules (Bombay).

Criminal Circular No. 37—Trial held on a Sunday—Irregularity. Emperor v. Baban

High Court Rules (Bombay)—(Concluded).

Daud, 17 Bom. L.R. 918=3 Bom. Cr. O. 130=16 Cr. L.J. 752=31 Ind. Cas. 352. See Final Part, 1915, Col. 152.

Honorary Magistrates.

(1) See BENCH OF MAGISTRATES, No. 1, 8 L.B.R. 463.

House-breaking.

See CRIMINAL TRESPASS.

(1) Possession of stolen property—Presumption. See EVIDENCE ACT, No. 25, 17 Cr. L.J. 32.

(2) See HOUSE TRESPASS, No. 1, 21 P.R. 1916 (Cr.).

(3) House-breaking with intent to commit theft—Completion of the offence—Causing grievous hurt by stabbing, thereafter—Offence committed. See PENAL CODE, No. 206, 27 P.R. 1916 (Cr.).

(4) Evidence of—Surrender of stolen articles by accused—Possession unexplained—Offence. See PENAL CODE, No. 174, 17 Cr. L.J. 179.

House Trespass.

(1) *House-breaking—Lurking house-trespass.*

House trespass becomes lurking house-trespass if the offender takes precautions to conceal such house-trespass from some person who has a right to exclude him.

The mere fact that a house-trespass was committed by night does not make the offence one of lurking house-trespass. In order to constitute lurking house-trespass the offender must take some active means to conceal his presence (a).

Where a person enters the court-yard of the *haveli* through the *deorhi*, but the *deorhi* itself has no door attached to it that would constitute house-trespass, not house-breaking. **Budha v. The Crown**, 21 P.R. 1916 (Cr.)=123 P.L.R. 1916=44 P.W.R. 1916 (Cr.)=17 Cr. L.J. 304=35 Ind. Cas. 176.

RATTIGAN and SCOTT-SMITH, JJ.

Reference:—(a) 16 P.R. 1889 (Cr.), *R.*

(2) Murder—Death caused in lurking house-trespass. See CRIM. PRO. CODE, No. 184, 50 P.W.R. 1916 (Cr.).

(3) See CRIMINAL TRESPASS, No. 1, 8 L.B.R. 463.

Hut.

(1) Thatch, whether a building. See PENAL CODE, No. 195, 17 Cr. L.J. 536.

Illegality.

(1) Sentence passed by trial Court under S. 457, Indian Penal Code—Sessions Judge altering the conviction under S. 411—Whether such alteration makes the trial by trying Magistrate illegal. See JOINT TRIAL, No. 2, 49 P.W.R. 1916 (Cr.).

(2) Jury—Deficiency in number made up by selection and not by lot—Trial, if vitiated. See CRIM. PRO. CODE, No. 225-a (1917) M.W.N. 1.

Immoveable Property.

See CRIM. PRO. CODE, Ss. 145, 147.

(1) Surety's—to be taken into consideration in deciding as to their fitness. See CRIM. PRO. CODE, No. 44, 17 Cr. L.J. 91.

Immoveable Property—(Concluded).

(2) Order regarding possession of, following acquittal in case under Ss. 447 and 426 of the Penal Code, propriety of. See PENAL CODE, No. 186, 20 C.W.N. 1302.

(3) If to be considered in deciding fitness of surety. See SURETY, No. 1, 17 Cr. L.J. 97.

Importer.

Trade-mark—Using a distinctive mark has property in mark. See PENAL CODE, No. 217, 14 A.L.J. 1080.

Imprisonment.

See SENTENCE.

(1) Detention in civil prison whether amounts to—Prisons Act (IX of 1894), S. 42. See CRIM. PRO. CODE, No. 277, 17 Cr. L.J. 480.

Indian Councils Act.

See ST. 24 AND 25 VIC. C. 67.

Indian Emigration Act.

See ACT XVII OF 1908.

Informant.

(1) Prosecution launched as result of information given to Village Magistrate—Discharge of accused—Order of compensation as against informant—Validity. See CRIM. PRO. CODE, No. 211-a, 32 M.L.J. 78.

Infringement of Copyright.

(1) Printing book at Lahore—Offence under S. 7 (a) of Copyright Act III of 1914—Completion of offence. See CRIM. PRO. CODE, No. 126, 23 P.R. 1916 (Cr.).

Ingress into India Ordinance.

See ORDINANCE V OF 1914.

Inherent Powers of Court.

(1) To prevent miscarriage of justice—Civ. Pro. Code (1908), S. 151.

The High Court has an inherent jurisdiction to make orders to prevent a miscarriage of justice, and this right is expressly recognised by S. 151 of the Code of Civil Procedure. *Ramjas v. Mahadeo Parshad*, 17 Cr.L.J. 637 = 36 Ind. Cas. 585.

RICHARDS, C.J. and BANERJI, J.

Insult.

See PENAL CODE, S. 604.

Obstruction to public thoroughfare—Union Chairman removing obstruction, use of insulting and abusive language by—Offence, if committed 'as such public servant'—Sanction, if necessary. See CRIM. PRO. CODE, No. 163, 4 L.W. 556.

Intention.

(1) See PENAL CODE, No. 113, 17 Cr.L.J. 465.

(2) Presumption of knowledge. See RAILWAYS ACT (1890), No. 1, 17 Cr.L.J. 961.

(3) Intending death of one and causing death of another—Murder. See PENAL CODE, No. 89-a, 15 A.L.J. 13.

Intention—(Concluded).

(4) False charge—Proof of charge of specific offence—, to set criminal law in motion. See PENAL CODE, No. 71-a, 36 Ind. Cas. 834.

Irregularity.

(1) Sanction when necessary—When not curable. See ACT XI OF 1878 (ARMS), No. 4, 9 L.B.R. 452.

(2) Civ. Pro. Code, 1908, S. 115—Proceedings taken while a suit is pending—If material irregularity. See CRIM. PRO. CODE, No. 335, 20 M.L.T. 252.

(3) Previous convictions, to be set forth in charge when curable. See CRIM. PRO. CODE, No. 176, 8 L.B.R. 461.

(4) Magistrate's refusal to examine witnesses—Declining jurisdiction—Revision. See CRIM. PRO. CODE, No. 100, 17 Cr.L.J. 217.

(5) See CRIM. PRO. CODE, No. 351-a, 1 Pat. L.J. 553.

(6) Issue of process without examining complainant on oath—No prejudice to accused—Curable defect. See CRIM. PRO. CODE, No. 133, 1 Pat.L.J. 592.

(7) Jury—Deficiency in number made up by selection and not by lot—Trial, if vitiated. See CRIM. PRO. CODE, No. 225-a, (1917) M.W. N. 1.

Jail Appeal.

Summary dismissal of—No bar to appeal, subsequently presented by accused's Counsel. See APPEAL, No. 3, 17 Cr.L.J. 453.

Jail Code.

Rule 528, Exp. 1. See CRIM. PRO. CODE, No. 13, 24 C.L.J. 54.

Joinder of Charges.

See CRIM. PRO. CODE, Ss. 233, 234, 237 to 239.

See JOINT TRIAL.

(1) Offences committed within one year, against different individuals—Whether can be tried together—"Offences of the same kind," meaning of. See CRIM. PRO. CODE, No. 191, 20 M.L.T. 234.

(2) Offences of same kind—Two acts of theft in same night—Legality of single trial for both offences. See CRIM. PRO. CODE, No. 196-a, 36 Ind. Cas. 873.

Joint Possession.

(1) See ACT XII OF 1896 (EXCISE), No. 1, 8 L.B.R. 464.

(2) Of property in dispute—Magistrate, jurisdiction of. See CRIM. PRO. CODE, No. 90, 17 Cr.L.J. 76.

Joint Trial.

See APPROVER.

See CRIM. PRO. CODE, Ss. 233, 234, 237 to 239.

(1) Parts of stolen property found in possession of two persons—Joint trial—Legality.

Where it is merely shown that part of the stolen property was found in the possession of one person and another part was found in the possession of another, it would probably be

Joint Trial—(Concluded).

illegal to try the two men together; but if the two men were acting in concert and were in joint control of the stolen property, *held*, their joint trial would not be illegal. **Jadunandan Prasad v. King-Emperor**, 1 Pat. L.J. 61=17 Cr. L.J. 234=34 Ind. Cas. 650.

CHAMBER, C.J., and JYALA PRASAD, J.

- (2) *Joint trial—Legality of trial of accused—Sentence passed by trial Court under S. 457, Indian Penal Code Act XLV of 1860—Sessions Judge altering the conviction under S. 411—Whether such alteration makes the trial by trying Magistrate illegal.*

Eight persons were convicted by a Magistrate under S. 457, Indian Penal Code. They all appealed to the Sessions Judge who upheld the conviction of two under S. 457, Indian Penal Code, but altered the conviction of the other six to one under S. 411, Indian Penal Code. These six applied for revision to the Chief Court.

Held, that in one and the same trial there cannot be convictions against some accused under S. 457 and against others under S. 411 (a). **Muhammad v. The Crown**, 49 P.W.R. 1916 (Cr.).

CHEVIS, J.

References:—(a) 38 P.R. 1905=52 P.W.R. 1905; 51 P.R. 1906=62 P.W.R. 1905, F.

(3) *Appeal—Right of—Non-appealable sentence against some accused and appealable sentence against one—Appeal at instance of former—Maintainability.* See CRIM. PRO. CODE, No. 288, 31 M.L.J. 837.

(4) *Charge to jury—Trial of several accused together—Omission to place defence evidence regarding each accused before jury, effect of—Misdirection.* See CRIM. PRO. CODE, No. 233, 17 Cr. L.J. 19.

(5) *Misappropriation—Separate trials for misappropriating different items of money during the same period, whether allowed.* See CRIM. PRO. CODE, No. 180, 17 Cr. L.J. 30.

(6) See CRIM. PRO. CODE, No. 204, 17 Cr. L.J. 477.

Judge.

Transfer, grounds for—Expression of opinion by, in counter-case—Judge's competence to try subsequent case. See TRANSFER OF CRIMINAL CASES, No. 1, 1 Pat. L.J. 399.

Judge and Jury.

View of place of occurrence of offence by, or assessors—Notice to parties. See CRIM. PRO. CODE, No. 231, 9 Bur. L.T. 133.

Judgment.

(1) *Case tried and judgment written, signed and dated by one Magistrate, but not pronounced owing to absence of accused—Change of Magistrate—De novo trial granted—New Magistrate if bound to pronounce judgment of his predecessor.* See CRIM. PRO. CODE, No. 266, 3 C.W. 496.

(2) *Magistrate on appeal writing a judgment of four lines—Revision—Retrial.* See CRIM. PRO. CODE, No. 50, 14 A.L.J. 279.

Judgment—(Concluded).

(3) *Appellate, what should be.* See CRIM. PRO. CODE, No. 271, 20 C.W.N. 1296.

(4) See CRIM. PRO. CODE, No. 52, 17 Cr. L.J. 461.

(5) *Civil judgment between the parties with reference to certain items—Charge of criminal breach of trust as to the same items—Admissibility of civil judgment in the criminal case.* See EVIDENCE, No. 1, 18 Bom. L.R. 185.

(6) See LETTERS PATENT, No. 1, 17 Cr. L.J. 537.

(7) *Magistrate on leave—Effect of, written and signed by Magistrate after availing himself of leave.* See CRIM. PRO. CODE, No. 264-a, 36 Ind. Cas. 842.

Judicial Inquiry.

False statement in the course of a non-judicial inquiry—Indian Penal Code, S. 193—Reg. VIII of 1827. See ACT X OF 1873 (OATHS), No. 1, 10 S.L.R. 64.

Judicial Officers Protection Act.

See ACT XVIII OF 1850.

Judicial Order.

Power of Court to issue certiorari when issued—When act judicial—Duty of Magistrate under S. 3, ministerial—Exercise of power by ministerial or executive officer in excess—Remedy—Right of suit. See ACT I OF 1910 (PRESS), No. 3, (1916) 2 M.W.N. 497.

Judicial Proceedings.

(1) *Inquiry preliminary to issue of search warrant under S. 100, Crim. Pro. Code—Nature.* See CRIM. PRO. CODE, No. 2, 34 P.R. 1916 (Cr.).

Jurisdiction—General.

(1) *Breach of contract—Of Magistrate where employer resides or carries on business.* See ACT XIII OF 1859 (WORKMAN'S BREACH OF CONTRACT), No. 3, 10 S.L.R. 56.

(2) See ACT I OF 1910 (PRESS), No. 3, (1916) 2 M.W.N. 497.

(3) *Of Courts to question orders of internment passed under Emergency Legislation Continuance Act.* See ACT I OF 1915 (EMERGENCY LEGISLATION CONTINUANCE), No. 1, 20 C.W.N. 1327.

(4) *Formalities of, compliance with—Practice.* See CRIM. PRO. CODE, No. 102, 4 L.W. 440.

(5) *Arrest outside Magistrate's.* See CRIM. PRO. CODE, No. 54, 8 L.B.R. 378.

(6) *Revision, concurrent, of Sessions Judge and District Magistrate in.* See CRIM. PRO. CODE, No. 309, 8 L.B.R. 361.

(7) *Trading with enemy—Goods 'obtained' in London—Jurisdiction of Madras Courts.* See ORDINANCE VI OF 1914 (COMMERCIAL INTERCOURSE WITH ENEMIES), No. 1, 31 M.L.J. 178.

(8) *Sanction to prosecute—Order granting or refusing sanction by lower Court—Appeal—Power of superior Court to convert proceedings into one under S. 476.* See SANCTION TO PROSECUTE, No. 4-c, 1 Pat. L.J. 607.

Jurisdiction of Criminal Courts.

See CRIM. PRO. CODE, S. 177.

See MAGISTRATE, JURISDICTION OF.

(1) Offence committed at Boripanda in Nala State—Jurisdiction of Agent for the Mewas Estate to try the accused. See ACT XIV OF 1874 (SCHEDULED DISTRICTS), No. 1, 18 Bom. L.R. 789.

(2) Jurisdiction—Criminal Court—Printing of book at Lahore—Infringement of copyright—Loss to complainant caused elsewhere—Offence under S. 7 (a), Copyright Act—Completion at the place of printing—Proper Court to try—Lahore Court. See CRIM. PRO. CODE, No. 126, 28 P.R. 1916 (Cr.).

(3) Court abolished but re-established with curtailed territorial limits—Jurisdiction—Sanction for prosecution for offence committed before abolition. See CRIM. PRO. CODE, No. 147, 16 Cr. L.J. 787.

(4) See CRIM. PRO. CODE, No. 103, 21 C. W.N. 160.

Jury.

(1) Deficiency in number made up by selection and not by lot—Trial, if vitiated. See CRIM. PRO. CODE, No. 225-a, (1917) M.W.N. 1.

Justice of the Peace.

See CRIM. PRO. CODE, No. 331, 4 L.W. 405.

Labourer.

See ACT XIII OF 1859.

Contractor not artificer, or workman. See ACT XIII OF 1859 (WORKMAN'S BREACH OF CONTRACT), No. 4, 9 Bur. L.T. 108.

Landlord and Tenant.

(1) Removal of batai crops by the tenants—Tenant acting dishonestly—If amounts to an offence. See BEN. ACT VIII OF 1885 (BENGAL TENANCY), No. 2, 1 Pat. L.J. 353.

(2) See CRIM. PRO. CODE, No. 172, 17 Cr. L.J. 406.

Land Revenue Act (U.P.).

See U. P. ACT III OF 1901.

Lathis.

(1) Whether "arms" under S. 106, Crim. Pro. Code. See ARMS, No. 1, 17 Cr. L.J. 313.

Layangi Crackers.

Possession of, without license whether punishable. See EXPLOSIVES RULES, No. 1, 18 Bom. L.R. 556.

Leading Questions.

Evidence Act, S. 143, in cross-examination. See CRIM. PRO. CODE, No. 231, 9 Bur. L.T. 133.

Legal Practitioners Act (XVIII of 1879).

S. 14—Order refusing to renew pleader's certificate—Order for prosecution—Penal Code, S. 209.

The plaintiff, a pleader, brought a suit for pre-emption based on the Muhammadan Law which was decreed by the Munsif. The District Judge on appeal reversed the decree of the

11 Cr.

Legal Practitioners Act (XVIII of 1879)

—(Concluded).

Munsif after having recalled and examined the plaintiff. The District Judge ordered the prosecution of the plaintiff under S. 209, Penal Code. The prosecution was suspended by reason of appeals against his decree having been preferred in the High Court. Upon the pleader applying for renewal of certificate, the District Judge reported to the High Court that he had refused to renew his certificate.

Held, that the action of the District Judge was inconsistent, for either he ought to have waited till the determination of the criminal prosecution which he had ordered or he might have proceeded under S. 14 of the Legal Practitioners Act. The District Judge had in effect found the pleader guilty before he had been tried by ordering his suspension. *In the matter of a Pleadet*, 14 A.L.J. 82=38 A. 182 (F.B.)=17 Cr. L.J. 152=33 Ind. Cas. 632 (F.B.).

RICHARDS, C.J., TUDBALL and RAFIQ, JJ.

Legislature, Powers of.

Emergency Legislation Continuance Act (I of 1915), if *ultra vires*—Ordinances 3 and 5 of 1914—Power of Governor-General in Council to pass Act embodying provisions of ordinances—Ordinance III of 1914—S. 11, Effect of. See ACT I OF 1915 (EMERGENCY LEGISLATION CONTINUANCE), No. 1, 20 C.W.N. 1347.

Letters Patent (Calcutta).

Cl. 26—Review under cl. 26 of the—. See MISDIRECTION TO JURY, Nos. 1 and 2, 24 C. L.J. 400.

Letters Patent (Madras).

Cl. 15—Order under S. 488, Crim. Pro. Code, passed by a Magistrate—Revision to High Court—Order of a single Judge—No appeal. *Rajanb Appadu v. Rayana Appana*, 17 M.L.T. 330=28 M.L.J. 483=16 Cr. L.J. 326=28 Ind. Cas. 662=39 M. 472. See Final Part, 1915, Col. 158.

Letters Patent (N.W.P.).

(1) S. 10—Order granting sanction to prosecute—Not judgment.

The order of a Judge granting sanction to prosecute is not a "judgment" within the meaning of that expression in S. 10 of the Letters Patent. *Ramjas v. Mahadeo Pershad*, 17 Cr. L.J. 537=36 Ind. Cas. 586.

RICHARDS, C.J., and BENERJI, J.

Limitation.

See SANCTION TO PROSECUTE.

(1) Prosecution more than three years after the first offence. See ACT IV OF 1893 (INDIAN MERCHANDISE MARKS ACT), No. 1, 20 S.L.R. 45.

(2) Attachment and sale of property of an absconding offender—Application for return of property or its sale-proceeds made after two years barred—Remedy if attachment, &c., illegal. See CRIM. PRO. CODE, No. 17, 40 P. W.R. 1916 (Cr.).

(3) See TRADE MARK, No. 1, 17 Cr. L.J. 488.

Local Enquiry.

(1) Right of way, dispute as to—Report on—Statements of parties, order on—Jurisdiction. See CRIM. PRO. CODE, No. 116, 17 Cr. L.J. 478.

Local Inspection.

View of place of occurrence of offence by Judge and jury or assessors—Notice to parties, See CRIM. PRO. CODE, No. 231, 9 Bur. L.T. 133.

Local Investigation.

Magistrate's duty to record reasons before directing—Accused if should be allowed to be represented when Magistrate considers the report of the local investigation. See CRIM. PRO. CODE, No. 168, 21 C.W.N. 127.

Lottery.

See PENAL CODE, No. 85, 9 Bur. L.T. 124.

Lower Burma Courts Act.

See BUR. ACT IV OF 1900.

Lurking House-trespass.

(1) Murder—Death caused in. See CRIM. PRO. CODE, No. 184, 50 P.W.R. 1916 (Cr.).

(2) See HOUSE-TRESPASS, No. 1, 21 P.R. 1916 (Cr.).

Madras Abkari Act.

See MAD. ACT I OF 1886.

Madras City Municipal Act.

See MAD. ACT III OF 1904.

Madras City Police Act.

See MAD. ACT III OF 1898.

Madras District Municipalities Act.

See MAD. ACT IV OF 1894.

Madras Forest Rules.

Madras Forest Rules, r. 8—'Forest produce,' meaning of—Forest grass, if comprised in the term—Grazing in reserved forest, if amounts to use of forest produce—Conviction for offence.

The term 'forest produce' occurring in r. 8 of the Madras Forest Rules includes forest grass, and the use of such grass by grazing cattle on lands reserved as fuel reserve amounts to the use of a forest produce which is prohibited by the said rule, and a conviction for such unlawful grazing is sustainable. **Perumal Nalk v. Emperor**, 4 L.W. 552=17 Cr. L.J. 534=36 Ind. Cas. 582.

SADASIVA IYER, J.

Madras Planters' Labour Act.

See MAD. ACT I OF 1903.

Madras Survey and Boundaries Act.

See MAD. ACT IV OF 1897.

Madras Towns Nuisances Act.

See MAD. ACT III OF 1889.

Madras Village Police Regulation.

See MAD. REG. XI OF 1816.

Magistrate, Jurisdiction of.

See BENCH OF MAGISTRATES.

See CRIM. PRO. CODE, ss. 133, 144, 145, 147, 177, 179, 181.

See SANCTION TO PROSECUTE.

See SENTENCE.

(1) *Practice—Magistrate also being complainant has no jurisdiction to pass order in that case.*

A Magistrate ought not to make an order in any case in which he is even the nominal complainant.

Such an order should be set aside, and it will be for the Crown to consider whether it is expedient to move further in the matter. **Rup Lal v. Emperor**, 16 Cr. L.J. 801=31 Ind. Cas. 817.

RICHARDS, C.J.

(2) Breach of contract—Jurisdiction of Magistrate where employer resides or carries on business. See ACT XIII OF 1859 (WORKMAN'S BREACH OF CONTRACT), No. 3, 10 S.L.R. 56.

(3) Power of High Court—Jurisdiction of Magistrate to cancel order first exempting—Keeping of printing presses and publication of newspapers, legitimate business. See ACT I OF 1910 (PRESS), No. 1, (1916) 2 M.W.N. 385.

(4) Criminal breach of trust—Article given to accused under written agreement—Competency of Criminal Courts to decide whether agreement was real or nominal. See CRIM. PRO. CODE, No. 313, (1916) 2 M.W.N. 158.

(5) Jurisdiction of Magistrate over persons residing outside his jurisdiction. See CRIM. PRO. CODE, No. 48, 14 A.L.J. 1074.

(6) Court abolished but re-established with curtailed territorial limits—Jurisdiction—Sanction for prosecution for offence committed before abolition. See CRIM. PRO. CODE, No. 147, 16 Cr. L.J. 787.

(7) Offence committed before one Magistrate—Succeeding—Penal Code, S. 193. See CRIM. PRO. CODE, No. 339, 17 Cr. L.J. 40.

(8) Joint possession of property in dispute. See CRIM. PRO. CODE, No. 90, 17 Cr. L.J. 76.

(9) See CRIM. PRO. CODE, No. 55, 17 Cr. L.J. 141.

(10) Offence committed before one Magistrate—Succeeding. Magistrate, jurisdiction of—Penal Code (Act XLV of 1860), S. 193. See CRIM. PRO. CODE, No. 339, 17 Cr. L.J. 40.

(11) How far Magistrate bound to respect decrees of Civil Court. See HIGH COURT, JURISDICTION OF, No. 1, 1 Pat. L.J. 336.

(12) If includes Village Magistrate. See CRIM. PRO. CODE, No. 211-a, 32 M.L.J. 78.

Maiming.

Meaning of. See PENAL CODE, No. 188, 18 Bom. L.R. 299.

Maintenance.

See CRIM. PRO. CODE, S. 488.

(1) Application for, dismissed—Order, final—Magistrate not competent to entertain another application on same facts. See CRIM. PRO. CODE, No. 355, 17 Cr. L.J. 106.

Malabar Law.

-Child entitled to maintenance from its mother's tarwad—Liability of father under S. 488, Crim. Pro. Code. See CRIM. PRO. CODE, No. 363, 19 M.L.T. 23.

Manager.

(1) Or agent, it has sufficient possession—Servant, nature of possession of—Order under the S. 145, Crim. Pro. Code, if can be made against servants of landlord. See CRIM. PRO. CODE, No. 94-a, 5 L.W. 118.

Mashirnamas.

Police. See EVIDENCE ACT, No. 13, 10 B. L.R. 7.

Master and Servant.

(1) Opium—Possession by servant—Master's liability—Onus of proof. See ACT I OF 1878 (OPIUM), No. 2, 15 P.R. 1916 (Cr.).

(2) Possession of opium by servant on behalf of master if an offence. See CRIM. PRO. CODE, No. 199, (1916) 2 M.W.N. 267.

(3) See MISDIRECTION TO JURY, Nos. 1 and 2, 24 C.L.J. 400.

Math.

Attachment of, and cattle found therein—Legality. See CRIM. PRO. CODE, No. 105, 1 Pat. L.J. 356.

Measurement of Lands.

Surveyor—Placing boundary marks and measuring lands—No authority to survey the lands—Act done in good faith—Obstruction to surveyor—Offence committed. See PENAL CODE, No. 48, 31 M.L.J. 305.

Medical Certificate.

(1) Abortive attempt to secure, no offence under S. 196, Penal Code. See CRIM. PRO. CODE, No. 341, 17 Cr.L.J. 388.

Merchandise Marks Act.

See ACT IV OF 1889.

Meane Profits.

Award of, by Magistrate when objectionable. See CRIM. PRO. CODE, No. 104, 4 L.W. 55.

Mewas Estates Act.

See BOM. ACT XI OF 1846.

Ministerial Act.

Power of Court to issue *certiorari* when issued—When not judicial—Duty of Magistrate under S. 3, ministerial—Exercise of power by ministerial or executive officer in excess—Remedy—Right of suit. See ACT I OF 1910 (PRESS), No. 3, (1916) 2 M.W.N. 497.

Misdirection to Jury.

See REVISION.

See TRIAL.

(1) *Misdirection—Charge to jury—Indian Penal Code (Act XLV of 1860), Ss. 27, 243—Possession of spurious coin by the servant—Master's knowledge—Time, moment of—Non-direction to jury, if misdirection—Judge, statement of—Review under cl. 26*

Misdirection to Jury—(Continued).

of the Letters Patent—Crim. Pro. Code (Act V of 1898), S. 537, if applicable—Whole case, if can be considered on review—Prosecution, duty of.

In a case under S. 243 of the Indian Penal Code it is necessary to direct the Jury to the effect that they should come to a decision (1) whether the counterfeit coins were in the possession of the accused, or in the possession of his clerk or servant on behalf of the accused; and (2) if they came to the conclusion that the coins were in the possession of the accused, they would then have to decide whether he knew at the time when he became so possessed of them, that the coins were counterfeit; and (3) if they came to the conclusion that the coins were in the possession of the clerk or servant on behalf of the accused, they would then have to decide whether at the time the clerk or servant on behalf of the accused became possessed of the counterfeit coins, the accused himself knew that they were counterfeit.

Per *Mukerjee, J.*—The statement of the Judge who presides at the trial as to what actually took place before him, is conclusive (a).

Mere non-direction is not necessarily misdirection (b).

S. 537 of the Code of Criminal Procedure has no application to a case reviewed under cl. 26 of the Letters Patent.

When a point or points of law have been reserved or have been certified by the Advocate General as erroneously decided or as worthy of further consideration, and the Court on review holds on the point of law in favour of the accused, it has been the practice of the Courts to consider the whole case on the evidence and to pass such sentence as shall seem right (c).

Quare. Whether these cases have not in effect been overruled by the decision of the judicial Committee in *Subramanya v. King-Emperor*, 25 M. 61.

The duty of the prosecution is, not to secure a conviction, but to assist the Court in arriving at the truth, and for that purpose to place before the Court all the material evidence at its disposal (d). *Emperor v. Fateh Chand*, 24 C.L.J. 400=21 C.W.N. 33 (F.B.).

SANDERSON, C.J., MOOKERJEE, FLETCHER, TEUNON and CHAUDHURI, JJ.

References:—(a) 21 C.L.J. 377, R. (b) (1909) 2 Cr. App. Rep. 217 (246), R. (c) 9 Bom. H.C. R. 358; 2 B. 61; 1 C. 207; 25 W.R. Cr. 36; 17 C. 642, R. (d) 19 C.W.N. 28; 21 C.L.J. 331; 21 C.L.J. 396, R.

(2) Mere non-direction is not necessarily misdirection. *Emperor v. Fateh Chand*, 24 C.L.J. 400=21 C.W.N. 33 (F.B.).

SANDERSON, C.J., MOOKERJEE, FLETCHER, TEUNON and CHAUDHURI, JJ.

(3) *Jury—Misdirection—Admission of improper evidence—S. 33 of Evidence Act—Court must exercise judicial mind. Annavi Muthurayan v. Emperor*, (1915) M.W.N. 229=17 M. L.T. 214=28 M.L.J. 329=16 Cr.L.J. 294=28 Ind. Cas. 518=39 M. 449. See Final Part, 1915, Col. 162.

Misdirection to Jury—(Concluded).

(4) *Charge to Jury—Misdirection—Jury not misled. In re Chinnu*, 16 Cr. L.J. 618=30 Ind. Cas. 442. See Final Part, 1916, Col. 162.

(5) What amounts to. See PENAL CODE, No. 105, 20 C.W.N. 512.

Motive.

(1) Murder—Proof of motive if absolutely necessary, before upholding conviction. See PENAL CODE, No. 100, 17 Cr.L.J. 366.

Moveable Property.

Attachment of *Math* and cattle found therein—Legality. See CRIM. PRO. CODE, No. 105, 1 Pat. L.J. 356.

Municipal Act.

See BEN. ACT III OF 1884.

See BUR. ACT III OF 1893.

See U. P. ACT I OF 1900.

See PUN. ACT III OF 1911.

Municipal Commissioner.

Public servant—Dismissal or removal from the office without the sanction of the Local Government. See CRIM. PRO. CODE, No. 153, 48 P.W.R. 1916 (Cr.).

Murder.

See PENAL CODE, Ss. 299, 300, 302, 304.

(1) Death caused in lurking house-trespass. See CRIM. PRO. CODE, No. 184, 60 P.W.R. 1916 (Cr.).

(2) Conviction based on circumstantial evidence alone—When legal. See EVIDENCE, No. 2, 32 P.R. 1916 (Cr.).

(3) Private defence of property—Assault upon thief—Death—More harm than necessary caused—Offence committed—Murder. See PENAL CODE, No. 103, 35 P.R. 1916 (Cr.).

(4) Charge of—Guilt to be established beyond reasonable doubt. See PENAL CODE, No. 98, 17 Cr. L.J. 102.

(5) Abetment of—Evidence—Proof. See PENAL CODE, No. 17, 17 Cr. L.J. 175.

(6) Provocation grave not sudden—Sentence. See PENAL CODE, No. 99, 17 Cr. L.J. 190.

(7) Proof of, Motive, if absolutely necessary, before upholding conviction. See PENAL CODE, No. 100, 17 Cr. L.J. 366.

(8) Intending death of one and causing death of another. See PENAL CODE, No. 89-a, 15 A.L.J. 13.

(9) Culpable homicide—Accused pointing out places of occurrence of offence—Presumption of guilt of. See PENAL CODE, No. 100-a, 36 Ind. Cas. 638.

Nazif.

Direction to bailiff to attach goods—Execution by—Resistance to his entry—No offence—No mention in the warrant of day before which it is to be executed—Illegality. See PENAL CODE, No. 44-a, 1 Pat. L.J. 550.

Negligence.

Negligent conduct with respect to animal. See PENAL CODE, No. 64, 18 Bom. L.R. 682.

Newspapers.

Power of High Court—Jurisdiction of Magistrate to cancel order first exempting—Keeping of printing presses and publication of legitimate business. See ACT I OF 1910 (PRESS), No. 1, (1916) 2 M.W.N. 385.

Non-direction to Jury.

Mere non-direction is not necessarily misdirection. *Emperor v. Fateh Chand*, 24 C.L.J. 400=21 C.W.N. 33 (F.B.).

SANDERSON, C.J., MOOKERJEE, FLETCHER, TEUNON and CHAUDHURI, JJ.

Non-judicial Inquiry.

False statement in the course of a non-judicial inquiry—Indian Penal Code, S. 193—Reg. VIII of 1897. See ACT X OF 1873 (OATHS), No. 1, 10 S.L.R. 64.

Notice.

See CRIM. PRO. CODE, S. 112.

See SANCTION TO PROSECUTE.

See TRANSFER OF CRIMINAL CASES.

(1) View of place of occurrence of offence by judge and jury or assessors—, to parties. See CRIM. PRO. CODE, No. 231, 9 Bur. L.T. 133.

(2) See CRIM. PRO. CODE, No. 370, 17 Cr. L.J. 207.

(3) Proper Court to apply to for sanction—Order granting sanction. See SANCTION TO PROSECUTE, No. 4-a, 9 Bur. L.T. 202.

Oaths Act.

See ACT X OF 1873.

Obstruction to Public Thoroughfare.

Carts with unyoked oxen left across the street—Union Chairman removing obstruction, use of insulting and abusive language by—Offence, if committed 'as such public servant'—Sanction, if necessary. See CRIM. PRO. CODE, No. 163, 4 L.W. 556.

Offence.

See SENTENCE.

(1) *Engineering of offence to be strongly deprecated.*

To send a person to spy out whether a crime is being committed and to come back with information that it is being committed is one thing, but to engineer an offence in order to find out whether a person when tempted will commit the offence is quite a different thing. The latter practice is to be strongly deprecated. *Bhim Sen v. Emperor*, 17 Cr. L.J. 139=33 Ind. Cas. 315.

KNOX, J.

(2) Acts done partly before and partly after the date of a penal statute if constitute offence. See ORDINANCE VI OF 1914 (COMMERCIAL INTERCOURSE WITH ENEMIES), No. 1, 31 M. L.J. 178.

(3) One act constituting two—Conviction for both offences, and separate punishment, legality of. See PENAL CODE, No. 6, 1 Pat. L.J. 373.

Opinion.

Transfer, grounds for—Expression of, by Judge in counter case—Judge's competence to try subsequent case. See TRANSFER OF CRIMINAL CASES, No. 1, 1 Pat. L.J. 399.

Opium Act.

See ACT I OF 1878.

Ordinance III of 1914 (Foreigners).

(1) Ordinances III and V of 1914—Power of Governor-General in Council to pass Act embodying provisions of Ordinances—S. 11, effect of. See ACT I OF 1915 (EMERGENCY LEGISLATION CONTINUANCE), No. 1, 20 O.W.N. 1827.

(2) Ss. 3, 4, 7—Trial of offenders—Procedure—Appeal—Applicability of provisions of Criminal Procedure Code.

Ordinance III of 1914 is a law and the infringement of its provisions is an offence, and the enquiry into such an offence must be dealt with according to the provisions of the Crim. Pro. Code, unless there is any other enactment in force prescribing a different method of inquiry into such an offence.

The Crim. Pro. Code must be followed in the absence of any rules promulgated in exercise of the powers conferred by S. 7 of the Ordinance.

So where a District Magistrate convicts a person for an offence against S. 3 of the Ordinance, an appeal lies to the Sessions Judge under S. 408, Crim. Pro. Code. *Sher Singh v. The Crown*, 10 P.R. 1916 (Cr.) = 15 P.W.R. 1916 (Cr.) = 152 P.L.R. 1916 = 17 Cr. L.J. 225 = 34 Ind. Cas. 641.

LESLIE-JONES, J.

(3) Ss. 3, 8—Delegation of power to Local Government—Notification of Local Government not ultra vires.

By S. 3 of the Foreigners Ordinance, 1914, the Governor-General in Council has power to regulate or restrict in such manner as he thinks fit the liberty of foreigners residing or being in British India; and by S. 8 of the same Ordinance the Governor-General in Council is empowered to delegate its powers under the Ordinance to any civil authority in British India. By Notification No. 907, dated the 22nd August 1914, the Governor-General in Council delegated his powers under S. 3 of the Ordinance to the Local Government of the Presidency Notification No. 632, dated 6th September 1914, made by the said local Government is, therefore, *intra vires* the Ordinance. *In re Charles George Hedinger*, 17 Cr. L.J. 67 = 32 Ind. Cas. 659.

COUTS-TROTTER, J.

(4) S. 4. See No. 2, *supra*.

(5) S. 7. See No. 2, *supra*.

(6) S. 8. See No. 3, *supra*.

Ordinance Y of 1914 (Ingress into India Ordinance).

Ordinances III and V of 1914—Power of Governor-General in Council to pass Act embodying provisions of Ordinances—Ordinance III of 1914—S. 11, effect of. See ACT I OF 1915 (EMERGENCY LEGISLATION CONTINUANCE), No. 1, 20 O.W.N. 1827.

Ordinance VI of 1914 (Commercial Intercourse with Enemies).

(1) S. 3—Trading with enemy—Declaration of war, force of—Proclamation of 14th October 1914 whether retrospective—"Obtaining of goods" from enemy, what is—Goods "obtained in London"—Madras Courts, jurisdiction of—Acts done partly before and partly after the date of a penal statute, if constitute offence—Penal Code, S. 511—Attempt to commit offence—Possibility or success, if necessary—English and Indian Law difference between.

Even according to the common law of England, it is illegal to trade with an enemy (a).

The force of a declaration of war is equal to that of an Act of Parliament and contravening the provisions of a declaration prohibiting commercial intercourse with an enemy is a criminal offence (b).

A statute and especially a penal statute has no retrospective operation unless the intention of the Legislature that it should have such an effect is clearly indicated (c).

Per *Wallis, C.J.*—Acts which prior to the coming into force of a penal statute do not constitute an offence cannot become criminal unless all the ingredients of the offence are committed after the statute comes into force (d).

"Obtaining" includes procuring or ordering goods as well as taking delivery of them on arrival. Where goods are "obtained" from an enemy by the London Agent of a Madras firm, the offence is committed in London, and the Madras Courts have no jurisdiction.

For an attempt to be a criminal offence, it need not be shown that the attempted act was capable of performance or taking effect (e).

The Indian law on this point is the same as the law in England. Sending for goods from an enemy or enemy country would be an offence even if the goods sent for are the accused's own property (f).

Per *Coutts-Trotter, J.*—Whenever the Legislature declares a series of acts to constitute a crime, any person who has entered upon that series of acts must from that moment stay his hand and if he proceeds to the completion of the series, he is guilty of a crime (g).

Per *Coutts-Trotter, J.*—The same goods can be obtained twice within the meaning of S. 5 (7) of the Commercial Intercourse with Enemies Ordinance 1914 and the two "obtainings" would constitute two separate offences.

Semble.—In a country like India where the accused person is not afforded an opportunity of denying and explaining an accusation brought against him, it would be particularly wrong to act upon slender evidence. *Frederick Edmed Hooper v. King-Emperor*, 31 M.L.J. 178 = 4 L.W. 82 = 20 M.L.T. 180 = (1916) 2 M.W.N. 161 = 17 Cr. L.J. 321 = 35 Ind. Cas. 497.

WALLIS, C.J., and COUTTS-TROTTER, J.

References.—(a) 1 Ch. Rob. 199; 6 T.R. 35; 8 T.R. 548; 7 E. & B. 763; (1916) 1 K.B. 511. (b) 7 E. & B. 763, F. (c) L.R. 10 Q. B. 195 R. (d) (1891) 3 Q. B. 145, R. (e) 61 C.L.J. N.8 M.C. 116, R. (f) (1915) 2 K.B. 755, F. (g) (1891) 2 Q. B. 145, D.

Ordinance VI of 1914 (Commercial intercourse with Enemies)—(Concluded).

(2) S. 3—S. 5, cl. (7), *Royal Proclamation prohibiting trade with enemy—Elements necessary to constitute offence—'Trading in' meaning of, if necessarily involves handling of goods—Destined for an enemy country' meaning of—Penal proclamation, construction of—Principal and agent—Liability of principal for acts of agent—Conviction of abettor in appeal when charge framed for substantive offence only, propriety of.* **Indra Chand v. King Emperor**, 19 C.W.N. 1239=42 C. 1094=17 Cr. L.J. 113=33 Ind. Cas. 289. See Final Part, 1915, Col. 167.

Pardon.

See APPROVER.

See CONFESSION.

See CRIM. PRO. CODE, S. 337.

(1) See CRIM. PRO. CODE, No. 243, 9th Bur. L.T. 76.

(2) How forfeited—Approver, whose pardon is alleged to have been forfeited, procedure in trying. See CRIM. PRO. CODE, No. 242, 8 L.B. R. 447.

Partition.

Proceedings submitted to Collector for confirmation—Summons issued to accused to appear before Collector—Refusal to take summons—Penal Code, S. 174—Revision. See U.P. ACT III OF 1901 (LAND REVENUE). No. 1, 14 A. L.J. 1069.

Partnership.

(1) Dissolution of—Collection of old debt thereafter—Omission to pay to other partner—Cheating. See PENAL CODE, No. 177-a, 36 Ind. Cas. 872.

Penal Code.

(a) S. 23. See No. 207, *infra*.

(b) S. 24. See No. 207, *infra*.

(1) Ss. 27, 243. See MISDIRECTION TO JURY, Nos. 1 and 2, 24 C.L.J. 400.

(2) Ss. 29, 478, 486—*Trade mark, meaning of—Counterfeiting, what amounts to.* **Nilmoney Nag v. Durga Pada Banerji** 19 C.W.N. 957=16 Cr. L.J. 719=30 Ind. Cas. 1007. See Final Part, 1915, Col. 158.

(3) Ss. 30, 467—*Valuable security—Promissory note or receipt bearing uncanceled one-anna stamp.*

Certain signature was forged on each of two printed forms, one intended to be used as a promissory-note and the other as a receipt; the blank spaces left for entering particulars of the amount, the name of the person in whose favour the document is executed, the date and place of execution and the rate of interest, were not filled in; a one-anna stamp was affixed on the top of each paper, but the stamp was neither signed across nor cancelled in any way.

Held, that the documents, as they stood, were valuable securities within the meaning of S. 30, Penal Code. **Jawahir Thakur v. Emperor**, 14 A.L.J. 643=38 A. 430=17 Cr. L.J. 303=34 Ind. Cas. 315.

PIRGOTT, J.

(3-a) S. 34. See Nos. 77, 102, 130, *infra*.

Penal Code—(Continued).

(3-b) S. 71. See SENTENCE.

(4) Ss. 71, 147, 149, 395—*Rioting—Grievous hurt committed in the course of riot and in prosecution of the common object—Sentence.*

Whether there are different definitions of the same offence or whether the same offence is provided for in different sections or by separate and different provisions in the Code, the accused, under no circumstances, should be sentenced to a greater punishment than the highest penalty contained in one of the provisions under which he may be convicted. **Dharamdeo Singh v. Emperor**, 14 A.L.J. 738=17 Or. L.J. 418=35 Ind. Cas. 978.

WALSH, J.

(5) Ss. 71, 326 and 397—*Imposition of sentence—Sessions case—Tendering of witnesses before the committing Magistrate for cross examination—Admission of previous evidence as exhibit, illegal—Charge to the jury—Presentation of evidence—Misdirection.* **Kottalgadu v. Emperor**, (1915) M.W.N. 544=16 Cr. L.J. 615=30 Ind. Cas. 439. See Final Part, 1915, Col. 170.

(6) Ss. 71 and 353—*General Clauses Act (X of 1897), S. 26—Railways Act (IX of 1890), S. 101—One act constituting two offences—Conviction for both offences, and separate punishment legality.*

S. 71 of the Penal Code indicates that when one act constitutes two offences, those offences must, if it is desired to inflict separate punishment for each offence, be offences against the same law. S. 26 of the General Clauses Act makes the point still more clear. In this case the accused by one act resisted the Police and endangered the lives of by-standers. One offence is under the Penal Code, and the other under the Railway Act. *Held* that the conviction and sentence under the Railway Act must be set aside, and that the conviction under S. 353 of the Penal Code may stand. **Rahmatulla v. King-Emperor**, 1 Pat. L.J. 373.

ROE and JWALA PRASAD, JJ.

(6-a) S. 75. See No. 204, *infra*.

(7) S. 30—*Plea of accident—Onus on accused—Criminal case—Motive for committing offence—Crim. Pro. Code—Written statement filed by accused—S. 342—Examination of accused by Court.* **King Emperor v. Dwijendra Chandra Mukerjee**, 19 C.W.N. 1043=16 Cr. L.J. 721=31 Ind. Cas. 164. See Final Part, 1915, Col. 171.

(8) S. 84—*Unsoundness of mind—Nature of unsoundness requisite—Test.*

Though there may be a mental derangement of some sort, that derangement must be shown to be a derangement which impairs the cognitive faculties of the accused, i.e., the faculty of understanding the nature of the act that he has committed (a).

It is only when the mental unsoundness lead to this form of incapacity that the accused

Penal Code—(Continued).

is entitled to the exception accorded by S. 84, I.P.C. **Dhanibux v. The Crown**, 9 S.L.R. 171 = 32 Ind. Cas. 671 = 17 Cr. L.J. 79.

PRATT, J.C.

Reference :—(a) 23 C. 604, R.

(9) Ss. 86, 303, 304—*Effect of drunkenness—Knowledge—Intent.* **Re Mandru Gadaba**, 38 M. 479 = 16 Cr. L.J. 647 = 30 Ind. Cas. 451. See Final Part, 1915, Col. 172.

(10) Ss. 87, 90, 304—*Death caused by consent under misconception of fact—Intention or knowledge of accused.* **Ngwa Shwe Kin v. Emperor**, 16 Cr. L.J. 581 = 30 Ind. Cas. 133 = 8 Bur. L.T. 242 = 8 L.B.R. 166. See Final Part, 1915, Col. 172.

(11) S. 90. See No. 10, *supra* and 126, *infra*.
(12) S. 95. See CRIM. PRO. CODE, No. 163, 4 L.W. 566.

(13) S. 96—*Right of private defence of property—Title to property.*

The right of private defence of property can only exist in favour of the person who possesses a clear title to that property and where no such title has been determined, no right of private defence of property can exist. But a person whose legal title is beyond dispute is while in possession of property entitled to resist and attempt to deprive him of his property by force, provided that he does not exercise greater violence than the circumstances of the case warrant. **Jaipal v. King-Emperor**, 19 O. C. 18 = 17 Cr. L.J. 180 = 33 Ind. Cas. 820.

STUART, A.J.C.

References :—10 O.C. 196; 20 A. 459; 24 A. 143; 24 A. 298, *Appr.*; 14 B. 441, *Diss.*

(13-a) S. 97. See No. 103, *infra*.

(13-b) S. 99. See No. 103, *infra*.

(14) Ss. 100, 148, 325—*Right of private defence—Injury caused in self-defence.*

Four persons of the accused's party were digging drain. They were attacked by the complainants. Partisans of the parties ran up and a free fight ensued. One of the accused's party was killed and the arm of one of the complainant's party was fractured. The accused were convicted of offences under Ss. 148 and 325, Penal Code.

Held, that the accused must be acquitted. There was no safe ground for holding that they acted otherwise than in self defence either of themselves or of the deceased. **Bega v. The Crown**, 105 P.L.R. 1916.

LE ROSSIGNOL, J.

(15) Ss. 100, 304, para II, 325—*Right of private defence—Culpable homicide not amounting to murder—Grievous hurt—Fatal injury caused on sudden provocation.*

It appeared that the deceased came with a pitchfork in his hand and abused the sister of the accused, and her son's attack upon the latter provoked the accused, who, in a moment of anger and without any premeditation, struck the deceased on the head causing him fatal injury, and the accused was convicted of an offence under S. 304, para II, Penal Code. It was contended that the accused acted in the exercise of right of private defence and in any

Penal Code—(Continued).

case she could only be convicted for having committed grievous hurt to the deceased.

Held, that the right did not extend to the causing of deceased's death, but the conviction could only be maintained for the offence of grievous hurt. **Musammatt Siryan v. The Crown**, 69 P.L.R. 1916 = 17 Cr. L.J. 270 = 34 Ind. Cas. 990.

SHADI LAL, J.

(15-a) S. 103. See No. 103, *infra*.

(16) S. 107 (2)—*Conspiracy—Proof—Inference from conduct of parties.*

Though, to establish a charge of conspiracy, there must be agreement, there need not be proof of direct meeting or combination, nor need the parties be brought into each other's presence; the agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design. **Jumo Allarakhlo v. The Crown**, 9 S.L.R. 223 = 17 Cr. L.J. 233 = 34 Ind. Cas. 649.

PRATT, J.C.

References :—(1851) 5 Cox. 404, (1858) 1 F. & F. 213; 9 Bom. L.R. 347; 37 C. 467, R.

(17) S. 107, cl. (2) (3)—*Abetment of murder—Evidence—Proof.*

In order to sustain a conviction for the offence of abetment of murder whether by conspiracy or aiding (cls. 2 and 3 of S. 107 of the Indian Penal Code), a knowledge on the part of the person convicted that the actual murderer intended to commit the murder is essential. *In re Nennur Ram Reddi*, 17 Cr. L.J. 175 = 23 Ind. Cas. 655.

AYLING and NAPIER, JJ.

(17-a) S. 107. See No. 23, *infra*.

(17-b) S. 109. See Nos. 65 and 127, *infra*.

(18) Ss. 109, 114, 467, 471. See CRIM. PRO. CODE, No. 152, 14 A L.J. 74.

(19) Ss. 109, 120-B, 420—*Abetment by conspiracy—Evidence Act, S. 10.*

The accused M was a loader of the E. I. Railway Company. The case for the prosecution was that, when making out the weights in the consignment notes, he entered a weight less than the actual with the result that the Railway Company received a sum less than they were entitled to, and the other accused who were a firm of merchants paid, as consignees of goods, illegal gratification to M for this fraudulent work. It appeared that the name of M signed by himself appeared in one of the note books of the firm of D and J and the jama-kharach of the firm showed the payment of certain sums to accused M. The accused were tried and convicted by the Deputy Magistrate under Ss. 120-B, 420, 420/109, 161, 161/109, I.P.C., but the Sessions Judge in appeal, being of opinion that the conviction under S. 120-B could not stand on the ground that the offences were committed before that section came into force, took into consideration, only the direct evidence against M of making the endorsement of false weight and finding this to be insufficient acquitted all the accused.

Held—That the Session Judges rightly held that the conviction under S. 120-B, I.P.C.,

Penal Code—(Continued).

could not stand by reason of the fact that the offences were committed before that section came into force but he entirely omitted to notice that this was immaterial as the law of abetment includes abetment by conspiracy which was distinctly charged before the Magistrate under Ss. 420/109, I.P.C. That being so the circumstantial evidence of conspiracy to defraud the Railway Company was to be considered.

§ That, under S. 10 of the Evidence Act, the note books and *jama-kharach* of the firm of D and J could be used as evidence of abetment by conspiracy against M. **King-Emperor v. Mommohan Roy**, 20 C.W.N. 292 = 17 Cr. L.J. 439 = 35 Ind. Cas. 999.

HOLMWOOD and MULLICK, JJ.

(20) S. 114. See No. 18, *supra*.

(20-a) S. 115. See No. 105, *infra*.

(20-b) S. 116. See No. 105, *infra*.

(21) Ss. 120-A, 511—*Criminal conspiracy, what is—Attempt to fabricate false evidence.*

A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When to agree to carry it into effect the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, is punishable, if for a criminal object or for the use of criminal means.

Hence, where the accused were charged with conspiracy to bring about the conviction of certain persons, and the evidence showed that the conspiracy consisted in one of them taking photographs of the prisoners, another in arranging his camera and the third in arranging the prisoners themselves, *held* that the evidence was insufficient to prove a charge of conspiracy, as it was not proved that they took several steps tending to one obvious purpose and that, through a continued portion of time, they took steps leading to an end.

Held also that "in cases of an indictment for conspiracy when two people are indicted and are tried together, either both must be convicted or both must be acquitted."

Where, therefore, three persons were charged with having entered into a conspiracy and two of them were acquitted, the third person could not be convicted of conspiracy, whether the conviction be upon the verdict of a jury or upon his own confession.

Held, assuming a criminal intention to exist that photographing persons charged with the offence of dacoity, by itself, did not amount to attempting the offence of fabricating false evidence, within the meaning of S. 511, I.P.C. **Gulab Singh v. Emperor**, 14 A.L.J. 688 = 17 Cr. L.J. 431 = 35 Ind. Cas. 991.

KNOX and LINDSAY, JJ.

(22) S. 120-B. See No. 19, *supra*.

(23) Ss. 120-B and 107—*Proof of abetment of specified offence—Optional for prosecution to proceed under either section.*

Penal Code—(Continued).

The words "where no express provision has been made in this Code for the punishment of such a conspiracy" in S. 120-B of the Code do not mean that when there is proof of an abetment of an offence the charge should be for such abetment. It only includes cases where there is express provision for the punishment of the particular conspiracy alleged, and the only such case in the Code is that under S. 121-A, Indian Penal Code. It is optional for the prosecution to proceed for abetment of the offence by conspiracy under S. 107 or for the conspiracy as a substantive offence, under S. 120-B. This is in accord with the law in England. **Udhasing v. The Crown**, 10 S.L.R. 69 = 17 Cr. L.J. 366 = 35 Ind. Cas. 670.

PRATT, J.C., and HAYWARD, A.J.C.

(24) Ss. 124-A and 153-A—*Difference between Ss. 124-A and 153-A of Penal Code and S. 4 of the Press Act. See ACT I OF 1910 (PRESS), No. 1, (1916) 2 M.W.N. 385.*

(21-a) S. 141. See No. 36, *infra*.

(25) Ss. 141, 147. See CRIM. PRO. CODE, No. 232, 17 Cr. L.J. 92.

(26) S. 143—*Conviction for unlawful assembly—Findings necessary to justify an order for bond for keeping the peace. See CRIM. PRO. CODE, No. 29, 20 C.W.N. 197.*

(27) Ss. 143, 147—*Lawful assembly—Whether becomes 'unlawful' by exciting others to do unlawful acts—Assembly becoming unlawful—Rioting taking place—Duty of trying Magistrate—Carrying of "Sevali Kalis" whether unlawful.*

An assembly lawful in itself does not become unlawful merely by reason of its lawful acts exciting others to do unlawful acts (a).

An assembly of persons lawfully exercising their lawful rights would not become an unlawful assembly by repelling an attack made on them by persons who had no right to obstruct them, nor by exceeding the lawful use of their right of private defence (b).

Where an assembly, lawful in its origin, becomes an unlawful one, and both parties are accused of rioting, the trying Magistrate is bound to decide which party was the aggressor and how the riot actually arose.

Ordinarily there would be no presumption that the mere carrying of 'Sevali Kalis' would be unlawful (c). *In re Mukka Muthrian*, 16 Cr. L.J. 743 = 31 Ind. Cas. 343.

SPENCER, J.

References:—(a) 9 Q.B.D. 308 = 51 L.J.M.C. 117 = 47 L.T. 194 = 31 W.R. 275 = 15 Cox C.C. 138 = 46 J.P. 789, F. (b) 39 C. 896 = 15 Ind. Cas. 481 = 16 C.W.N. 1053 = 13 Cr. L.J. 481, F. (c) 31 Ind. Cas. 337, F.

(28) Ss. 143, 426, 451—*Charge under Ss. 426, 451, I.P.C.—Addition of charge under S. 143, I.P.C., by the Appellate Court—Legality—Carrying of "Sevali Kalis"—Whether unlawful. See CRIM. PRO. CODE, No. 183, 16 Cr. L.J. 737.*

(29) S. 147—*Rioting, charge of—Evidence—Common object, mention of.*

Penal Code—(Continued).

In cases of rioting the common object should be clearly and specifically set out in the charge (a).

Where the charge simply stated that the accused were guilty of rioting, and the accused complained during the trial that the charge did not state what the common object was, it cannot be said that they were not prejudiced by the omission in the charge. *In re Ramasamy Naidu*, 16 Cr. L.J. 809 = 31 Ind. Cas. 825.

KUMARASWAMI SASTRI, J.

References:—(a) 11 C. 106; 22 C. 276; 33 C. 295; 2 C.L.J. 516; 3 Cr. L.J. 153, *F*.

(30) S. 147—See Nos. 4, 25, 27, *supra*.

(31) Ss. 147, 325—*Rioting—Grievous hurt—Right of private defence—Implication of innocent persons—Burden of proof—Benefit of doubt—First report to Police—When not safe guide—Sentence.*

The first reports made to the Police in riot cases are not safe guides to charge the persons named therein, for friends and relations of the real culprits are more often than not promiscuously implicated.

An accused person who bears no injury should be convicted of having taken part in a fight only on very cogent other evidence.

If a person while acting in self defence uses greater resistance than he is entitled to use, he makes himself liable to punishment, though a severe sentence may not be necessary in his case. *Baqri v. The Crown*, 107 P.L.R. 1916 (Cr.) = 43 P.W.R. 1916 (Cr.) = 17 Cr. L.J. 450 = 36 Ind. Cas. 450.

LE ROSSIGNOL, J.

(32) Ss. 147, 325—*Riot and unlawful assembly, the result of causing hurt—Conviction under Ss. 147, 325—Separate sentences—Illegality—Appeal—Setting aside conviction under S. 325—Enhancing sentence under S. 147 to aggregate term imposed by Magistrate—Illegality—Not 'maintaining' sentence—Crim. Pro. Code, S. 423.*

Where the use of violence and causing of hurt was the thing which turned the assembly of the accused persons into an unlawful assembly and turned the unlawful assembly into a riot.

Held, that separate convictions under S. 147 and under S. 325, I.P.C., with separate sentences attached is illegal (a).

Where, on appeal, the Sessions Judge set aside the conviction under S. 325, I.P.C., but, while maintaining the conviction under S. 147 increased the sentence under S. 147 to the aggregate of the sentences inflicted by the Magistrate under the two sections.

Held that S. 423, Crim. Pro. Code, 1898, does not authorise the Sessions Judge to enhance the sentence and that he cannot be said to have been simply "maintaining" the sentence (b). *Mangal Singh v. The Crown*, 31 P.R. 2916 (Cr.).

JOHNSTONE, C.J.

References:—(a) 4 P.R. 1901 (Cr.), *F*. (b) 22 B. 760 and 30 M. 48, *R*.

Penal Code—(Continued).

(33) S. 148—*Rioting—Members of an unlawful assembly—Accused party originally in possession—Complainant's party entering upon the land during absence of former—Accused party armed with sticks seeking to recover possession—Conviction, if sustainable—Lawful possession, what is.*

Where the accused has sown the crops on certain land and harvested them but subsequently after the harvest, the complainant's party took possession of the land and began to plough it during the absence of the accused party, and later the accused party went to the fields armed with sticks to recover possession from the opposite party.

Held that the persons who have been found to have reaped the crops and to have been in possession of the property must be deemed to be lawfully in possession and that the persons who disturbed their possession must be taken to be trespassers and that the conduct of the accused in going to the field armed with sticks in order to maintain their right to possession did not constitute the offence of being members of an unlawful assembly or of rioting since they must be presumed to have taken the sticks to protect themselves and not to use them on the opposite party without provocation. *In re Samba Pillai*, 4 L.W. 125 = (1915) 2 M.W.N. 213 = 17 Cr. L.J. 391 = 35 Ind. Cas. 823.

SESHAGIRI AIYAR, J.

Reference:—41 C. 43, *F*.

(34) S. 148—See No. 14, *supra*.

(35) S. 149—See No. 4, *supra* and No. 102, *infra*.

(36) Ss. 149, 141, 304 (2)—*Members of lawful assembly—One of them committing an offence—His companions not liable. Mihan Singh v. Crown*, 26 P.R. 1914 (Cr.) = 16 Cr. L.J. 60 = 26 Ind. Cas. 652 = 24 P.L.R. 1916. See Final Part, 1914, Col. 187.

(37) Ss. 149, 302—*Party of men going out together heavily armed for committing dacoity—Stoppage on road—Some members firing at attacking party—Death of two among latter—Liability of each of the party for murder—Conviction—Legality—Charge under S. 149—Omission to set out common object—Irregularity—No substantial injustice—S. 537, Crim. Pro. Code. Dhan Singh v. Crown*, 16 P.R. 1915 (Cr.) = 17 P.W.R. 1915 (Cr.) = 16 Cr. L.J. 689 = 30 Ind. Cas. 737. See Final Part, 1915, Col. 176.

(38) S. 153-A—*Distinction between S. 109(b), Crim. Pro. Code, and. See CRIM. PRO. CODE, No. 43, 20 C.W.N. 199.*

(39) S. 153-A—See No. 24, *supra*.

(40) Ss. 154 and 155—*Death of complainant—Application by the son of complainant to proceed with the case—Acquittal under S. 247, Crim. Pro. Code—Reference under S. 434, Crim. Pro. Code—Interference by High Court—Practice in case of acquittals.*

On the application of the complainant in a case of rioting which ended in a conviction, proceedings under Ss. 154, 155, I.P.C., were instituted against the person in whose interest the riot had been committed. On the date

Penal Code—(Continued).

fixed for hearing, the complainant's son appeared in Court, his father having died in the meantime, and asked to be allowed to go on with the case, but the trying Magistrate acquitted the accused under S. 247, Crim. Pro. Code, being of opinion that he had no option in the matter.

Held—That it is open to doubt whether S. 247, Crim. Pro. Code, was intended to apply to a case like the present. The section seems to apply to the case of a complainant who is alive but does not appear.

That in any view the trying Magistrate should have proceeded with the case.

That the practice of the High Courts has always been to refuse to interfere in revision with acquittals except for special reasons; but in the present case which was one of considerable importance involving the peace of the district and in which the Magistrate had not exercised his discretion and given reasons for refusing to go on with the case, the order of acquittal should be set aside. **Damoo Sahu v. Jitan Dusadh**, 20 C.W.N. 862=1 Pat. L.J. 264.

CHAMIER, C.J., and JWALA PRASAD, J.

(41) S. 155. See No. 40, *supra*.

(42) S. 174.—Partition proceedings submitted to Collector for confirmation—Summons issued to accused to appear before Collector—Refusal to take summons—Revision. See U. P. ACT III OF 1901 (LAND REVENUE), No. 1, 14 A. L.J. 1069.

(42-a) S. 182. See CRIM. PRO. CODE, Ss. 195, 476.

(42-b) S. 182. See PENAL CODE, S. 211.

(42-c) S. 182. See SANCTION TO PROSECUTE.

(43) S. 184. See SANCTION TO PROSECUTE, No. 3, 10 S.L.R. 65.

(43-a) S. 182. See CRIM. PRO. CODE, No. 251-c, 1 Pat. L.J. 553.

(44) S. 182, 211—Charge made to Police found to be false—Same charge repeated to Magistrate and action taken thereon—Right of person aggrieved to institute prosecution in respect of the charge made to the Police. See CRIM. PRO. CODE, No. 137, U.B.R. (1915), 4th Qr., p. 9b.

(44-a) Ss. 183, 186, 253—Warrant—Direction to bailiff to attach goods—Execution by Nazir—Resistance to his entry—No offence—No mention in the warrant of day before which it is to be executed—Illegality—Civ. Pro. Code (1909), O. XXI, r. 24, O. XXXVIII, r. 7.

Where a Civil Court issued a warrant directed to the bailiff of the Court directing him to seize certain goods that were in accused's workshop, where the warrant specified no day upon which or before which it was to be executed and where the Nazir of the Court who sought to enter the defendant's house for the purpose of executing such warrant was resisted by the accused.

Held, that the accused committed no offence. The Nazir was not the person who was clothed with lawful authority under the warrant to

Penal Code—(Continued).

execute it. If he took upon himself the voluntary execution of it, the execution so made by him was not in pursuance of the warrant and therefore not lawful (a).

The warrant was bad also because it was absolutely blank in point of time, uncertain and would operate as a continuing authority indefinitely (b). **Mohini Mohan Banerji v. King-Emperor**, 1 Pat. L.J. 560=36 Ind. Cas. 871.

ATKINSON and KINGSFORD, JJ.

References:—(a) 37 C. 122, F. (b) 40 C. 849, F.

(45) S. 186—Obstructing a public servant in the discharge of his public functions—Local inspection by Munsif—Water ways.

In a suit in which a public right of way was claimed, there was a dispute not only as to whether the public right of way claimed existed but also as to whether there were not certain other public ways, the existence of which would discredit the plaintiff's allegations in the suit. The Munsif trying the case went to the spot to hold a local inspection; he wanted to pass in a boat along a water-way but, was not allowed to do so by the petitioners who claimed it as their private property. It was found that it was a water-way used at least by the people of a particular locality. None of the petitioners were parties to the suit pending before the Munsif in which the local inspection was held. The petitioners were convicted under S. 186, I.P.C.

Held—That no offence under S. 186, I.P.C., was committed. **Nishi Kanta Pal v. The Emperor**, 20 C.W.N. 857.

CHITTY and WALMSLEY, JJ.

(46) S. 186—Process-server—Obstruction to attachment **Mussammat Jatto v. Crown**, 30 P.W.R. 1915 (Cr.)=16 Cr. L.J. 700=30 Ind. Cas. 748. See Final Part, 1915, Col. 177.

(47) Ss. 186, 224—Running away to avoid arrest under warrant of Civil Court, when no offence.

In this case 'he *Amin* said that he tried to arrest the accused under a warrant of a Civil Court, but the petitioner ran away. *Held*, that this was not either obstructing a public servant in the discharge of his public functions within the meaning of S. 186, I.P.C., nor does it bring the matter within S. 224, I.P.C., which deals with the offence of offering resistance or illegal obstruction to the lawful apprehension of a person for an offence with which he is charged, **Peeru Muhammad Lebbal v. Swaminatha Pillai**, 17 Cr. L.J. 71=32 Ind. Cas. 663.

ABDUR RAHIM and AYLING, JJ.

(48) Ss. 186, 434—Surveyor—Placing boundary marks and measuring lands—No authority to survey the lands—Act done in good faith—Obstruction to surveyor—Offence committed—**Madras Act IV of 1897 (Survey and Boundary)**, S. 17-A.

A Surveyor empowered to survey an estate under S. 17 (a) of Act IV of 1897, put up some boundary marks on what he thought was the estate boundary and was engaged in taking

Penal Code—(Continued).

measurements on what he thought was the estate land when the 'accused came across' his chain and after asking who he was, told him not to measure. Accused who also removed the marks already set up were charged with offences punishable under Ss. 186 and 434, I.P.C.

Held, that the accused were guilty of offences under Ss. 186 and 434 of the I.P.C., even though the land on which the Surveyor put the boundary marks was not included in the notification which authorised the Surveyor to carry on his operations (a).

Even if the Surveyor had no authority to go upon the Estate lands to measure them and to fix demarcation stones upon them, if he, in good faith, believed that he had such authority or that the lands were actually in the estate, the obstruction would fall under S. 186. **Public Prosecutor v. Madhava Bhonjo Santos**, 31 M.L.J. 305=(1916) 2 M.W.N. 183=4 L.W. 377=17 Cr. L.J. 481=36 Ind. Cas. 161.

OLDFIELD and SADASIVA AIYAR, JJ.

References:—(a) 19 M. 349; 21 M. 78; 21 M. 296, F.; 23 C. 896; 22 C. 286; 12 B 377; 13 B. 168; 8 A. 293, R.

(49) S. 188—*Disobedience to an injunction issued by a Civil Court, if punishable under—'Promulgated,' import of. Pommali Chintakath Mammall v. Thazhithattathkutti Ammu*, 2 L.W. 410=17 M.L.T. 391=16 Cr. L.J. 592=30 Ind. Cas. 141=39 M. 543. See Final Part, 1915, Col. 178.

(50) S. 188—*Disobedience of an order—Injunction issued to a guardian not to marry wards under his charge—Prosecution. Emperor v. Mallapa Mallapa Tavargi*, 17 Bcm. L.R. 676=3 Bcm. Cr. Cas. 89=16 Cr. L.J. 668=30 Ind. Cas. 652. See Final Part, 1915, Col. 178.

(51) S. 188—*Prohibition order under S. 144, Crim. Pro. Code, passed without any evidence—Prosecution for disobedience of order not properly passed—Cognizance of case under S. 188 by the same Magistrate who passed the order disobeyed. See CRIM. PRO. CODE, No. 84, 20 C.W.N. 981.*

(52) Ss. 192, 193—*False evidence, fabrication of—Document, admissibility of—Intention and not admissibility creates criminal offence. Baroda Kanta Sarkar v. Emperor*, 16 Cr. L.J. 620=30 Ind. Cas. 444. See Final Part, 1915, Col. 179.

(52-a) S. 193. See CRIM. PRO. CODE, Ss. 195, 476.

(52-b) S. 193. See SANCTION TO PROSECUTE.

(53) S. 193—*Contradictory statements by witness in one and the same deposition—Prosecution for perjury—Presumption in favour of good faith.*

For a prosecution under S. 193, I.P.C., the Court must be satisfied that the intention of the witness was dishonest.

Prosecutions in respect of contradictory statements made in one and the same deposition are maintainable, if the contradiction was

Penal Code—(Continued).

made not to correct a *bona fide* mistake, but with dishonest intention (a).

But every possible presumption in favour of good faith should be made, for it would be most undesirable that a witness should be afraid to correct a mistake made in his deposition for fear of rendering himself liable to a prosecution for perjury. Such a fear would frustrate the object of cross-examination. **The King-Emperor v. Girdharimal wd. Mulral**, 9 S.L.R. 202=17 Cr. L.J. 240=34 Ind. Cas. 656.

PRATT, J C. and BOYD, A.J.C.

References:—(a) 10 C. 937; 26 M. 55, R.

(54) S. 193—*Giving false evidence—Statement complained of, literally true—No offence.*

To support a prosecution for giving false evidence punishable under S. 193, Penal Code, it must be shown that the false statement charged against the accused is literally false. There must be a statement of fact which is false. It is no offence if the fact stated is true but some circumstance is suppressed with a result that a wrong inference may be deduced. **Ratansi Daya v. The Crown**, 9 S.L.R. 170=32 Ind. Cas. 688=17 Cr. L.J. 96.

PRATT, J C. and BOYD, A.J.C.

(55) S. 193—*False statement in the course of a non-judicial inquiry—Indian Penal Code, S. 193—Reg. VIII of 1827. See ACT X OF 1873 (OATHS), No. 1, 10 S.L.R. 64.*

(56) S. 193—*Statement made by witness with reference to his re-collection and belief—Prosecution for perjury whether justifiable—Interference in revision. See CRIM. PRO. CODE, No. 305, 14 A.L.J. 851.*

(57) S. 193—*Statement of a nonconfessional nature recorded as 'statement'—Admissibility as evidence—Alternative charge for perjury. See CRIM. PRO. CODE, No. 120, 20 M.L.T. 21.*

(58) S. 193—*Perjury committed in judicial enquiry—Jurisdiction of High Court to sanction prosecution. See CRIM PRO. CODE, No. 136, 16 Cr. L.J. 740.*

(59) S. 193—*Offence committed before one Magistrate—Succeeding Magistrate, jurisdiction of. See CRIM. PRO. CODE, No. 339, 17 Cr. L.J. 40.*

(60) S. 193. See SANCTION TO PROSECUTE, No. 4, 52 P.W.R. 1916 (Cr.).

(61) S. 193. See No. 52, *supra*.

(61-a) S. 193. See SANCTION TO PROSECUTE, No. 4-b, 9 Bur. L.T. 203.

(62) Ss. 193, 209—*Application for succession certificate—Allegations false—Enquiry under S. 476, Crim. Pro. Code—Order for prosecution under Ss. 193 and 209, Penal Code—Appeal pending in High Court—Stay of Criminal proceedings.*

In the course of a proceeding upon an application for revocation of the grant of a succession certificate, the District Judge found that D, the applicant for the certificate, was not, as he alleged, related to the deceased, in any way and ordered his prosecution under Ss. 193 and 209, I.P.C. D then filed an appeal to the High

Penal Code—(Continued).

Court and asked for stay of criminal proceedings pending the hearing of the appeal :

Held—That to make a declaration in the rule for stay of proceedings as to the correctness or otherwise of the order of the District Judge would be to prejudge an issue which is likely to come before the Bench who will hear the appeal. The proceedings against the appellant under Ss. 193 and 209, I.P.C., were stayed pending the hearing of the appeal. **Debi Mahto v. King-Emperor**, 20 C.W.N. 1116.

ROE and JWALA PRASAD, JJ.

(63) S. 195—*Perstading witnesses to make statements, if offence*, **Durga Prasad v. Emperor**, 16 Cr. L.J. 667=30 Ind. Cas. 651. See Final Part, 1915, Col. 179.

(63-a) S. 196. See SANCTION TO PROSECUTE.

(64) S. 196—*Offence under, what constitutes*—Abortive attempt to secure medical certificate, no offence under. See CRIM. PRO. CODE, No. 311, 17 Cr. L.J. 388.

(65) Ss. 197, 198, 109—*Issuing or signing a false certificate—"Certificate," meaning of*—Civ. Pro. Code (1908), O. XXI, r. 2—*Petition in Court stating satisfaction of decree if a certificate within the meaning of the sections.*

The two petitioners were convicted under Ss. 197 and 198 and Ss. 197/109 and 198/109 respectively, the charge being that one of the petitioners purporting to represent the decree-holder in a certain suit signed and filed a petition in the Court of the Subordinate Judge, stating, contrary to fact, that the other petitioner who was the judgment-debtor had paid off the decretal amount to the decree-holder through him, *her* Ammuktear.

Held—that the petition in question filed before the Subordinate Judge was not a certificate within the purview of Ss. 197 and 198, I.P.C., neither of the requirements of a "certificate" within the meaning of the sections being satisfied in the case.

That there is no provision of law which requires a decree-holder or his agent to give or sign a certificate of payment or adjustment, nor is there any provision of law which makes the statement of the decree-holder or his agent as to payment or satisfaction admissible in evidence as such certificate, that is, without further proof.

That the word "certificate" may be used as synonymous with certification but that is clearly not its meaning in Ss. 197 and 198, I.P.C. **Mahabir Thakur v. The King Emperor**, 20 C.W.N. 520=23 C.L.J. 423=17 Cr. L.J. 140=33 Ind. Cas. 316.

CHITTY and WALMSLEY, JJ.

(66) S. 199. See No. 65, *supra*.

(66-a) S. 201. See No. 152, *infra*.

(67) Ss. 201, 302—*Murder, causing evidence of murder to disappear—Propriety of alternative indictments—Principal and accessory after fact—Principal if can be convicted under S. 201*, **Sumanta Dhupl v. King Emperor**, 20 C.W.N. 166=23 C.L.J. 333=17 Cr. L.J. 4=32 Ind. Cas. 132. See Final Part, 1915, Col. 181.

Penal Code—(Continued).

(68) S. 209. See LEGAL PRACTITIONERS ACT (XVIII OF 1879), No. 1, 14 A.L.J. 82.

(69) S. 209. See No. 62, *supra*.

(69-a) S. 211. See CRIM. PRO. CODE, Ss. 195, 476.

(69-b) S. 211. See SANCTION TO PROSECUTE.

(70) S. 211—*Offence by a man aged 65 years—Punishment—How far age to be taken into account in passing sentence.*

Where the accused was convicted of an offence under S. 211, I.P.C., of having brought a maliciously false charge of riot, and the Magistrate, taking into consideration the age of the accused who was said to be about 65 years, imposed a fine of Rs. 1,000, *held*, in revision, that, although a somewhat severer punishment should be imposed, the discretion of the Magistrate ought not to be interfered with to enhance the sentence.

Ayling, J.—The offence is one which should ordinarily be punished with a substantive sentence of imprisonment. The age of the accused is a factor to be taken into consideration in deciding the nature of the sentence. But if for that reason the Magistrate deems fit only to impose a fine instead of imprisonment, the amount of the fine should be so determined as to inflict on the accused a punishment comparable with what he would suffer had he been a younger man. **Emperor v. P. R. S. Muthia Chetti**, (1916) M.W.N. 1=17 Cr. L.J. 158=33 Ind. Cas. 638.

ABDUR RAHIM and AYLING, JJ.

(71) S. 211—*False information to the Police—Legality of sanction to prosecute*. See CRIM. PRO. CODE, No. 3, 24 C.L.J. 134.

(71-a) S. 211—*False charge—Proof of charge of specific offence—Intention to set criminal law in motion.*

S. 211 requires great deal more than a mere suggestion of an inference. There must be a charge of some specific offence made with the intention and object of setting the criminal law in motion against the man who is said to have committed the offence. Further the circumstances in which the statement was made and the form of words used should also be considered. **Nga Bohn She v. Emperor**, 36 Ind. Cas. 834.

TWOMEY, J.

(72) S. 211—*Proceedings in relation to which sanction of Court necessary—Information to Police followed by complaint in Court*. See CRIM. PRO. CODE, No. 134, 20 C.W.N. 1347.

(73) S. 211. See No. 44, *supra*.

(74) S. 215—*Cow lost from grazing ground—Accused taking money from complainant and promising to return cow—Failure to do so—Applicability of S. 215*, **Sharfa v. Crown**, 9 P.R. 1915 (Cr.)=16 Cr. L.J. 541=29 Ind. Cas. 669=98 P.L.R. 1916. See Final Part, 1915, Col. 181.

(75) S. 224—*Escape from custody after arrest on charge subsequently not proved if offence—Opium Act (I of 1878), Ss. 9, 15.*

The first petitioner was arrested under S. 15 of the Opium Act for being in illicit possession

Penal Code—(Continued).

of opium and while in such custody he was rescued by the other petitioners. The first petitioner was convicted under S. 224, I.P.C., and the others under S. 225, I.P.C. The first petitioner was also separately prosecuted and convicted under S. 9 of the Opium Act, but the High Court in revision set aside that conviction on the ground that the substance seized from him was not opium within the meaning of the Act.

Held—That under S. 224, I.P.C., it would be an offence for a person to escape from custody after he had been lawfully arrested on a charge of having committed an offence although he may not be convicted of such latter offence.

That the arrest of the first petitioner under S. 15 of the Opium Act was legal and at the time of the rescue he was in lawful custody. **Mahomed Kazi v. The King-Emperor**, 20 C. W.N. 1294=43 C. 1161=17 Cr. L.J. 379=35 Ind. Cas. 811.

SANDERSON, C.J., and WALMSLEY, J.

(76) S. 224. See No. 47, *supra*.

(77) Ss. 224, 333, 34—*Arrest made by Chaukidars—Causing grievous hurt to public servant in discharge of duty—Act XX of 1856, S. 52—The United Provinces Town Areas Act (II of 1914), S. 41.*

Two chaukidars arrested one F on suspicion that he was in possession of stolen property. While he was being taken to the Police Station, he was rescued from the custody of the chaukidars by certain persons: *Held* that the chaukidars were not members of the Police force, and had no authority to arrest F on mere suspicion inasmuch as S. 52 of Act XX of 1856 whereunder they had been appointed was repealed by the United Provinces Town Areas Act, S. 41.

Held, also, that F could not be convicted under S. 333 of the Penal Code, because it was necessary to make out that F and the actual rescuers were acting in pursuance of a common intention within the meaning of S. 34. **Jafar v. Emperor**, 14 A.L.J. 789=17 Cr. L.J. 549=36 Ind. Cas. 577.

SUNDAR LAL, J.

(78) S. 225—*Theft in custody of chowkidar—Rescue—No offence—Chowkidar, not Police officer—Village Chowkidari Act (VI of 1870, B.C.), Ss. 29, 40.*

Under Ss. 29 and 40 of the Village Chowkidari Act (Bengal Act VI of 1870), the chowkidar is not authorised to detain the thief in his custody and he is not a Police Officer within the meaning of the Act and, therefore, his custody of the thief would not be lawful; hence rescuing the thief from the custody of the chowkidar is no offence under S. 225, Penal Code. **Dirajadul v. Emperor**, 17 Cr. L.J. 164=33 Ind. Cas. 644.

GREAVES and WALMSLEY, JJ.

(79) S. 225 (B)—*Resistance to lawful apprehension—Actual resistance necessary.*

In order to constitute an offence under S. 225 (B), Penal Code, something more is required than an evasion of arrest or a mere assertion by the person sought to be arrested that he would

Penal Code—(Continued).

not like to be arrested or that a fight would be the result of such arrest. The officer armed with a warrant of arrest should produce the warrant before the person sought to be arrested and make an attempt to arrest him, and then if he is resisted, an offence under the section is committed. **Emperor v. Aljaz Husain**, 14 A. L.J. 731=38 A. 506=17 Cr. L.J. 413=35 Ind. Cas. 973.

SUNDAR LAL, J.

(80) S. 228—*Offering insult to a public servant sitting judicially—Application for transfer.*

An application containing certain unhappy expressions presented to a Court, in which the applicants occupied the position of accused persons, does not raise the presumption that the intention was to offer insult to the presiding officer of the Court. **Murli Dhar v. Emperor**, 14 A.L.J. 247=38 A. 284=17 Cr. L.J. 163=33 Ind. Cas. 643.

PIGGOTT, J.

(81) S. 228—*Audible remark in Court—Interruption of proceedings—Intention, if inferable. In re Ramasami Gounden*, 2 L.W. 686=29 M.L.J. 274=16 Cr. L.J. 610=30 Ind. Cas. 434. See Final Part, 1915, Col. 183.

(82) S. 243. See No. 1, *supra*.

(83) S. 255-B—*Bailiff—Accused not touched by him—No arrest—No offence committed—Escape from lawful custody—Arrest, —Meaning—Crim. Pro. Code, S. 46 (1).*

Where the bailiff of a Civil Court met the accused in the street, showed his staff, told him he was under arrest but did not touch him, and where the accused, instead of going with him, walked away and entered a shop.

Held, that the accused was not arrested at all and that therefore he could not be convicted; under S. 225, I.P.C., of the offence of escaping from lawful custody.

The method of a civil arrest is not different from that prescribed by the Crim. Pro. Code (*vide* S. 46 (1), Crim. Pro. Code).

An arrest is a restraint of the liberty of the person. Unless there is submission, actual contract is necessary to effect it (a). **Aludomal, son of Dasamali v. Crown**, 9 S.L.R. 141=17 Cr. L.J. 87=32 Ind. Cas. 679.

FRATT, J.C., and BOYD, A.J.C.

References :—(a) 1 Car. and P. 153; 4 Bing. (N.C.) 212 and L.J.R. 38 Ex. 156, R.

(84) S. 289—*Negligent conduct with respect to animal.*

The essential ingredient of an offence under S. 289 of the Indian Penal Code is that there should be probable danger to human life or limb from the negligence shown in the custody of the animal. **Emperor v. Shivbharan Ayodhyaprasad**, 18 Bom. L.R. 682=3 Bom. Cr. Cas. 203=17 Cr. L.J. 383=35 Ind. Cas. 815.

BATCHELOR and SHAH, JJ.

(85) S. 294-A—*Keeping a place for drawing a lottery—Publishing a proposal to pay any sum on any event or contingency relative to the drawing of any ticket, lot, number or figure in a lottery.*

Penal Code—(Continued).

The essence of a lottery is the distribution of prizes by lot or chance, and it makes no difference that the distribution is part of a genuine mercantile transaction.

It is not necessary for an offence under the first part of S. 294-A of the Penal Code that the place should be kept solely for the purpose of drawing a lottery. *G. C. Chakrabatty v. v. King-Emperor*, 9 Bur. L.T. 124=17 Cr. L. J. 143=33 Ind. Cas. 319.

PARLETT, J.

(86) Ss. 297, 441—*Meaning of the word "trespass"—Land in which place of sepulchre is included belonging to accused—Effect—Gist of offence under S. 297—Knowledge of accused—Presumption—Construction of penal statutes.* *Umar Din v. The Crown*, 23 P.R. 1915 (Cr.)=16 Cr. L.J. 683=30 Ind. Cas. 731=40 P.W.R. 1915 (Or.) See Final Part, 1915, Col. 184.

(87) S. 299, Expl. 3—*Culpable homicide of new born baby—Nature of proof required—Child when becomes a human being—English and Indian Law.* *Mussammatt Budho v. The Crown*, 29 P.R. 1915 (Cr.)=17 Cr. L.J. 20=82 Ind. Cas. 148. See Final Part, 1915, Col. 185.

(88) Ss. 299, 300—*Charge of murder—Provocation—Insufficient—Reduction of sentence—Statement of accused pleading guilty, value of.* *In re Krushno Kariko*, 16 Cr. L.J. 611=30 Ind. Cas. 435. See Final Part, 1915, Col. 185.

(89) Ss. 299, 300, 304, 326—*Trial for murder—Intention of accused—Directions to jury—Points for the consideration of the jury.*

Where an accused is charged with murder, and the jury find that the accused caused the injuries which resulted in death, they should be directed to find with what intention the accused caused the injuries. If the jury should find that the accused stabbed with the intention of causing only such bodily injuries as were likely to cause death, the offence would amount to culpable homicide not amounting to murder, punishable under the first part of S. 304, Penal Code.

The frame of the accused's mind at the time of the offence, the nature of the weapon used, the number and nature of the wounds, etc., are all considerations which should guide the jury in arriving at a finding as to the intention of the accused. *Kya Nyun v. King-Emperor*, 8 L.B.R. 125=17 Cr. L.J. 154=33 Ind. Cas. 634.

HARTNOLL, OFFG. C.J., and TWOMEY, J.
Reference:—3 L.B.R. 122 (123), R.

(89-a) Ss. 299, 301—*Scope of—Intending death of one and causing death of another—Murder.*

Mussammatt Jeoli had been carrying on an intrigue with a Lodhi who gave her some poison to administer to her husband. She prepared *halwa* mixed with poison which was eaten by one Madania who died as the result thereof. The husband and three others also partook of the *halwa* and suffered considerably but did not die. She, however, intended to murder her husband and not Madania.—*Held* that the accused was guilty of murder, notwithstanding that there was no intention actually

Penal Code—(Continued).

to murder Madania (a). *Jeoli v. Emperor*, 15 A.L.J. 13=36 Ind. Cas. 473=17 Cr. L.J. 505.

RICHARDS, C.J., and BANERJI, J.

References:—(a) 13 Ind. Cas. 833=22 M.L. J. 333, F.

(90) S. 300—*Brutal assault with lathis—Death caused thereby—When amounts to murder.* *Saundino walad Bago v. The Crown*, 9 S.L.R. 92=16 Cr. L.J. 710=30 Ind. Cas. 998. See Final Part, 1915, Col. 186.

(91) S. 300, Except. 2—*Proclaimed offender murdering Police official trying to arrest him—Publication of proclamation not proved—Failure to file statement, effect of.*

A proclaimed offender was tried for murdering a Police Officer trying to arrest him. The prosecution failed either to file the statement referred to in clause 3. S. 87, of the Cr. P.C., or to adduce any other evidence of publication. *Held* that the accused was entitled to the benefit of exception 2 to s. 300, I.P.C., and was guilty of culpable homicide not amounting to murder. *In re Kayambu Teyan*, 17 Cr. L.J. 79=32 Ind. Cas. 670.

AYLING and NAPIER, JJ.

(92) S. 300, cl. 3—*Death caused by a single blow—Culpable homicide not amounting to murder.*

Owing to a quarrel which the deceased had with the accused, the latter armed himself with an iron-shod stick and struck one blow with it on the head of the deceased which caused his death. He was convicted of murder. On appeal:

Held, that, inasmuch as it was possible that the blow struck by the accused exceeded in violence the injury he had in view at the moment of striking it, the conviction should be altered from murder to culpable homicide not amounting to murder. *Emperor v. Sardarkhan*, 18 Bom. L.R. 793=3 Bom. Cr. C. 211=17 Cr. L.J. 530=36 Ind. Cas. 578.

BEAMAN and HEATON, JJ.

(93) S. 300, Except. 4—*Accused using knife when there is no risk of even serious hurt to him—Offence.*

Except. 4 to S. 300, Penal Code, cannot apply where the accused used a knife when there was no appreciable risk of even serious hurt to his person. *In re Muthumada Nadan*, 16 Cr. L.J. 747=31 Ind. Cas. 347.

SADASIVA AYYAR and PHILLIPS, JJ.

References:—4 Crim. Law Rev. 373, F.

(94) S. 300. See Nos 88, 89, *supra* and No. 103, *infra*.

(95) Ss. 300, 302—*Murder—First report not mentioning name of accused—Eye-witness denying identification of offender before the Police—Absence of strong motive and direct evidence—Value of circumstantial evidence.*

Held, that, in the absence of any strong motive for committing the murder and direct evidence of connecting the accused with its commission by inflicting numerous injuries with a knife, the following circumstantial evidence is insufficient for conviction especially

Penal Code—(Continued).

when the name of the offender is not given in the first Report to the Police:—

A person professing to be an eye-witness is not to be believed when he has denied having recognized the culprit at the time of committing the crime.

(1) Finding a blood-stained *Kurta* in the accused's house where he and his two brothers also reside.

(2) Following tracks from the scene of the murder to the house of the accused which correspond with shoes worn by him.

(3) His pointing out a blood-stained knife concealed in a bush on the way from the murdered man's house to that of his own. *Tajoo v. The Crown*, 22 P.W.R. 1916 (Cr.) = 17 Cr. L.J. 479 = 34 Ind. Cas. 999.

RATTIGAN and SCOTT-SMITH, JJ.

(96) Ss. 300, 304—*Culpable homicide not amounting to murder—Provocation, grave and sudden—Wife found lying with stranger, murder of.* *Ajudhi v. Emperor*, 16 Cr. L.J. 625 = 30 Ind. Cas. 449. See Final Part, 1915, Col. 187.

(97) Ss. 300, *except* (2), 304—*Private defence, limits of the right of—Absence of warning, effect of—Sentence.*

The right of private defence may arise when a person sees a man approaching him with a stick trailing in his hand, for he might expect the man to hit him with the stick. But when such a person claiming the right has another companion by his side who is himself properly armed, he should at least call on the person approaching him with the stick to drop down his stick before resorting to such a dangerous mode of exercising the right as firing a shot at such person.

Firing without giving such warning would be exceeding the right of private defence (a).

In a case of this kind a long term of imprisonment is not called for and the sentence of a year's imprisonment would be excessive.

Leniency may well be shown where the accused has acted in good faith for the protection of his person or property and has erred only in the degree of force or violence used or in acting too hastily, as in this case.

The second part of S. 304, Penal Code, refers only to cases in which the offender has no intention of injuring any one in particular (b). *Nga Tun v. Emperor*, 17 Cr. L.J. 335 = 35 Ind. Cas. 511.

TWOMEY, J.

References:—(a) & (b) 30 L.B.R. 122, R.

(98) S. 302—*Charge of murder—Guilt to be established beyond reasonable doubt.*

A tribunal in a case of murder has to be satisfied not of the probability but of the certainty beyond any reasonable doubt, that is to say, doubt which would operate on the mind of a reasonable man, that the accused is guilty. Per Walsh, J. *Musammatt Anandi v. Emperor*, 17 Cr. L.J. 102 = 32 Ind. Cas. 838.

PIGGOTT and WALSH, JJ.

(99) S. 302—*Murder—Provocation grave not sudden—Sentence.*

Case in which the appellate Court upheld the conviction for murder but reduced the sentence

Penal Code—(Continued).

to one for transportation for life on the ground that the offence was committed under serious provocation though not sudden. *Puran v. Emperor*, 17 Cr. L.J. 190 = 33 Ind. Cas. 830.

STUART and KANHAIYA LAL, A.J.CS.

(100) S. 302—*Murder—Proof of, Motive, if absolutely necessary, before upholding conviction.*

It is not an invariable rule that in all cases the High Court should be convinced that there is very satisfactory proof for motive before upholding a conviction for murder passed by a Sessions Judge. *Torap Ali v. Emperor*, 17 Cr. L.J. 386 = 35 Ind. Cas. 818.

SANDERSON, C.J., and WALMSLEY, J.

(100 a) S. 302—*Culpable homicide—Accused pointing out places of occurrence of offence—Presumption of guilt of murder.*

When an accused person charged with murder is able successfully to point out not one but several spots concerned in the commission of the offence there is a presumption that he had something to do with the murder. *Matu v. Emperor*, 36 Ind. Cas. 838.

JOHNSTONE, C.J., and JONES, J.

References:—12 Ind. Cas. 652 = (1911) 2 M. W.N. 478 = 21 M.L.J. 1071 = 12 Cr. L.J. 564; 13 M. 426 = 1 Weir 290 = 4 Ind. Dec. (N.S.) 1009, R.

(101) S. 302. See Nos. 9, 37, 67, 95, *supra* and No. 109, *infra*.

(102) Ss. 302, 149, 34—*Murder—Gang of persons—Common object of the gang—Arrest of two persons out of that gang—Murder of one of the arresting party by a member of the gang still at large.* *Emperor v. Hari Bijal*, 17 Bom. L.R. 906 = 3 Bom. Cr. Cas. 118 = 16 Cr. L.J. 745 = 31 Ind. Cas. 345. See Final Part, 1915, Col. 189.

(103) Ss. 302, 300, cl. (2), 97, 99 and 103—*Theft of crops—Assault on the thief with chavis and dangs—Infliction of severe wounds—Death of the thief—Offence committed—Murder—Private defence of property—Exceeding the right—Provocation—Reduction of sentence.*

The five accused persons along with another went out on a moonlight night armed with chavis and dangs and assaulted two thieves who were stealing crops from their field. In the course of their assault they inflicted on one of the thieves severe wounds on the head and face as a result of which, the wounded man died instantaneously or within an hour or two after the assault. The accused who were found to have had a common object were convicted of murder and sentenced to death.

Held that S. 100, *Except* 4, cannot be invoked and that the accused were rightly convicted of an offence under S. 302, I.P.O. (a).

Held further that the accused inflicted more harm than was necessary for the purpose of defence of property and that Ss. 97, 99, *Except* 4 and 103 of the Penal Code did not apply to the present case.

Held also, that as there was some provocation, the sentence in the case of each accused was

Penal Code—(Continued).

reduced to one of transportation for life. **Mam-mun v. The Crown**, 35 P.R. 1916 (Cr.).

JOHNSTONE, C.J., and BROADWAY, J.

References:—(a) 29 P.R. 1902 (Cr.) and 36 C. 296, *Dist.*

(104) Ss. 302, 304—*Stabbing with intent to cause injury likely to cause death—Death caused thereby—Offence.*

Held that where it was found that the accused caused the death of the deceased by stabbing him with the intention of causing such injury as was likely to cause death, the most that the accused could be convicted of on such finding was culpable homicide not amounting to murder, and the conviction of murder was wrong. **Maung Aung Tun v. Emperor**, 17 Cr. L.J. 544 = 36 Ind. Cas. 592.

FOX, C.J.

*Reference:—*3 L.B.R. 122, *F.*

(105) Ss. 302, 328, 115, 116—*Jury, misdirection to—Confession before village Salish—Evidence Act, S. 24—Person in authority—Abetment of murder by poisoning and causing hurt by means of poison—Absence of evidence as to amount of poison proposed to be administered.*

The accused was charged under Ss. 302/115 and 328/116, I.P.C., the case for the prosecution being that the accused suspecting an intrigue between her husband and a certain woman gave a powder to a girl with instructions to give it to the woman. Owing to the intervention of a relative of the girl, the powder was not given to the woman. The accused asked the girl to give her back the powder and the girl returned a portion of it. On the matter getting about in the village a *Salish* was summoned before whom the accused made a confession and produced the powder. The chemical analyser's report was that traces of white arsenic were found in the powder but it was not disclosed how much arsenic was there. It was found that the president and members of the *Salish* told the accused that if she confessed they would compromise the matter. The Sessions Judge in charging the jury said that the confession was not inadmissible because the members of the *Salish* were not persons in authority and the accused was not then charged with any offence.

Held—that the Sessions Judge misdirected the jury in the matter of the confession.

The president of a *panchayat* may be a person in authority within the meaning of S. 24 of the Evidence Act, and to tell the jury that he was not, was clearly erroneous, the matter depending on a question of fact, *viz.*, whether the confession was caused by any inducement, threat or promise, having reference to the charge against the accused (a).

That the *Salish* being summoned to consider the case which was being made against the accused, she was before the *Salish* on that charge and the Sessions Judge was wrong in directing otherwise.

That, having regard to the inducement offered by the president and members of the *Salish*

Penal Code—(Continued).

to the accused, it is extremely doubtful whether the confessions should have been allowed to be placed before the jury at all. It certainly ought not to have been placed before them without an explanation as to how they should value it, having regard to the circumstances in which it was made.

That the chemical analysis not disclosing how much arsenic was found in the powder, there was no evidence on the record against the accused as to the amount of poison which was proposed to be administered and it was doubtful whether the case would come under S. 302 or S. 328, I.P.C. **The King-Emperor v. Aushi Bibi**, 20 C.W.N. 512 = 23 C.L.J. 477 = 17 Cr. L.J. 189 = 33 Ind. Cas. 828.

CHITTY and WALMSLEY, JJ.

References:—(a) 9 C.W.N. 474; 11 C.W.N. 904, *R.*

(106) Ss. 302, 400—*Murder—Death caused in lurking house-trespass.* See CRIM. PRO. CODE, No. 184, 50 P.W.R. 1916 (Cr.).

(107) S. 304—*Opium found in stomach of deceased—Mention in first report of deceased taking opium—Proof of culpable homicide—Acquittal.*

Where the accused were convicted under S. 304, part 2, Penal Code, for causing the death of the deceased by violence, and the medical evidence showed that the cause of death was either concussion of brain due to head injuries or possibly opium poisoning, and the body bore no signs of injuries except four slight superficial lacerations but no fracture of any bone, while on the other hand opium was found in the stomach and the first report did make mention of the fact that the deceased had admitted having taken opium:

Held, that the prosecution had failed to prove that the death was caused by any act of the accused, and that they were, therefore, entitled to an acquittal. **Jahangir v. The Crown**, 16 P.W.R. 1916 (Cr.) = 17 Cr. L.J. 147 = 33 Ind. Cas. 627.

JOHNSTONE, C.J.

(108) S. 304. See Nos. 9, 10, 15, 36, 89, 96, 97, 104, *supra*.

(109) Ss. 304, 302, 325, 326—*Dacoity—Stuffing cloth into deceased's mouth in order to silence him—No intention to kill—Offence.* *In re Sengoda Goundan*, 18 M.L.T. 103 = (1915) M.W.N. 621 = 16 Cr. L.J. 614 = 30 Ind. Cas. 438. See Final Part, 1915, Col. 190.

(110) Ss. 304, 325, 326—*Culpable homicide—Grievous hurt.*

Where death is caused by blows struck to the deceased by several accused persons and it cannot be made certain which blow was struck by any individual accused the conviction of any of them of offence under S. 304, Part II, I.P.C., cannot be maintained. **Jahana v. The Crown**, 103 P.L.R. 1916 = 45 P.W.R. 1916 (Cr.) = 17 Cr. L.J. 451 = 36 Ind. Cas. 131.

BROADWAY, J.

*References:—*37 P.R. 1914 (Cr.) = 219 P.L.R. 1915, *F.*

Penal Code—(Continued).

- (111) S. 317—*Abandoning a child—Person having care of it—Mother giving the child to another for abandoning it—Such other person has the care of the child.*

The mother of a newly born child, with a view to dispose of the child, secretly gave it to her elder sister who carried it by a railway train and left it in a second class compartment. The child was carefully wrapped up and a bottle of milk was left by its side. The mother was tried for an offence under Ss. 317 and 109 of the Indian Penal Code, and her sister for an offence under S. 317 of the Code. The trying Judge acquitted them both. The Government having appealed:—

Held, reversing the order of acquittal, that both the accused were guilty of the offences charged.

Per Beaman, J.—In cases of this kind any person receiving an infant from its mother on the distinct understanding that the mother never desired or wished to have the child back again, must in law be regarded as a person having the care of that child until he or she had transferred it to the care and custody of some other person or institution. **Emperor v. Blanchi Constant Cripps**, 18 Bom. L.R. 934=3 Bom. Cr. C. 217.

BEAMAN and HEATON, JJ.

- (112) S. 323—*Revision—Finding of fact—1st Report by the Police for using abusive language—Subsequent development of the case into assault—S. 439, Crim. Pro. Code.*

Held that, when there was no mention of assault in the original report made by the Police, except of using abusive language, conviction under S. 323, Penal Code, was bad in law and liable to be set aside on revision. **Mool Chand v. The Crown**, 1 P.W.R. 1916 (Cr.)=32 Ind. Cas. 847=17 Cr. L.J. 111.

SHADI LAL, J.

- (113) Ss. 323, 336—*Intention—Offence.*

S. 336, Penal Code, should not be applied where the facts constitute a graver offence (a).

Each case has to be considered on its merits and especially with reference to the knowledge and intention of the accused (b). **Emperor v. Maung Po Nyan**, 17 Cr. L.J. 465=36 Ind. Cas. 145.

TWOMEY, J.

References:—(a) P.J. 426, F. (b) 4 Ind. Cas. 293=10 Cr. L.J. 552=5 L.B.R. 100, R.

(114) S. 325—*Private defence—Plea of private defence cannot be allowed in certain circumstances. Emperor v. Bechar Anop*, 17 Bom. L.R. 888=3 Bom. Cr. C. 100=16 Cr. L.J. 772=40 B. 105=31 Ind. Cas. 372. See Final Part, 1915, Col. 193.

(115) S. 325. See Nos. 4, 14, 15, 31, 32, 110, *supra*.

(116) S. 326—*Cutting wife's nose—'No leprosy to be shown'—Punishment. Sikandar v. Crown*, 20 P.R. 1915 (Cr.)=39 P.W.R. 1915 (Cr.)=16 Cr. L.J. 782=31 Ind. Cas. 382. See Final Part, 1915, Col. 193.

(117) S. 326. See Nos. 5, 89, 110 *supra* and No. 206, *infra*.

Penal Code—(Continued).

- (118) S. 328. See No. 105, *supra*.

- (119) S. 328. See No. 77, *supra*.

- (120) S. 336. See No. 113, *supra*.

(121) Ss. 339 and 341, *essentials of an offence under—Mamul path, whether a public path—Ploughing up, whether an obstruction. In re Rama Reddi*, 2 L.W. 1035=16 Cr. L. J. 701=30 Ind. Cas. 749. See Final Part, 1915, Col. 195.

- (122) S. 341. See No. 121, *supra*.

- (123) S. 342—*Civ. Pro. Code (Act V of 1908), S. 135—Wrongful confinement—Execution of decree—Arrest of judgment-debtor—Protection while returning from Court—Stay en route—Liability of bailiff to punishment—Sentence.*

A decree-holder is guilty of an offence under S. 342 of the Indian Penal Code, if he causes arrest of judgment-debtor while he is returning from Court under circumstances mentioned in S. 135 of the Civ. Pro. Code, and the Court officer who arrests or makes over the warrant of arrest to his subordinate for compliance is also guilty of the offence.

The fact that the judgment-debtor when returning from Court stopped in the way to get a petition written for him by a petition writer did not deprive him of the protection afforded to him by law.

On revision a lenient sentence was substituted for the one caused by the Magistrate against the decree-holder under the circumstances of the case. **The Crown v. Ram Lal**, 121 P.L.R. 1916=17 Cr. L.J. 525=36 Ind. Cas. 493.

CHREVIS, J.

- (124) S. 353. See No. 6, *supra*.

(125) Ss. 361, 363—*Hindu minor widow—Lawful guardian, who is. The Crown v. Tek Chand*, 27 P.R. 1915 (Cr.)=16 Cr. L.J. 780=31 Ind. Cas. 380. See Final Part, 1915, Col. 196.

- (126) Ss. 361, 366, 90—*Kidnapping—Essence of offence—Consent of minor—Immateriality—Consent by guardian given on misrepresentation of fact—Effect—Evidence Act, S. 3.*

The essence of the offence of kidnapping as defined in S. 361, Penal Code, is the taking of the minor out of the keeping of the guardian without the guardian's consent (a).

A consent given on a misrepresentation of fact is one given under a misconception of fact within the meaning of S. 90, Penal Code, and the consent of a guardian so obtained is not useful as a consent under the Penal Code (b).

A misrepresentation as to the intention of a person (in stating the purpose for which the person is asked) is a misrepresentation of fact within the meaning of S. 3 of the Evidence Act. **The Crown v. Mussammat Soma**, 17 P. R. 1916 (Cr.)=36 Ind. Cas. 850.

JOHNSTONE, C.J. and SCOTT SMITH, J.

References:—(a) 2 W.R. 5 (Cr.); 2 W.R. 61 (Cr.); 3 W.R. 15 (Cr.); 7 W.R. 36 (Cr.); 7 W. R. 52 (Cr.); 7 Cr. L.J. 210; 4 P.R. 1902 (Cr.), (F.B.), R. (b) 36 M. 453, R.

Penal Code—(Continued).

- (127) Ss. 361, 366, 109—*Kidnapping—Whether a continuous offence—Completion of the offence—Abetment.*

The offence of kidnapping is completed the moment a girl under sixteen years of age is taken out of the custody of a lawful guardian and is not an offence continuing until she returns to her guardian, and there can be no abetment of the offence by conduct which commences only after the minor has once been completely taken out of the keeping of the guardian and the guardian's keeping of the minor is completely at an end. **Abdur Rahman v. Emperor**, 14 A.L.J. 765=38 A. 664=17 Cr. L.J. 498=36 Ind. Cas. 466.

SUNDAR LAL, J.

- (128) S. 363—*Kidnapping—Taking out of lawful guardianship.*

The question whether the taking of a minor girl out of the custody of her lawful guardian was or was not complete at a given moment is a question for determination with reference to the circumstances proved in each particular case. It may no doubt be difficult in some cases of kidnapping from lawful guardianship to determine the precise moment at which the taking is complete. Speaking generally, the keeping of the guardian would be at an end when the person of the minor had been transferred from the custody of the guardian or some person on his behalf into the custody of some person not entitled to custody of the minor. **Gurdit Singh and Jawala v. The Crown**, 55 P.L.R. 1916=25 P.W.R. 1916 (Cr.)=17 Cr. L.J. 236=34 Ind. Cas. 662.

SHAH DIN, J.

References:—6 P.R. 1894 (Cr.) ; 6 Bom. L.R. 785, R.

- (129) S. 363. See No. 125, *supra*.

- (130) Ss. 363, 368, 34—*Kidnapping—Lawful guardianship—Keeping of the lawful guardian.*

A, a married woman under sixteen years of age, being dissatisfied with her mother-in-law, left her husband's home to go to her maternal uncle. On the way she was induced by K to accompany him and he deceitfully took her to a village in Aligarh where she was kept in the house of K's brother. Here negotiations were set on foot by K to re-marry the girl as a *Jat*, but on the girl disclosing her identity to enquirers, K left the village. Thereupon K's brother took her to the *thana*, and pending enquiry by the police she lived for a month at his place.

Held that K was guilty of kidnapping, inasmuch as, although the girl left home of her own accord, she did not cease to be under the guardianship of the husband, her lawful guardian, but that K's brother was not guilty of any offence as he had done nothing in furtherance of a common intention. **Karan Singh v. Emperor**, 14 A.L.J. 792=17 Cr. L.J. 592=36 Ind. Cas. 580.

SUNDAR LAL, J.

Penal Code—(Continued).

- (131) S. 365—*Kidnapping—Abduction of a female with the intention of putting pressure upon her friends to restore a girl whom they had abducted—Sentence.*

The accused abducted B merely in order to put pressure upon her friends to restore a young girl whom they had abducted. She was restored a few days after B was abducted and then B was also let go. It was not found that any harm was done to B.

Held, that, under such circumstances, heavy sentences of imprisonment on the accused were not necessary. **Warle v. The Crown**, 89 P.L.R. 1916=17 Cr. L.J. 472=36 Ind. Cas. 162.

SCOTT-SMITH, J.

- (132) S. 366—*Kidnapping—Abduction—Intention—Aid by girl 13 years old.*

The appellant, a girl of 13 or 14 years of age, and her brother were convicted of offence under S. 366, I.P.C.

Held, that, since for the offence under S. 366 a special intent or knowledge is necessary, the girl's conviction must be set aside. If she did help to deceive the abducted girl, she must have done so at the instance of her brother. **Mussammat Mehran v. The Crown**, 53 P.L.R. 1916=13 P.R. 1916 (Cr.)=28 P.W.R. 1916 (Cr.)=17 Cr. L.J. 283=34 Ind. Cas. 1003.

SCOTT-SMITH, J.

- (133) S. 366—*Kidnapping—Sentence—Charge of rape not made during police investigation but made at trial for the first time.*

At the trial the abducted woman stated that rape was committed on her by the accused, and Court believing this statement, the accused, were sentenced to rigorous imprisonment for five years and 3 months' solitary confinement. It appeared that during police investigation she did not make any such statement. On appeal the sentence was reduced to one of three years' rigorous imprisonment, for the story as to rape could not be believed under the circumstances of the case. **Bela Singh v. The Crown**, 54 P.L.R. 1916=17 Cr. L.J. 284=34 Ind. Cas. 1004.

LESLIE JONES, C.

- (134) S. 365. See Nos. 126, 127, *supra*.

- (135) Ss. 366, 372—*Minor girl voluntarily leaving her guardian—Kidnapping—Selling minor for purpose of prostitution. Ewaz Ali v. Emperor*, 13 A.L.J. 848=16 Cr. L.J. 663=30 Ind. Cas. 647=37 A. 624. See Final Part, 1915, Col. 198.

- (135-a) S. 369. See No. 130, *supra*.

- (135-b) S. 369. See No. 221, *infra*.

- (136) S. 372. See No. 135, *supra*.

- (137) S. 376—*Charge of rape—Delay in first information report—Doubt as to guilt of accused—Benefit of doubt.*

Where in a charge of rape it appeared that there was no direct reliable evidence as to the commission of the offence and no semen or blood was found on the person of the prosecutrix, and further there had been great delay in making the first information report which had not been satisfactorily explained, and the family

Penal Code—(Continued).

of the accused and the prosecutrix were at enmity with each other :

Held, that all these circumstances combined to raise a doubt in favour of the accused and that he was entitled to the benefit of the doubt. **Abdul Rahman v. The Crown**, 17 P.W.R. 1916 (Or.) = 17 Cr. L.J. 150 = 33 Ind. Cas. 630.

SHADI LAL, J.

(138) **S. 378—Theft—Dishonest intention—Removal of property with consent.**

Where the charge against an accused person was theft, which consisted in the removal of a box belonging to himself from the possession of a Station Master with dishonest intention, that is to say, with the intention of falsely denying that he ever received it, and so causing wrongful loss to the Station Master or the Railway administration, and possibly wrongful gain to himself in the shape of compensation for the loss of the box, *held* that the conviction for theft could not be sustained, for the reason (1) that the accused removed the box with the implied consent of the Station Master when he had paid for certain excess charged from him ; (2) that there was no dishonest intent, the burden of proving which lay on the prosecution. **Abdul Karim v. Emperor**, 14 A.L.J. 417 = 17 Cr.L.J. 468 = 36 Ind. Cas. 148.

PIGGOTT, J.

(139) **S. 378—Theft—Bona fide belief that accused is entitled to property—Whether good defence.**

Ordinarily it is not a sufficient defence to a charge of theft for the accused merely to assert that he thought that he was acting within his legal rights. But if the Court finds that the person accused was *bona fide* acting on what he supposed to be his legal rights and was not acting dishonestly, the Court should not convict him. **Bhagwat Saran Misl v. Emperor**, 14 A.L.J. 399 = 17 Cr. L.J. 295 = 35 Ind. Cas. 167.

RICHARDS, C.J.

(140) **S. 379—Theft—Elements necessary to constitute offence—Removal of property in assertion of bona fide claim of right.**

To sustain a conviction under S. 379 it is necessary to prove a dishonest intention to take property out of the possession of another person. Consequently when property is removed in the assertion of a *bona fide* claim of right, the removal does not constitute theft. The claim of right must be an honest one though it may be unfounded in law or in fact. If the claim is not made in good faith but is a mere colourable pretence to obtain or to keep possession, it is of no avail as a defence. **Arfan Ali v. King-Emperor**, 20 C.W.N. 1270 = 17 Cr. L.J. 456 = 36 Ind. Cas. 136.

MOOKERJEE and SHEEPHANKS, JJ.

(141) **S. 379—Value—Magistrate's jurisdiction to try the case summarily—Crim. Pro. Code, S. 260, cl. (1) (d)—Bengal Tenancy Act, S. 71—Paddy cut and carried away by landlord from tenant's land, value of, for summary trial for theft.**

Since a tenant is entitled to the exclusive possession of the whole produce until it is

Penal Code—(Continued).

divided under S. 71 of the Bengal Tenancy Act, his complaint against landlord for theft for having cut and carried away paddy worth Rs. 88 of which the latter was only entitled to one-half, cannot be summarily tried by a Magistrate as the value of the property in this case must be regarded as Rs. 88 and not Rs. 44 only. **Shalkh Haboo v. Sheikh Kariman**, 20 C.W.N. 1212 = 1 Pat. L.J. 230 = 17 Cr. L.J. 473 = 36 Ind. Cas. 153.

CHAMIER, C.J. and SHARFUDDIN, J.

(142) **S. 379—Possessory order under S. 145, Crim. Pro. Code, in favour of accused—Crops sown and cut down by accused—Theft.**

In this case the allegation of the complainant was that certain crops were sown by him and that the accused had wrongfully cut them. The Judge found that the crops were not sown by the complainant, but that they were sown by the accused. *Held*, that under this circumstance the crops being the property of the accused, the cutting down of these crops by them could not constitute the offence of theft.

The fact that a possessory order under S. 145, Crim. Pro. Code, had been made in favour of the complainant did not make any difference in the matter. **Sarju v. Emperor**, 17 Cr.L.J. 75 = 32 Ind. Cas. 667.

BANERJEE, J.

(143) **S. 379—Theft of Crops—Order directing complainant to be put in possession, whether sufficient—Effect of order.**

Where a person is charged as having committed theft of certain crops growing on a certain land, the fact, that in a previous case between the accused and the complainant an order was passed directing that the complainant is to be put into possession of the same land, is not conclusive as to the possession of the crops by the complainant. *Held*, that there must be an independent finding as to who was in actual possession of the land and crops. **In re Kota Appadu**, 17 Cr. L.J. 81 = 32 Ind. Cas. 673.

ABDUR RAHIM and AYLING, JJ.

(144) **S. 379—Crops attached in execution of decree—Distraint by landlord—Removal of crops by cultivators—Theft. Emperor v. Ram Dayal**, 13 A.L.J. 1058 = 39 A. 40 = 16 Cr. L.J. 812 = 31 Ind. Cas. 828. See Final Part, 1915, Col. 199.

(145) **S. 379—Theft—Dishonest intention—Burden of proof—Circumstances showing assertion of bona fide claim of right—Effect. Lunidomal Paramanad v. The Crown**, 9 S. L.R. 75 = 16 Cr. L.J. 715 = 30 Ind. Cas. 1003. See Final Part, 1915, Col. 199.

(146) **S. 379.** See CRIM. PRO. CODE, No. 285, 14 A.L.J. 518.

(147) **S. 379.** See CRIM. PRO. CODE, No. 172, 17 Cr. L.J. 406.

(147-a) **S. 379.** See No. 169, *infra*.

(148) **Ss. 379, 380—Offences under—Mischief of charges.** See CRIM. PRO. CODE, No. 193, 20 C.W.N. 672.

(149) **Ss. 379, 411—Criminal misappropriation—Carnel found in possession of accused**

Penal Code—(Continued).

about 7 months after it was lost—Reasonable explanation of getting it—No offence—Principle laid down in such cases—Revision under S. 439, Crim. Pro. Code—Burden of proof—Prosecution to establish every allegation against accused. Mangaya Shah v. The Crown, 41 P.W.R. 1915 (Cr.)=62 P.L.R. 1916=32 Ind. Cas. 660=17 Cr. L.J. 68. See Final Part, 1915, Col. 200.

(150) Ss. 379, 429—*Theft of bullock and its subsequent killing by accused with the object of benefiting himself and not of injuring the complainant—Conviction for mischief—Maintainability—Essence of mischief.*

Where a person commits theft of a bullock and subsequently kills it with the object of benefiting himself and not of injuring the complainant (owner), the killing does not amount to an offence under S. 429, Penal Code, and the accused is guilty only under S. 379, I.P.C.

The essence of the offence of mischief is that the act of destruction should be caused with the intention of causing wrongful loss or damage to the public or to the owner of the thing destroyed—which is not the case here. *Jairo v. Crown, 9 S.L.R. 204=17 Cr. L.J. 239=34 Ind. Cas. 655.*

PRATT, J.C. and CROUCH, A.J.C.

(151) S. 380. See No. 148, *supra* and No. 174, *infra*.

(152) Ss. 380, 201, 511—*Theft—Causing disappearance of document.*

In this case the accused, during the pendency of a civil suit brought by them on the basis of a forged instrument, got into the inner verandah of a building where the said instrument was, removed it from there, and, on being pursued, tore it to pieces. Held that they were guilty of an offence under S. 380 of the Penal Code and also of an offence under Ss. 201 and 511 of the Code (i.e.) attempt at causing disappearance of document. *Sheonandan v. Emperor, 16 Cr. L.J. 791=31 Ind. Cas. 647.*

PIGGOTT, J.

(153) S. 381—*Evidence Act, Ss. 11, 32—Ownership of alleged stolen property—Witness stating what a deceased person had said to him—Admissibility of such statement. In re Dorasami Ayyar, 16 Cr. L.J. 640=30 Ind. Cas. 464. See Final Part, 1915, Col. 200.*

(154) S. 384—*Extortion—Specific charge, necessity for—Crim. Pro. Code (Act V of 1898), Ss. 221, 222, 223.*

Failure to state in any substantial form the nature and particulars of the offence alleged against the accused would in some cases be a fatal defect which would vitiate the whole proceedings. Where an offence charged involves consequences which may be stated in a general form, such as may arise in a case of arson where a man may by one act of arson set fire and destroy several stacks of several persons, no particular is required, the nature of the offence being sufficiently stated by the date, time and place of the setting of fire; but extortion or obtaining money from persons by unlawful means involves stating with some approach to accuracy the approximate amounts alleged to have been

Penal Code—(Continued).

obtained from each person and the nature of the extortion used against each person. It is not sufficient to say that at the close of the evidence the accused knows what is alleged against him. The object of Ss. 221, 222 and 223, Crim. Pro. Code, is clearly to enable him to know the substantive charges which he will have to meet and to be ready for them before the evidence is given. Failure to comply with the provisions of the said sections is an irregularity which would not be cured by appearance even without objection. *Ram Chandar Sahai v. Emperor, 17 Cr. L.J. 411=35 Ind. Cas. 971.* WALSH, J.

(155) Ss. 390, 391—*First report—When robbery is dacoity—Approver's testimony—Name of culprit not mentioned therein—Value of evidence of identification and production of stolen property. Uda v. The Crown, 26 P.W.R. 1915 (Cr.)=16 Cr. L.J. 634=30 Ind. Cas. 458. See Final Part, 1915, Col. 200.*

(155-a) S. 391. See No. 155, *supra*.

(156) S. 395. See No. 109, *supra*.

(157) S. 396. See No. 109, *supra*.

(158) S. 397. See No. 5, *supra*.

(159) S. 399—*'Preparation,' what amounts to—Duty of prosecution.*

In order to commit the offence of preparation, it is not necessary that the prisoners should have done an overt act towards the commission of dacoity. What the law contemplates is that they should have done some act to get ready for a dacoity, and the collection of men from different villages, coupled with the collection of arms, sufficiently proves the required preparation. The mere assemblage to commit dacoity does not amount to preparation, but when it is found, as in this case, that the members of the gang had taken, into their possession instruments for house-breaking and arms for the purposes of offence and defence, and they had actually proceeded to a place near the scene of contemplated dacoity. Courts will be justified in holding that there was not only a mere assemblage, but that the members of the assembly had got ready for the actual commission of dacoity. It is not necessary that the prosecution should point out the exact part taken by each member of the gang as regards preparation, provided that it is shown that the accused were members of a gang which had made in fact preparation for dacoity. *Karmun v. The Crown, 6 P.R. 1916 (Cr.)=37 P.W.R. 1916 (Cr.)=17 Cr. L.J. 280=34 Ind. Cas. 1000.*

SHADI LAL, J.

Reference:—41 C. 350 (357), R.

(160) Ss. 399, 402—*Essentials—Assembly for breaching railway lines or damaging telegraphs—Whether punishable under. See ACQUITTAL, No. 1, 7 P.W.R. 1916 (Cr.).*

(161) Ss. 399, 402. See APPROVER, No. 1, 2 P.W.R. 1916 (Cr.).

(162) S. 401—*Associating with gang of thieves. The following are necessary to prove in order*

Penal Code—(Continued).

to sustain a conviction on a charge under S. 401, Indian Penal Code :—

- i. That there existed a gang of dacoits ;
- ii. That those persons were associated for purpose of committing theft or robbery ;
- iii. That theft or robbery was to be committed habitually and
- iv. That the accused was a member of the gang.

Once it was established that a gang was formed for the purpose of habitually committing theft, all persons who thereafter joined that gang in one or more cases of theft came within the purview of S. 401. This does not mean that any person who joins the members of such a gang in committing theft becomes *ipso facto* a member of that gang. It should be taken to mean that any person, who knowing of the existence of such a gang joins that gang for the purpose of committing even one theft, is guilty under S. 401. An accused person may have taken part in a theft with one or more members of a gang without himself becoming member of that gang.

An association with the members of a gang at fairs, weddings and liquor shops cannot be presumed against the accused as for the purpose of committing theft or robbery. *Wasawa Singh v. The Crown*, 110 P.L.R. 2916=47 P.W.R. 1916 (Cr.)=17 Cr. L.J. 443=35 Ind. Cas. 1003.

SCOTT-SMITH, J.

References:—13 P.R. 1914, Cr. ; 223 P.B.R. 1915, F.

(163) S. 402. See Nos. 160, 161, *supra*.

(164) Ss. 403, 417—*Cheating—Dishonest intention—Criminal misappropriation*. *Sohan Lal v. Emperor*, 13 A.L.J. 1131=16 Cr. L.J. 795=31 Ind. Cas. 651. See Final Part, 1915, Col. 202.

(165) S. 406—*Criminal breach of trust—Sale of motor car on hire purchase system—Vindes pledging the car while the hire-purchase agreement is in force*. *Emperor v. Silas Moses*, 17 Bom. L.R. 670=3 Bom. Cr. C. 84=16 Cr. L. J. 665=30 Ind. Cas. 649. See Final Part, 1915, Col. 203.

(166) S. 406—*Criminal breach of trust—Article given to accused under written agreement—Competency of Criminal Courts to decide whether agreement was real or nominal*. See CRIM. PRO. CODE, No. 313, (1916) 2 M.W. N. 158.

(167) Ss. 406, 420. See STAY OF CRIMINAL PROCEEDINGS, No. 2, 8 P.W.R. 1916 (Cr.).

(168) S. 409—*Offence committed by Chairman of Union Panchayat—Sanction for prosecution*. See CRIM. PRO. CODE, No. 162, (1916) M.W.N. 384.

(169) Ss. 409, 411, 379—*Joint trial of offences under—Legality*. See CRIM. PRO. CODE, No. 203, 14 A.L.J. 344.

(170) S. 411—*Receiving of stolen property, conviction for—Elements of the offence—Proof of property being stolen—State of mind of the receiver*.

Penal Code—(Continued).

In order to sustain a charge of the offence of receiving stolen property under S. 411 of the Penal Code, it is necessary to prove by satisfactory evidence that the property in question is stolen property and further that the accused received the same believing it to be stolen property. It is not enough to show that the receiver suspected the goods to be stolen property. *The Crown Prosecutor v. Sankara Narayana Chetti*, 4 L.W. 53=17 Cr. L.J. 312=35 Ind. Cas. 488.

SESHAGIRI AIYAR, J.

Reference:—6 B. 402, F.

(171) S. 411—*Receiving stolen property—Proof—"Believe", meaning of*.

In a charge under S. 411 of the Penal Code for receiving stolen property it is not sufficient for the prosecution to show that the accused person was careless or that he had reason to suspect that the property was stolen or that he did not make sufficient enquiry to ascertain whether the same had been honestly acquired. The word "believe" is a very much stronger word than "suspect," and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property (a). *Muhammad Ibrahim v. Emperor*, 17 Cr. L.J. 25=32 Ind. Cas. 153.

KNOX, J.

(172) S. 411. See Nos. 149, 169, *supra*.

(173) Ss. 411, 457—*Sentence passed by trial Court under S. 457, Indian Penal Code—Sessions Judge altering the conviction under S. 411—Whether such alteration makes the trial by trying Magistrate illegal*. See JOINT TRIAL, No. 2, 49 P.W.R. 1916 (Cr.).

(174) Ss. 411, 457, 380—*Evidence of house-breaking—Surrender of stolen articles by accused—Possession unexplained—Offence*.

In this case there was no direct evidence connecting any of the accused persons with the breaking into the house or the actual removal of the articles alleged to have been stolen. But the properties were recovered soon afterwards (i.e., four days after the theft) in consequence of information which the Police received.

The accused persons did not claim the properties as their own and there was no satisfactory explanation given by them for their possession of them.

Held that this was a case in which the accused committed an offence under S. 411 of the Indian Penal Code and that there should be a conviction under that section and not under Ss. 457 or 380 of the Code. *In re Turimella Kurmanna*, 17 Cr. L.J. 179.

ANDUR RAHIM and COUTTS-TROTTER, JJ.

(175) S. 415—*What constitutes cheating*.

To constitute the offence of cheating, the law does not require, and does not say, that the wrongful gain must be made out of the person deceived. The Code provides that it may be either wrongful loss to the person deceived or

Penal Code—(Continued).

wrongful gain to the person who deceived. *In re N. Venugopal Mudaly*, 16 Cr. L.J. 753 = 31 Ind. Cas. 353.

ABDUR RAHIM, J.

(176) S. 415—*Acquittal—Reversion—Retrial—Cheating—Facts constituting cheating—Crim. Pro. Code, S. 439.* *Ram Chand v. Jal Dial*, 18 P.W.R. 1915 (Cr.) = 16 Cr. L.J. 667 = 30 Ind. Cas. 641. See Final Part, 1915, Col. 206.

(177) S. 415—*Said—Failure to disclose prior mortgage or fact of existence of joint Hindu family—No offence—No duty to disclose facts easy of discovery with ordinary care.* *The Karachi Municipality v. Bhojraj*, 9 S.L.R. 97 = 16 Cr. L.J. 706 = 30 Ind. Cas. 994. See Final Part, 1915, Col. 207.

(177-a) Ss. 415 and 420—*Dissolution of partnership—Collection of old debt thereafter—Omission to pay to other partner—Cheating.*

A concealment can be said to be dishonest only if the person was under a duty to disclose the facts.

The accused was a partner in commission business. The accused and his co-partner dissolved the business by a deed of dissolution, the accused undertaking not to interfere with the Company's business without the knowledge of his co-partner. After the date of the deed of dissolution, the accused collected certain outstanding due to the Company and executed a receipt therefor. He, however, did not pay the amount collected to his co-partner. *Held* that the act of the accused did not amount to an offence of cheating. There was no evidence of any active deception practised by the accused on the person who paid the money. There was nothing to show in the deed of dissolution that the accused should not collect the old debts of the company. It was not shown that the accused acted fraudulently or dishonestly in thinking that he had still the right to collect the debts. *In re Paruchery Venkatappaya Choudari*, 36 Ind. Cas. 872.

KRISHNAN, J.

References :—27 A. 561 = A.W.N. (1905) 98 = 2 A.L.J. 268 = 2 Cr. L.J. 218, R.

(178) S. 417—*Cheating, complaint of—Proceeding quashed as prima facie case not made out—Pleader's promise to persuade client to give undertaking—Undertaking not given—Pleader, if may be proceeded against for cheating.*

In a proceeding under S. 107, Crim. Pro. Code, the opposite party undertook not to go to the property, the subject-matter in dispute, or to do any act that was likely to involve a breach of the peace, on the pleader for the complainant agreeing to persuade complainant's master to file an undertaking that he would protect the property from sale. The undertaking, which the latter offered to file, not having been approved of by the opposite party, was not filed,

Penal Code—(Continued).

whereupon the opposite party started proceedings against the pleader under S. 417 of the Penal Code :

Held—That the proceedings should be quashed as no *prima facie* case of cheating had been made out. *Narsingha Kumar Mukerjee v. Kumudendu Mukerji*, 20 C.W.N. 1112.

CHITTY and WALMSLEY, JJ.

(179) S. 417. See No. 164, *supra*.

(180) Ss. 417, 420 and 511—*"Valuable security" whether acknowledgment of receipt of insured parcel is—Crim. Pro. Code (Act V of 1898), S. 237 (2)—Accused charged with an offence, if can be convicted of attempt to commit such offence.*

The accused in this case owed the complainants Rs. 650 and, in order to create evidence that he had paid that Rs. 650, filled a registered envelope with blank sheets of paper and posted it to the complainants after insuring it for Rs. 650. The complainant gave an acknowledgment of receipt to the Post Office.

Held, that (1) the above facts did not amount to a complete offence of cheating but that they amounted to an attempt to cheat.

(2) That an acknowledgment of receipt of an insured parcel is not a valuable security. It is merely evidence that a parcel of some sort was delivered to the complainants and cannot operate as a discharge of any liability and is not therefore a valuable security.

(3) That the petitioner should therefore have been charged with an attempt to commit an offence under S. 417.

(4) Under S. 237 (2) of the Crim. Pro. Code of 1898, when an accused is charged with an offence, he may be convicted of having attempted to commit that offence, although the attempt is not separately charged. *Sadho Lal v. King-Emperor*, 1 Pat. L.J. 391 = 17 Cr. L.J. 272 = 34 Ind. Cas. 992.

ROE and J WALA PRASAD, JJ.

(181) S. 420. See Nos. 19, 167, 180, *supra*.

(182) S. 424. See BENGAL ACT VIII OF 1885 (TENANCY), No. 2, 1 Pat. L.J. 353..

(183) S. 425—*Mischief—Accused throwing stone at a cow after driving it from his master's field—Cow's legs fractured—Mischief—Limitation of right of private defence.*

The accused, an agricultural labourer, was cutting arhar in a field which contained wheat also. A cow belonging to a passing herd in charge of a grazier entered the field and the accused drove her out. When the animal had reached the boundary of the field and joined the rest of the herd, the accused threw two stones each weighing about $\frac{1}{2}$ seer at it with the result that one of its hind legs was fractured. The fracture was shown by the medical evidence to have been the result of a blow from a stone. *Held*, (1) that the accused committed the offence of mischief, (2) to constitute the offence of mischief, it would suffice if the person who caused the injury knew that he was likely by his act to cause damage to any person.

Penal Code—(Continued).

In such circumstances an intention to cause the injury might be presumed. (a)

In the course of an action done in right of private defence, no more harm should be inflicted than is necessary for the purpose of defence. Once the cow had left the field, the accused being still at hand, no need for violence remained.

It may be that impounding cattle which trespass upon crops affords no adequate satisfaction to the injured agriculturists; but that is no sound reason for refusing to treat as mischief, injury deliberately and unnecessarily inflicted on the offending animal (b) **Emperor v. Mahadeo**, 12 N.L.R. 188.

BROCKMAN, J.C.

References:—(a) 1 N.L.R. 134 at 136, *F.* (b) 1 Weir 497; 1 Weir 502, *D.*

(184) S. 426. See CRIM. PRO. CODE, No. 206, 24 C.L.J. 444.

(185) S. 426. See No. 28, *supra*.

(186) Ss. 426, 447—*Order regarding possession of immovable property following acquittal in case under Ss. 447 and 426 of the Penal Code, propriety of.*

The accused were tried for offences under Ss. 447 and 426, I.P.C., for having cut and removed some bamboos from a bamboo clump alleged by the complainant to be his. The trying Magistrate acquitted the accused but directed that the complainant was to retain possession of the bamboo clump until ousted by the Civil Court.

The High Court set aside the order so far as it contained the direction about the bamboo clump. **Radha Kanta Guin v. Kartik Guin**, 20 C.W.N. 1302.

SANDERSON, C.J. and WALMSLEY, J.

(187) Ss. 426, 447 - *Mischief—Trespass—Trespasser's entry, whether gives him juridical possession - Removal of obstruction, whether offence—Pathway—Obstruction. In re Dhar-malinga Mudali*, 15 Cr. L.J. 723=26 Ind. Cas. 171=39 M. 57. See Final Part, 1914, Col. 216.

(188) S. 429—*Maiming an animal—Cutting off half an ear of a mare—Injury.*

The cutting off of nearly one half of one ear of a mare whereby the animal's sense of hearing is not impaired, is not a maiming within the meaning of S. 429, Penal Code. The 'maiming' of the section implies some permanent disability inflicted on the animal; the term involves the notion of the privation of the use of some limb or member involving a permanent injury, and not a mere disfigurement. **Emperor v. Anna Laxman Bhintade**, 18 Bom. L. R. 289=3 Bom. Cr. C. 194=17 Cr. L.J. 253=84 Ind. Cas. 973.

BATCHELOR and SHAH, JJ.

(189) S. 429. See No. 150, *supra*.

(190) S. 434. See No. 48, *supra*.

(191) S. 436—*Arson—Evidence of precious fires, unconnected with the charge under enquiry - Conviction on inadmissible evidence.*

The accused was convicted of arson. During the trial the Sessions Judge admitted the

Penal Code—(Continued).

evidence of previous fires in the locality with which, however, there was nothing to connect the accused and, relying amongst others on that evidence, convicted the accused:

Held, that the Sessions Judge was wrong in admitting the evidence in question.

The High Court set aside the conviction and sentence. **Abdul Kadir v. King-Emperor**, 20 C.W.N. 1267=17 Cr. L.J. 421=35 Ind. Cas. 981.

SANDERSON, C.J. and WALMSLEY, J.

(191-a) S. 441. See CRIMINAL TRESPASS.

(192) S. 441—*Criminal trespass—Possession must be actual not juridical—Crim. Pro. Code, S. 345.*

Criminal trespass is an offence committed by entering into or remaining on property in the possession of another with intent to commit an offence or to intimidate, insult, or annoy any person in possession. The possession contemplated is actual possession and is not merely a power of control such as a trust scheme may vest in the trustees.

Where property is held in actual physical possession by one person I think that is the only person whose feelings have to be considered under S. 441, Indian Penal Code. Otherwise we might have the juridical possessor prosecuting for criminal trespass and the actual possessor compounding the offence under S. 345, Code of Criminal Procedure, a result which could never have been contemplated by the Legislature. Per *Twomey, J. Tok Gyi v. The King-Emperor*, 8 L.B.R. 425=17 Cr. L.J. 378=35 Ind. Cas. 810.

TWOMEY, J.

(193) S. 441. See CRIMINAL TRESPASS, No. 1, 8 L.B.R. 463.

(194) S. 441. See No. 86, *supra* and No. 201, *infra*.

(194-a) S. 442. See CRIMINAL TRESPASS.

(195) S. 442—*Thatch hut, whether a building.*

A thatched hut which has been built for the purpose of residence is a building used as a human dwelling under S. 442, Penal Code. **Salig Ram v. Emperor**, 17 Cr. L.J. 536=36 Ind. Cas. 584.

LINDSAY, J.O.

(195-a) S. 447. See CRIMINAL TRESPASS.

(196) S. 447—*Punjab Land Revenue Act (XVII of 1887), S. 101 (A) (B) - Land transferred from one district to another—Failure to pass order of suspension at the time of transfer. Wir Singh v. The Crown*, 170 P.L.R. 1915=31 P.W.R. 1915 (Cr.)=16 Cr.L.J. 631=30 Ind. Cas. 455. See Final Part, 1915, Col. 208.

(197) S. 447—*Criminal trespass—Elements necessary to constitute offence. See CRIM. PRO. CODE, No. 329, 20 C.W.N. 1071.*

(198) S. 447. See Nos. 186, 187, *supra*.

(199) S. 451. See No. 28, *supra*.

Penal Code—(Continued).

(199-a) S. 456. See CRIMINAL TRESPASS, HOUSE TRESPASS.

(200) S. 456—*Lurking house-trespass—Intent.*

An accused person, though he may have known that, if discovered, his act would be likely to cause annoyance to the owner of a house, cannot be said to have intended either actually or constructively to cause such annoyance.

Where, therefore, it was proved that a person entered a house with intent to have illicit intercourse with a woman who was a widow and of age, held that he was guilty of no offence: **Emperor v. Gaya Bhar**, 14 A.L.J. 719=38 A. 517=17 Cr. L.J. 419=35 Ind. Cas. 979.

SUNDAR LAL, J.

(201) Ss. 456, 457, 441—Conviction under S. 456 when charged under S. 457, propriety of—Criminal intention if should be specified in the charge in a case under S. 456—Intention of accused how may be determined by Court. See CRIM. PRO. CODE, No. 200, 20 C.W.N. 1075.

(201-a) S. 457. See CRIMINAL TRESPASS, HOUSE TRESPASS.

(202) S. 457—*Revision—Finding of fact—Unreliable evidence*—S. 439 of the Crim. Pro. Code—*First Report to the Police—Accused not found in possession of the stolen property*. **Machhia v. The Crown**, 28 P.W.R. 1915 (Cr.) =16 Cr. L.J. 737=31 Ind. Cas. 337. See Final Part, 1915, Col. 210.

(203) S. 457. See Nos. 173, 174, 201, *supra*, and No. 206, *infra*.

(204) Ss. 457, 511, 75—Sessions case—Commitment for offences under Ss. 457 and 75—Charge under S. 75, omitted by Sessions Court—Conviction under Ss. 457, 511—Previous convictions admitted by prisoner—Legality of sentence—Interference in appeal. See CRIM. PRO. CODE, No. 225, 3 L.W. 403.

(204-a) S. 458. See No. 206, *infra*.

(205) S. 460. See No. 106, *supra*.

(206) Ss. 460, 457, 458, 326—*House-breaking with intent to commit theft—Completion of the offence—Causing grievous hurt by stabbing, thereafter—Offence committed*—S. 460 not applicable—Conviction under Ss. 457, 458 and 326.

The accused S and A, broke into the house of one T at night, with intent to commit theft and armed with deadly weapons, threatened and injured the inmates, left the house on alarm being raised, and in the Court-yard one of the accused, S stabbed one B, who tried to seize them injuring him so that he died later on. The accused were later on pursued and captured some 700 karams from the village. On these facts, the accused were convicted under S. 450, I.P.C.

Held on appeal, that the house-breaking by night with intent to commit theft was completed first, and then as a separate transaction, grievous hurt was caused by a dangerous

Penal Code—(Continued).

weapon, both accused being equally liable under S. 34, I.P.C., and that S. 460, I.P.C., did not apply but Ss. 457, 458 and 326 applied (a). **Sed Rasul v. The Crown**, 27 P.R. 1916 (Cr.).

JOHNSTONE, C.J., and CHEVIS, J.

References:—(a) 17 P.R. 1876 (Cr.) and 2 P.R. 1882 (Cr.), *Ref. to*.

(207) Ss. 463, 464, 465, 23, 24—*Forgery—Giving a false name and address in a certificate of purchase at the time of purchasing arms.*

The accused purchased revolvers and cartridges from three firms in Calcutta and on each occasion signed the certificate (which according to the usual procedure in respect of the sale of arms and ammunition a purchaser is required to sign at the time of purchase) in a false name and giving a false address. These certificates are required for the identification of the purchaser and the weapons purchased. The accused purported to purchase the revolvers and cartridges for his own use. It was admitted that if he had given his real name and address he would have had no difficulty in purchasing the arms and ammunition:

Held—That it may be that the action of the accused was not dishonest within the meaning of Ss. 23 and 24, I.P.C., but he acted fraudulently and the signing of the certificates in a false name and giving a false address amounted to forgery on the part of the accused within the meaning of Ss. 463 and 464, I.P.C. **P.L. Gauseley v. King Emperor**, 20 C.W.N. 326=43 C. 421=32 Ind. Cas. 661=17 Or. L.J. 69.

CHITTY and WALMSLEY, JJ.

(207-a) S. 464. See No. 207, *supra*.

(207-b) S. 465. See No. 207, *supra*.

(207-c) S. 466. See No. 213, *infra*.

(207-d) S. 467. See Nos. 3, 18, *supra*.

(208) Ss. 467, 471—*Conviction both for forging document and for using it as genuine, not illegal.*

A conviction for the offence of forging a document and also for using it as genuine is not illegal in the course of the same trial (a). **In re Madu Chinnaagi Reddi**, 17 Cr. L.J. 73=32 Ind. Cas. 665.

ABDUR RAHIM and PHILLIPS, JJ.

Reference:—(a) 23 A. 84, *Diss.*

(209) Ss. 467, 471—*Forged document produced before Registrar for registration, effect of—Document, subsequently found to be forged by Court—Crim. Pro. Code, S. 195—Sanction to prosecute*. **Abdul Gani v. Emperor**, 16 Cr. L.J. 617=30 Ind. Cas. 441. See Final Part, 1915, Col. 211.

(210) Ss. 467, 471—*Evidence to prove charge for forgery insufficient—Knowledge that document is forged, whether sufficient to sustain conviction*. **Public Prosecutor v. Ramarazu Venkattappayya**, 16 Cr. L.J. 701=30 Ind. Cas. 749. See Final Part, 1915, Col. 212.

(211) S. 471—*Forged document mentioned in another document—Handwriting expert, evidence of—Comparison, whether to be made*

Penal Code—(Continued).

in Court. In re Sithaya Nalk, 16 Cr. L.J. 708=30 Ind. Cas. 751. See Final Part, 1915, Col. 212.

(212) S. 471. See Nos. 18, 208, 209, 210, *supra*.

(213) Ss. 471, 466—*Using a forged document—Mere filing of a copy of which the original forged, is equivalent to user—Proof of similar other forgeries, when proper.*

The accused was convicted under S. 471 read with S. 466, I.P.O., for filing a proceeding under S. 107, Crim. Pro. Code, a copy of a registered lease taken out from the Registration Office, it being alleged that the transcript in the Registration Office was itself a forged interpolation. Evidence was adduced of a number of other registration books containing forgeries relating to documents in respect of the same property. There was no evidence connecting the present accused with the makers of these forgeries.

Held, that the evidence was wholly inadmissible.

That a series of transactions which are not the offence charged can only be used as evidence of the intention of the person who forged the document and not as evidence of forgeries.

That it is extremely doubtful whether the mere filing of a copy, of which the original is alleged to be a forgery, is user of a forged document. *Krishna Govinda Pal v King-Emperor*, 20 C.W.N. 262=43 C.783=17 Cr. L.J. 130=33 Ind. Cas. 306.

HOLMWOOD and MULLICK, JJ.

(214) Ss. 471, 474—*Forgery—Hundi—Conviction not technically correct, but doing substantial justice not to be interfered with—Crim. Pro. Code, S. 537—Admission of accused in trial Court how far binding on him.*

A *Hundi* purporting to have been drawn by a firm which never had any existence is a forgery.

When A takes a *Hundi* from S knowing that the latter has fabricated it, the former is guilty under S. 474, and if A negotiates, it knowing it to be a forged document, he is guilty of the more serious offence punishable under S. 471, Penal Code.

A conviction which is not technically correct but does substantial justice should not be interfered with in appeal.

*An admission of the accused in the trial Court is binding on him if it is not improbable, but is fitting the circumstances of the case. *Arora Mal v. The Crown*, 30 P.W.R. 1916 (Cr.)=17 Cr. L.J. 474=36 Ind. Cas. 154.

LE ROSSIGNOL, J.

(215) S. 474. See No. 214, *supra*.

(215-a) S. 478. See TRADE MARK.

(216) S. 478. See No. 2, *supra*.

(217) Ss. 478, 482—*Trade-mark—Importer using a distinctive mark has property in mark.*

14 Cr.

Penal Code—(Continued).

A distinctive mark may be adopted by a person who is not the manufacturer but the importer of goods and he will acquire the property in that mark as indicating that all goods which bear it have been imported by him (a). Hence where the complainants, importers of hand-made sugar used a distinctive mark denoting that the sugar contained in the bags so marked had been imported by them, (their customers accepting the mark as a guarantee that the sugar was hand-made), and the accused were found as having used the same mark, whereby the complainants had established a special trade, *held* that the accused were guilty of using a false trade-mark. *Latif v. Emperor*, 14 A.L.J. 1080=17 Cr. L.J. 535=36 Ind. Cas. 583.

LINDSAY, J.

References :—(a) 3 C. 417 ; 2 M. 149, R.

(218) S. 482. See No. 217, *supra*

(219) S. 486. See No. 2, *supra*.

(220) S. 498—*Adultery—Revision—Criminal cases—Finding of fact—Benefit of doubt.*

The petitioner was convicted of an offence under S. 498, I.P.C. The case for the prosecution was that the complainant's wife was shut up in a house of one of the accused. The woman was not discovered there by the police. Next day it was found that there was a hole in the wall between the accused's house and the adjoining house which belonged to an uncle of the petitioner. There was no direct evidence as to original abduction. The only other evidence was of two witnesses who said they had seen the woman and the petitioner with his two co-accused going away from the village 3 days after the abduction. The petitioner's co-accused were discharged and acquitted.

Held, that benefit of doubt must be given to the petitioner. As to the evidence of witnesses who deposed that they had seen the woman in company with the accused, the Chief Court observed that such evidence is of the sort usually brought to bolster up cases under S. 498. *Nawab v. The Crown*, 100 P.L.R. 1916.

CHEVIS, J.

(221) Ss. 498, 869—*Complaint—Jurisdiction—Code of Criminal Procedure, Ss. 169, 238 (3).*

Where, on a charge under S. 366, Penal Code, the police took up the proceedings in which the husband of the woman appeared as a witness, and he asked the Magistrate to drop the proceedings thereunder but said that he intended to prosecute the accused under S. 498, Penal Code, and to get him punished, *held* that there was a "complaint" inasmuch as he made an allegation before the Magistrate that the offence should be enquired into. *Bhawani Dat v. Emperor*, 14 A.L.J. 233=38 A. 276=32 Ind. Cas. 664=17 Cr. L.J. 72.

KNOX, J.

(222) Ss. 498, 499—*Right of father of girl enticed away to complain, when husband stands by.* See CRIM. PRO. CODE, No. 165, 17 Cr. L.J. 363.

Penal Code—(Concluded).

(223) S. 499, *Excep.* (8)—*Accusation against any person to one who has lawful authority over that person—Good faith.*

A defamatory statement made without express malice, and with a *bona fide* belief in its truth against one whose conduct in the respect defamed has caused the accused any injury, to one whose duty it is to enquire into and redress such injury falls within *Excep.* (9) to S. 499 of the Penal Code. It is not necessary for the accused in such a case to show that the imputations are true in fact. He has only to show that he acted with due care and attention. *Nga Poona v. King-Emperor*, 9 Bur. L.T. 136 = 8 L.B.R. 440 = 17 Cr. L.J. 213 = 34 Ind. Cas. 325.

TWOMEY, J.

(224) S. 499, *Excepts.* (8), (9)—*Defamation—Complaint to Police Constable not privileged—Privilege.*

Parties before the Court, counsel and witnesses are all absolutely privileged. But that principle cannot be extended to the case of the complaint to a constable. (a)

The two ingredients to be established under S. 499 (8) of the Penal Code are the preferring of a complaint in good faith and preferring it to a person who has authority over the person complained against. These ingredients should be affirmatively established by the person who wants to bring himself within *Excep.* 8, and that is what S. 105 of the Evidence Act lays down (b). *In re Kakumara Anjaneyalu*, 17 Cr. L.J. 381 = 35 Ind. Cas. 813.

SESHAGIRI AIYAR, J.

References:—(a) 14 Ind. Cas. 757 = 37 M. 110 at p. 111 = 11 M.L.T. 431 = 13 Cr. L.J. 293, F. (b) 12 M. 374, D.

(225) S. 499. See No. 222, *supra*.

(226) S. 504—*Insult, ingredients essential for a conviction—Breach of peace, if actual, necessary—Crim. Pro. Code, S. 438.*

The ingredients essential for a conviction under S. 504, Penal Code, are threefold: first, intentional insult, secondly, provocation therefrom, and, thirdly, intention that such provocation should cause, or knowledge that such provocation was likely to cause the person so insulted to break the public peace or to commit any other offence.

Insult may be inferred not merely from the words used, but also from the tone and manner in which the words are spoken.

The law makes punishable an insulting provocation which under ordinary circumstances would cause a breach of the peace to be committed, even though in the particular case the person insulted does not commit a breach of the peace. *Jaykrishna Samanta v. King-Emperor*, 24 C.L.J. 137 = 21 C.W.N. 95 = 36 Ind. Cas. 849.

MOOKERJEE and SHEEPSHANKS, JJ.

(227) S. 511. See ORDINANCE VI OF 1914 (COMMERCIAL INTERCOURSE WITH ENEMIES), No. 1, 31 M.L.J. 178

(228) S. 511. See Nos. 21, 152, 180, 204, *supra*.

Planters Labour Act (Madras).

See MAD. ACT I OF 1903.

Pleader and Client.

(1) *Professional misconduct—Pleader accepting fees for whole case and failing to appear after few hearings—Presumption—Terms of engagement—Procedure. In the matter of A First Grade Pleader, Rangoon*, 16 Cr. L.J. 707 = 30 Ind. Cas. 995 = 8 L.B.R. 294. See Final Part, 1915, Col. 217.

(2) Pleader's promise to persuade client to give undertaking—Undertaking not given—Pleader, if may be proceeded against for cheating. See PENAL CODE, No. 178, 20 C.W.N. 1112.

Poisons Act.

See ACT I OF 1904.

Police.

See EVIDENCE.

(1) Preventive powers of police officers—S. 149, Crim. Pro. Code—Power to stop *pans* held without license. See ACT V OF 1861 (POLICE), No. 4, 8 L.B.R. 329.

(2) Admission before, inadmissibility of. See ACT XI OF 1878 (ARMS), No. 1, 17 Cr. L.J. 512.

(3) Proceedings in relation to which sanction of Court necessary—Information to, followed by complaint in Court—Penal Code, S. 211. See CRIM. PRO. CODE, No. 134, 20 C.W.N. 1347.

(4) Evidence extracted by torture by—Evidence, value of—Duty of Police officers. See EVIDENCE, No. 3, 17 Cr. L.J. 351.

(5) *Mashirnamas*. See EVIDENCE ACT, No. 13, 10 S.L.R. 7.

(6) Information by accused to, officer on threat, admissibility of—Confession retracted, effect of. See EVIDENCE ACT, No. 8, 17 Cr. L.J. 33.

(7) False statement to police, if offence. See SANCTION TO PROSECUTE, No. 4-b, 9 Bur. L.T. 203.

Police Act.

See ACT V OF 1861.

Police Constable.

(1) Defamation—Complaint to Police Constable not privileged. See PENAL CODE, No. 224, 17 Cr. L.J. 381.

Police Mashirnamas.

To be exhibited. See EVIDENCE ACT No. 13, 10 S.L.R. 7.

Police Officer.

(1) Chowkidar, not. See PENAL CODE, 17 Cr. L.J. 164.

Police Report.

First report to police—When not safe guide—Sentence. See PENAL CODE, No. 31, 107 P.L. R. 1916.

Possession.

(1) Joint possession of property in dispute—Magistrate, jurisdiction of. See CRIM. PRO. CODE, No. 90, 17 Cr. L.J. 76.

Possession—(Concluded).

(2) Rioting—Members of an unlawful assembly—Accused party originally in possession—Complainant's party entering upon the land during absence of former—Accused party armed with sticks seeking to recover—Conviction, if sustainable—Lawful possession, what is. See PENAL CODE, No. 33, 4 L.W. 125.

(3) Order regarding, of immovable property following acquittal in case under Ss. 447 and 426 of the Penal Code, propriety of. See PENAL CODE, No. 186, 20 C.W.N. 1302.

(4) Criminal trespass—Must be actual not juridical—Crim. Pro. Code, S. 345. See PENAL CODE, No. 192, 8 L.B.R. 425.

(5) Evidence of house-breaking—Surrender of stolen articles by accused—, unexplained—Offence. See PENAL CODE, No. 174, 17 Cr. L.J. 179.

(6) Manager or agent, if has sufficient possession—Servant, nature of—Order under S. 145, Crim. Pro. Code, if can be made against servants of landlord. See CRIM. PRO. CODE, No. 94-a, 5 L.W. 118.

Possessory Order.

(1) Theft of crops—Order directing complainant to be put in possession, whether sufficient—Effect of order. See PENAL CODE, No. 143, 17 Cr. L.J. 81.

(2) Under S. 145, Crim. Pro. Code, in favour of accused—Crops sown and cut down by accused—Theft. See PENAL CODE, No. 142, 17 Cr. L.J. 75.

Practice and Procedure.

See APPEAL.

(1) *Duty of Criminal Court—Certainty of offence to be made sure of before conviction—Indian Emigration Act (XVII of 1908).*

A Criminal Court must in every case before it convicts, and as a general rule, before it goes into evidence clear the ground and define the offence which it is sought to establish against the accused. The law has always required that the conviction shall be certain and not doubtful, otherwise no man would be safe. Scope of section of the Indian Emigration Act defined. *Qasim Ali v. Emperor*, 14 A.L.J. 1242=17 Cr. L.J. 407=35 Ind. Cas. 967.

WALSH, J.

(2) See CRIM. PRO. CODE, No. 231, 9 Bur. L.T. 133=17 Cr. L.J. 500=36 Ind. Cas. 468.

(3) *Practice—Separate trial of two accused persons charged with the same offence—Statement made by one accused at the trial of the other.*

When two persons are separately tried for the same offence, and one of them is a witness at the trial of the other, the statements made by him as a witness at the other trial cannot be

Practice and Procedure—(Continued).

used against him at his own trial. *Ram Sarup v. King-Emperor*, 9 Bur. L.T. 135=17 Cr. L.J. 503=36 Ind. Cas. 471.

TWOMEY, J.

(4) *Criminal law—Notice to Police Inspector in charge before disposing of case. Chemikkala Chinna Ball v. Emperor*, (1915) M.W.N. 554=16 Cr. L.J. 736=31 Ind. Cas. 176. See Final Part, 1915, Col. 218.

(5) Entries in account books—Books not prove to be kept in regular course of business—Objection as to admissibility, when to be taken. See ACCOUNT BOOKS, No. 1, 17 Cr. L.J. 73.

(6) Charge, framing of, necessity of—Conviction. See ACT III OF 1911 (CRIMINAL TRIBES), No. 1, 17 Cr. L.J. 70.

(7) High Court—Practice—Citation of Rulings of Chief Court of Burma—Permissibility. See AUTHORITIES, No. 1, 31 M.L.J. 837.

(8) Inducement to make—Lenial punishment. See CONFESSION, No. 1, U.B.R. (1916) 2nd Qr., p. 113.

(9) Pardon how forfeited—Approver, whose pardon is alleged to have been forfeited, procedure in trying. See CRIM. PRO. CODE, No. 242, 8 L.B.R. 447.

(10) Alteration of conviction from one section to another by appellate Court. See CRIM. PRO. CODE, No. 199, (1916) 2 M.W.N. 267.

(11) Revision Petition under the Charter Act—Death of petitioner pending revision—Abatement of proceedings—Legal representative, if can be brought on record to prosecute the revision—Power of High Court to deal *suo motu*. See CRIM. PRO. CODE, No. 104, 4 L.W. 440.

(12) View of place of occurrence of offence by Judge and jury or assessors—Notice to parties. See CRIM. PRO. CODE, No. 231, 9 Bur. L.T. 133.

(13) See CRIM. PRO. CODE, No. 243, 9 Bur. L.T. 76.

(14) See CRIM. PRO. CODE, No. 62, 17 Cr. L.J. 461.

(15) Sanction to prosecute—Procedure. See CRIM. PRO. CODE, No. 145, 17 Cr. L.J. 29.

(16) See CRIM. PRO. CODE, No. 197, 17 Cr. L.J. 64.

(17) Practice—Magistrate also being complainant has no jurisdiction to pass order in that case. See MAGISTRATE, JURISDICTION OF, No. 1, 16 Cr. L.J. 801.

(18) Conviction both for forging document and for using it as genuine, not illegal. See PENAL CODE, No. 208, 17 Cr. L.J. 73.

(19) Accused charged with an offence, if can be convicted of attempt to commit such offence. See PENAL CODE, No. 180, 1 Pat. L.J. 391.

(20) One act constituting two offences—Conviction for both offences, and separate punishment, legality of. See PENAL CODE, No. 6, 1 Pat. L.J. 373.

(21) Practice—Dismissal of complaint by competent Court—Accused acquitted—Evidence considered and reasons given—No re-prosecution to be ordered. See RE-TRIAL, No. 1, 14 A.L.J. 1070.

Practice and Procedure—(Concluded).

(22) Proper Court to apply to for sanction—Notice—Order granting sanction. See SANCTION TO PROSECUTE, No. 4-a, 9 Bur. L.T. 202.

(23) See CRIM. PRO. CODE, No. 94-b, 5 L.W. 165.

(24) Practice—Right of appellant to reply to Public Prosecutor. See CRIM. PRO. CODE, No. 293-a, 36 Ind. Cas. 835.

Presidency Magistrates.

(1) Previous convictions when and how to be proved—Special rule if any applicable to. See CRIM. PRO. CODE, No. 53, 20 C.W.N. 725.

(2) Order of discharge by—Revision by High Court. See CRIM. PRO. CODE, No. 330, 20 C.W.N. 1128.

press.

Power of High Court—Jurisdiction of Magistrate to cancel order first exempting—Keeping of printing, and publication of newspapers, legitimate business. See ACT I OF 1910 (PRESS), No. 1, (1916) 2 M.W.N. 385.

Press Act.

See ACT I OF 1910.

Presumption.

See EVIDENCE ACT, S. 114.

(1) See CRIM. PRO. CODE, No. 163, 4 L.W. 556=17 Cr. L.J. 462=36 Ind. Cas. 142.

(2) See CRIM. PRO. CODE, No. 232, 17 Cr. L.J. 92.

(3) Possession of stolen property—House-breaking. See EVIDENCE ACT, No. 25, 17 Cr. L.J. 32.

(4) Intention—, of knowledge. See RAILWAYS ACT (1890), No. 1, 17 Cr. L.J. 361.

(5) Culpable homicide—Accused pointing out places of occurrence of offence—, of guilt of murder. See PENAL CODE, No. 100-a, 36 Ind. Cas. 838.

Prevention of Gambling (Bombay).

See BOM. ACT IV OF 1887.

Previous Conviction.

See CRIM. PRO. CODE, Ss. 221, 222, 226, 227, 233, 234, 237, 238, 239, 247, 248, 250, 253, 256, 260, 263, 271, 284, 287, 288, 292, 297, 299, 309.

See SENTENCE.

(1) Previous convictions, proof of, necessity of, before conviction.

Previous convictions against accused persons, should be properly proved before sentences are passed on them. *In re Turimella Kurmanna*, 17 Cr. L.J. 179=33 Ind. Cas. 819.

ABDUR RAHIM and COURTTS-TROTTER, JJ.

(2) When and how to be proved. See CRIM. PRO. CODE, No. 53, 20 C.W.N. 725.

(3) To be set forth in charge—Irregularity, when curable. See CRIM. PRO. CODE, No. 176, 8 L.B.R. 461.

Printing Press.

Power of High Court—Jurisdiction of Magistrate to cancel order first exempting—Keeping of, and publication of newspapers, legitimate business. See ACT I OF 1910 (PRESS), No. 1, (1916) 2 M.W.N. 385.

Prisons Act.

See ACT IX OF 1894.

Private Defence, Right of.

See PENAL CODE, Ss. 96, 100.

(1) Right of private defence of property when arises—Title to property. See PENAL CODE, No. 13, 19 O.C. 18.

(2) Right of, when to be exercised. See PENAL CODE, No. 15, 69 P.L.R. 1916.

(3) Injury caused in self-defence—Right of. See PENAL CODE, No. 14, 105 P.L.R. 1916.

(4) Limitation of right of. See PENAL CODE, No. 183, 12 N.L.R. 188.

(5) Property—Assault upon thief with deadly weapons—Death—Exceeding right of private defence—Offence committed—Sentence—Provocation. See PENAL CODE, No. 103, 35 P.R. 1916 (Cr.).

(6) Limits of the right of—Absence of warning, effect of—Sentence. See PENAL CODE, No. 97, 17 Cr. L.J. 335.

(7) See PENAL CODE, No. 31, 107 P.L.R. 1916.

Privilege.

See PENAL CODE, S. 499.

(4) Defamation—Complaint to Police Constable not privileged. See PENAL CODE, No. 224, 17 Cr. L.J. 381.

Process.

Issue of, without examining complainant on oath—Irregularity—No prejudice to accused—Curable defect. See CRIM. PRO. CODE, No. 133, 1 Pat. L.J. 592.

Proof.

See EVIDENCE.

See EVIDENCE ACT, S. 114.

See PRESUMPTION.

(1) Charge of murder—Guilt to be established beyond reasonable doubt. See PENAL CODE, No. 98, 17 Cr. L.J. 102.

Prosecuting Inspector.

(1) Complainant, right of, to conduct prosecution—Complainant being also—Permission, grant of—Discretion of Court. See CRIM. PRO. CODE, No. 362, 17 Cr. L.J. 486.

Prosecution.

(1) More than three years after the first offence—Limitation. See ACT IV OF 1889 (INDIAN MERCHANDISE MARKS ACT), No. 1, 10 S.L.R. 45.

(2) Criminal trial—Duty to produce before the Magistrate all persons said to have witnessed the offence tried. See TRIAL, No. 1, 12 P.R. 1916 (Cr.).

Prosecution, duty of.

(1) See EVIDENCE ACT, No. 23, 17 Cr. L.J. 23.

Prosecution duty of—(Concluded).

(3) See **MISDIRECTION TO JURY**, Nos. 1 and 2, 24 C.L.J. 400.

Provident Insurance Societies Act.

See **ACT V OF 1912**.

Provocation.

See **PENAL CODE**, S. 300.

(1) Reduction of sentence. See **PENAL CODE**, No. 103, 35 P.R. 1916 (Cr.).

(2) Murder, grave not sudden—Sentence. See **PENAL CODE**, No. 99, 17 Cr. L.J. 190.

Public Conveyances (Bombay).

See **BOM. ACT VI OF 1863**.

Public Gambling Act.

See **ACT III OF 1867**.

Public Interest.

Principles governing grant of sanction—Reasonable chance of conviction, how far necessary—Non-desirability of prosecution on grounds of public justice—Whether a good ground for refusal of sanction. See **CRIM. PRO. CODE**, No. 138, 4 L.W. 615.

Public Place.

Hindu temple—Part thereof—Whether a public place. See **MAD. ACT III OF 1889** (TOWNS NUISANCES), No. 1, 31 M.L.J. 285.

Public Prosecutor.

(1) Specially appointed—Power to withdraw from the prosecution of an accused impleaded in the case subsequently. See **CRIM. PRO. CODE**, No. 361, 18 Bom. L.R. 266.

(2) Practice—Right of appellant to reply to. See **CRIM. PRO. CODE**, No. 293-a, 36 Ind. Cas. 835.

Public Servant.

(1) Village Munsif, whether public servant under S. 197, *Crim. Pro. Code*.

Where, in the trial of a civil suit, a Village-Munsif ordered the attachment before judgment and subsequent removal of a cart belonging to the defendant, who thereupon lodged a complaint of theft against the Village Munsif: Held that though the Village Munsif acted *ultra vires* of his powers, he acted as a Judge and could not be prosecuted without the sanction required by S. 197, *Crim. Pro. Code*. **Sankaralinga Tevan v. Ayudai Ammal**, 17 Cr. L.J. 394=35 Ind. Cas. 826, SESHAGIRI AIYAR, J.

* (2) Chairman of Union Panchayat whether a—Offence of criminal breach of trust committed by him—Sanction for prosecution—Power to remove him from office. See **CRIM. PRO. CODE**, No. 162, (1916) M.W.N. 384.

(3) See **CRIM. PRO. CODE**, No. 164-a, 17 Cr. L.J. 394.

(4) Carts with unyoked oxen left across the street—Obstruction to public thoroughfare—Union Chairman removing obstruction, use of insulting and abusive language by—Offence, if committed 'as such'—Sanction, if necessary. See **CRIM. PRO. CODE**, No. 163, 4 L.W. 556.

Public Servant—(Concluded).

(5) Municipal Commissioner—Dismissal or removal from the office without the sanction of the Local Government. See **CRIM. PRO. CODE**, No. 153, 48 P.W.R. 1916 (Cr.).

(6) Obstructing a public servant in the discharge of his public functions—Local inspection by Munsiff—Waterways—Obstruction whether punishable. See **PENAL CODE**, No. 45, 20 C.W.N. 857.

(7) Village Munsif, not removable from office—Authentication of vakalatnama. See **CRIM. PRO. CODE**, No. 164-b, 36 Ind. Cas. 869.

Public Street.

Magistrate's power to pass orders under S. 147, *Crim. Pro. Code*, in respect of. See **CRIM. PRO. CODE**, No. 115, 16 Cr. L.J. 767.

Punishment.

See **SENTENCE**.

(1) Youthful offender. See **ACT VIII OF 1897** (REFORMATORY SCHOOLS), No. 1, 14 A. L.J. 1158.

(2) See **ACT III OF 1911** (CRIMINAL TRIBES), No. 3, 17 Cr. L.J. 392.

(3) Inducement to make—Lenial—Practice. See **CONFESSION**, No. 1, U.B.R. (1916), 2nd Qr., p. 113.

Punjab Excise Act.

See **PUN. ACT I OF 1914**.

Punjab Government Notifications.

No. 61, 26th January 1897. See **ACT VII OF 1878** (FOREST), No. 1, 51 P.W.R. 1916, (Cr.).

Punjab Municipal Act.

See **PUN. ACT III OF 1911**.

Railways Act (1890).

(1) Ss. 68, 112, offence under, essence of—Intention—Presumption of knowledge.

S. 112 of the Railways Act makes it an offence in any person to enter a railway carriage in contravention of S. 68 of the Act with intent to defraud a Railway administration and S. 68 provides that no person shall, without the permission of a Railway servant, enter any carriage on a Railway for the purpose of travelling therein as a passenger unless he has with him a proper pass or ticket.

The rules of the Railway Company are that a ticket is only available for the particular railway journey for which it is issued and if a person is unable to travel, by the train by which he intended to travel then he ought to go back to the Station Master for a refund of the money he paid for the ticket.

The essence of an offence under that S. 112 of the Railways Act consists of an intent to defraud the Railway Company.

Where a person is charged under the section for having travelled with a ticket issued the previous day, until there is evidence from which it could be clearly inferred that he knew that the ticket had been used before, it is very difficult to say that there is anything from

Railways Act (1890)—(Concluded).

which an intention to cheat the Railway Company could be inferred.

Even supposing that a breach of the rules was committed and the man knew that he ought not to have travelled on the second day, it is very difficult to say that he intended to cheat the Railway Company as long as he held a ticket which represented the fare paid. **Manindro Nath Mitter v. Bengal Nagpur Railway Co.** 17 Cr. L.J. 361=35 Ind. Cas. 665.

HARRINGTON and TEUNON, JJ.

(2) S. 101. See PENAL CODE, No. 6, 1 Pat. L.J. 373.

(3) S. 112. See No. 1, *supra*.

Railway Station.

Order forbidding jatra-wals to frequent. See ACT V OF 1861 (POLICE), No. 5, 14 A.L.J. 1072.

Receiving Stolen Property.

(1) See CRIM. PRO. CODE, No. 204, 17 Cr. L.J. 477.

Reference.

To High Court—District Magistrate—Decision by Session Judge. See CRIM. PRO. CODE, No. 312, 19 Bom. L.R. 796.

Reformatory Schools Act.

See ACT VIII OF 1897.

Registration Act (1908).

(1) Ss. 82, 83—Sanction—Jurisdiction—Forgery of will presented for registration.

No prosecution for an offence under S. 82 of the Registration Act can be initiated without the permission of one or other of the different registering authorities mentioned in S. 83. **Hussain Khan v. Emperor**, 14 A.L.J. 412=38 A. 354=17 Cr.L.J. 465=36 Ind. Cas. 145.

RICHARDS, C.J.

Reference:—27 Ind. Cas. 208, F.

(2) S. 83. See No. 1, *supra*.

Regulations.

- 1.—IMPERIAL.
- 2.—BOMBAY.
- 3.—MADRAS.

1.—Imperial.**Regulation III of 1901 (Frontier Crimes).**

S. 11—Applicability to Hindus of Leiah Tahsil, Musaffargarh district—Reference of case to a girga under S. 11—Jurisdiction of Deputy Commissioner of Musaffargarh. **Bhola Ram v. The Crown**; 25 P.R. 1915 (Cr.)=16 Cr. L.J. 790=31 Ind. Cas. 646. See Final Part, 1915, Col. 221.

2.—Bombay.**Regulation VIII of 1827 (Administration of Estates).**

False statement in the course of a non-judicial inquiry—Indian Penal Code, S. 193. See ACT X OF 1873 (OATHS), No. 1, 10 S.L.R. 64.

3.—Madras.**Regulation IX of 1816 (Zilla Magistrate).**

(1) S. 10—Punishment of putting in stocks—Test for determining whether it is degrading to inflict the punishment—Shanars.

Shanars are not a "servile caste" but one on the members of which it is improper to inflict so degrading a punishment as confinement in stocks. (a)

Shanars do not belong to "any of the lower castes of the people on whom it may not be improper to inflict so degrading a punishment" as putting in stocks under S. 10, Reg. IX of 1816.

A *Mala*, a Hindu *pariah*, was a person on whom it may not ordinarily be improper to inflict so degrading a sentence, but it would be otherwise if it could be shown that on adopting Christianity he adopted also the Christian moral and social standards instead of those of his caste.

In the case of *Shanars* they would, at least at the present day, regard themselves degraded by the infliction of such punishment. That is one important test for determining the question whether the second condition of the section applies. *In re Madasamy Nadan*, 17 Cr. L.J. 4=32 Ind. Cas. 131.

ABDUR RAHIM and AYLING, JJ.

References:—(a) 24 M. 271=1 Weir 928 and 6 M. 247=1 Weir 927, F.

Regulation XI of 1816 (Village Police).

S. 10—Gevandla ryot—Confinement in stocks—Escape from custody—Liability under S. 224, I.P.C. *In re Uppala Kotayya*, 18 M.L.T. 310=16 Cr. L.J. 672=30 Ind. Cas. 656. See Final Part, 1915, Col. 221.

Remand.

See CRIM. PRO. CODE, S. 344.

(1) See CRIM. PRO. CODE, No. 309, 8 L.B. R. 361.

(2) See CRIM. PRO. CODE, No. 65, 39 M. 928.

Renewal of Enactments.

See ACT I OF 1915 (EMERGENCY LEGISLATION CONTINUANCE), No. 1, 20 C.W.N. 1327.

Rent.

Madras City Municipalities Act, Ss. 130, 176—Gross annual—What is. See MAD. ACT III OF 1904 (MADRAS CITY MUNICIPAL), No. 1, (1916) 2 M.W.N. 130.

Repeal of Enactments.

See ACT I OF 1915 (EMERGENCY LEGISLATION CONTINUANCE), No. 1, 20 C.W.N. 1327.

Reply, right of.

(1) Practice—Right of appellant to reply to public prosecutor. See CRIM. PRO. CODE, No. 293-a 36 Ind. Cas. 835.

Residence.

(1) Residence, change of—What is.

Change of residence seems to import something of a more definite character than a mere

Residence—(Concluded).

casual journey involving a couple of nights spent away from home. *In re Charles George Hedinger*, 17 Cr. L.J. 67=32 Ind. Cas. 659.

COUTTS-TROTTER, J.

Res Judicata.

(1) Application for maintenance—Allegations of cruelty—Dismissal of application on failure to prove cruelty—Subsequent application on the same allegations—Not maintainable. See CRIM. PRO. CODE, No. 354, 24 P.R. 1916 (Cr.).

Restitution of Conjugal Rights.

Order for maintenance—Subsequent decree for, effect of refusal to comply with decree. See CRIM. PRO. CODE, No. 352, 9 Bur. L.T. 162.

Re-trial.

See CRIM. PRO. CODE, S. 423.

See REVISION.

(1) *Practice—Dismissal of complaint by competent Court—Accused acquitted—Evidence considered and reasons given—No re-prosecution to be ordered.*

Where a competent Court has dismissed a case after considering the evidence, and giving thorough and careful reasons on the facts, an accused party who has stood his trial ought not to be ordered to run the risk again, unless there is clear evidence of miscarriage of justice. *Hashmat Ali v. Emperor*, 14 A.L.J. 1075=17 Cr. L.J. 459=36 Ind. Cas. 139.

WALSH, J.

(2) *Appellate Court when may send case for re-trial—Ss. 6, 7, Act III of 1889 (Madras Towns Nuisances)—No evidence as to house being common gaming house—Duty of Magistrate to acquit. In re Mogambara Pattan*, 28 M.L.J. 379=17 Cr. L.J. 193=34 Ind. Cas. 305. See Final Part, 1915, Col. 222.

(3) Magistrate on appeal writing a judgment of four lines—Revision—Re-trial. See CRIM. PRO. CODE, No. 50, 14 A.L.J. 279.

(4) Appellate Court setting aside conviction and sentence, ordering re-trial, and directing the Magistrate to take additional evidence and to record a fresh decision on the original and additional evidence—Legality—Prejudice to accused—Procedure. See CRIM. PRO. CODE, No. 298, 1 Pat. L.J. 99.

(5) See CRIM. PRO. CODE, No. 309, 8 L.B. R. 361.

Revenue Court.

Sanction granted in respect of false statements made before a—Civ. Pro. Code (Act V of 1908), S. 70—Revisional power of High Court. See CRIM. PRO. CODE, No. 336, 14 A.L.J. 1077.

Review.

See HIGH COURT, JURISDICTION OF.

(1) Of judgment of High Court—Finality of order—Order not sealed—Revision. See CRIM. PRO. CODE, No. 272, 14 A.L.J. 61.

Review—(Concluded).

(2) Revision, power of Sessions Judge to, orders passed in. See CRIM. PRO. CODE, No. 306, 8 L.B.R. 377.

(3) Of judgment by Sessions Court—Incompetency. See CRIM. PRO. CODE, No. 273, 25 P.R. 1916 (Cr.).

(4) Under cl. 26 of the Letters Patent. See MIS-DIRECTION TO JURY, Nos. 1 and 2, 24 C. L.J. 400.

Revision.

See CRIM. PRO. CODE, Ss. 435, 436, 437, 439.

See HIGH COURT, JURISDICTION OF.

See SANCTION TO PROSECUTE.

(1) *Applicant not diligent in applying to High Court in revision—Effect—Nature of revisional jurisdiction.*

This revisional jurisdiction of the High Court is discretionary and it will not interfere in revision at the instance of applicants who do not show reasonable diligence in prosecuting their cases. *Avadh Behari Misra v. Dwarka Prasad Singh*, 1 Pat. L.J. 165.

CHAMIER, C.J., and JWALA PRASAD, J.

(2) *Crim. Pro. Code, S. 435—Revision by Sessions Judge of order passed by District Magistrate—District Magistrate, inferiority of, to Sessions Judge for purposes of revision.*

It held, that the Court of the District Magistrate was for the purposes of revision a Court inferior to that of the Sessions Judge (a). *Harkaram Singh v. Harnam Singh*, 19 O.C. 108=17 Cr. L.J. 223=34 Ind. Cas. 335.

LINDSAY, J.

Reference:—9 B. 100, R.

(3) *Accused's guilt not free from doubt—Revision—High Court's interference.*

Case in which the High Court on revision set aside the convictions and sentences passed on the accused on the ground that the question of the guilt of the accused was not free from doubt. *Jotindra Nath Baral v. Emperor*, 17 Cr. L.J. 460=36 Ind. Cas. 140.

SANDERSON, C.J., and WATMSLEY, J.

(4) *Criminal revision—Proceedings under Chap. XII of the Crim. Pro. Code, revision of—High Court's power of revision limited to proceedings initiated without jurisdiction—Magistrate's omission to state in the preliminary order that he was satisfied that a dispute existed, effect of—Crim. Pro. Code, S. 439.*

S. 439 of the Crim. Pro. Code, does not confer upon any High Court any power to take any proceedings: it only sets out the powers of revision that the High Court possesses in cases which have come before it.

If an applicant can show to the Court by copies of the proceedings or perhaps by affidavit, that the Magistrate in question was not a first class Magistrate or a Sub-Divisional Magistrate exercising jurisdiction, or that there was no information that a dispute existed likely to cause breach of the peace concerning any land or water or boundaries thereof then he will

Revision—(Continued).

have shown *prima facie* to the Court that the proceedings in question were not proceedings under Chap. XII at all, whether or no the Magistrate might have called them so, and in that case the Court of the Judicial Commissioner would have power under S. 435, cl. (1) of the Crim. Pro. Code to call for the record and satisfy itself as to the correctness, legality or propriety of the order passed and as to the regularity of the proceedings.

There is nothing in S. 435 (3), Crim. Pro. Code, to prevent the Court of the Judicial Commissioner interfering in proceedings which purported to be proceedings under Chap. XII in a case where the Magistrate has initiated the proceedings without jurisdiction to do so.

A mere omission by the Magistrate to set out in the preliminary order that he was satisfied that a dispute existed does not affect his jurisdiction. **Udal Bhan Pratap Singh v. Ram Samujh**, 19 O.C. 136.

KENDALL and MUHAMMAD, A.J.CS.

(5) *Serious riot—Revision—Sentence, reduction cf.*

In the case of very serious rioting the High Court will not in revision interfere with the sentence passed by the lower Court and reduce the same on the ground that certain persons on the side of the accused also sustained injuries. **Noor Mahommed v. Emperor**, 17 Cr. L.J. 300=35 Ind. Cas. 172.

LINDSAY, J.

(6) *Charge, framing of—Revision by High Court.*

The High Court will not interfere in revision with an order framing a charge against an accused person. **Sankaralinga Tevan v. Ayudal Ammal**, 17 Cr. L.J. 394=35 Ind. Cas. 826.

SESHAGIRI AIYAR, J.

(7) *Revision against acquittal—Power of High Court—Interference—Want of notice to District Magistrate in criminal appeal—Only an irregularity.* **Yellayan Ambalam v. Solai Servai**, (1915) M.W.N. 540=16 Cr. L.J. 600=30 Ind. Cas. 152=39 M. 505. See Final Part, 1915, Col. 223.

(8) *Criminal cases—Finding of fact—First report—Benefit of doubt.* **Mohabli alias Mubba and Samandi v. The Crown**, 188 P.L.R. 1915=34 P.W.R. 1915 (Cr.)=16 Cr. L.J. 639=30 Ind. Cas. 747. See Final Part, 1915, Col. 223.

(9) Evidence for the prosecution found to be weak and biased—Benefit of doubt—Conviction set aside in revision. See ACQUITTAL, No. 2, 66 P.L.R. 1916.

(10) See ACT I OF 1910 (PRESS), No. 1, (1916) 2 M.W.N. 385.

(11) Partition proceedings submitted to Collector for confirmation—Summons issued to accused to appear before Collector—Refusal to take summons—Penal Code, S. 174. See U.P. ACT III OF 1901 (LAND REVENUE), No. 1, 14 A.L.J. 1069.

(12) Order of acquittal—Interference in revision when justifiable and when not. See CRIM. PRO. CODE, No. 290, 9 Bur. L.T. 47.

Revision—(Concluded).

(13) Revision—Time within which High Court must be moved—Practice. See CRIM. PRO. CODE, No. 324, 20 C.W.N. 1170.

(14) High Court's power to call for a finding or for additional evidence—Power of High Court under Charter Act. See CRIM. PRO. CODE, No. 115, 16 Cr. L.J. 767.

(15) Review of judgment of High Court—Finality of order—Order not sealed—Revision. See CRIM. PRO. CODE, No. 272, 14 A.L.J. 61.

(16) See CRIM. PRO. CODE, No. 156, 23 P. R. 1916 (Cr.).

(17)—Sanction granted in respect of false statements made before a Revenue Court—Civ. Pro. Code (Act V of 1908), S. 70—Revisional power of High Court. See CRIM. PRO. CODE, No. 336, 14 A.L.J. 1077.

(18) Petition under the Charter Act—Death of petitioner pending revision—Abatement of proceedings—Legal representative, if can be brought on record to prosecute the revision—Power of High Court to deal *suo motu*. See CRIM. PRO. CODE, No. 102, 4 L.W. 440.

(19) Power of Sessions Judge to review orders passed in. See CRIM. PRO. CODE, No. 306, 8 L.B.R. 377.

(20) Concurrent jurisdiction of Sessions Judge and District Magistrate in. See CRIM. PRO. CODE, No. 309, 8 L.B.R. 361.

(21) See CRIM. PRO. CODE, No. 320, 10 S. L.R. 68.

(22) See CRIM. PRO. CODE, No. 155, 17 Cr. L.J. 184.

(23) Magistrate's refusal to examine witnesses—Declining jurisdiction—Irregularity. See CRIM. PRO. CODE, No. 100, 17 Cr. L.J. 217.

(24) High Court, interference by. See CRIM. PRO. CODE, No. 92, 17 Cr. L.J. 266.

(25) See CRIM. PRO. CODE, No. 340, 17 Cr. L.J. 316.

(26) See CRIM. PRO. CODE, No. 109, 17 Cr. L.J. 348.

(27) See CRIM. PRO. CODE, No. 62, 17 Cr. L.J. 461.

(28) See SANCTION TO PROSECUTE, No. 4, 52 P.W.R. 1916 (Cr.).

(29) See SANCTION TO PROSECUTE, No. 2, 34 P.W.R. 1916 (Cr.).

(30) See CRIM. PRO. CODE, No. 1, 5 L.W. 165.

Right of Reply.

(1) Ss. 292, 289, Crim. Pro. Code—Construction—Documents exhibited on behalf of accused during cross-examination of prosecution witnesses—Prosecution whether has right of reply—Test under S. 292. See CRIM. PRO. CODE, No. 290, 43 C. 426.

(2) Practice—Right of appellant to reply to public prosecutor. See CRIM. PRO. CODE, No. 293-a, 36 Ind. Cas. 835.

Right of Suit.

(1) Power of Court to issue *certiorari* when issued—When not judicial—Duty of Magistrate under Press Act, S. 3, ministerial—Exercise of

Right of Suit—(Concluded).

power by ministerial or executive officer in excess—Remedy. See ACT I OF 1910 (PRESS), No. 3, (1916) 2 M.W.N. 497.

(2) See CRIM. PRO. CODE, No. 94-b, b L.W. 165.

Right of Way.

Dispute as to—Local enquiry, report on—Statements of parties, order on—Jurisdiction. See CRIM. PRO. CODE, No. 116, 17 Cr. L.J. 478.

Rioting.

See PENAL CODE, Ss. 147, 148.

(1) See CRIM. PRO. CODE, No. 232, 17 Cr. L.J. 92.

(2) Charge of—Evidence—Common object, mention of. See PENAL CODE, No. 29, 16 Cr. L.J. 809.

(3) Serious riot—Revision—Sentence, reduction of. See REVISION, No. 5, 17 Cr. L.J. 300.

Road.

(1) No right to dig up, or drain. See U.P. ACT I OF 1900 (MUNICIPALITIES), No. 3, 17 Cr. L.J. 404.

Rule 28 and No. 437, 3rd October 1904, r. 1.

See ACT VII OF 1978 (FOREST), No. 1, 51 P.W.R. 1916.

Sal.

Attachment and, of property of an absconding offender—Application for return of property or its sale—proceeds made after two years barred—Remedy if attachment, &c., illegal. See CRIM. PRO. CODE, No. 17, 40 P.W.R. 1916 (Cr.).

Sanction to Prosecute

See CRIM. PRO. CODE, Ss. 195, 197, 476.

(1) Sanction after complaint was brought, not good.

Held, that a sanction to prosecute obtained after bringing a complaint for any of the offences specified in S. 195, Crim. Pro. Code, 1898, is bad in law, consequently a conviction based upon such a complaint is illegal and is liable to be set aside even on revision. **Raja Ram v. The Crown**, 33 P.W.R. 1916 (Cr.)=17 Cr. L.J. 405=35 Ind. Cas. 965.

BROADWAY, J.

(2) Application for sanction to prosecute cannot be dismissed in default—Revision—Ss. 195 and 439, Crim. Pro. Code (Act V of 1898).

Held, that an application under S. 195, Crim. Pro. Code (Act V of 1898), for sanction to prosecute for any of the offences specified therein should either be granted or refused on the merits but cannot be dismissed in default if the applicant is absent on any of the dates fixed for its hearing. **Dhanpat v. Kesho Ram**, 34 P.W.R. 1916 (Cr.)=17 Cr. L.J. 417=35 Ind. Cas. 977.

SCOTT-SMITH, J.

Reference:—61 P.W.R. 1914=4 P.R. 1915, F.

Sanction to Prosecute—(Continued).

(3) Crim. Pro. Code, S. 195—Order by Collector *suo motu* for prosecution of person complaining against his subordinate.

It is not essential to the vitality of a sanction that it should be addressed to a particular complainant, for the sanction only removes the bar put up by S. 195 on the jurisdiction of the Court. But sanction implies the existence of a person who desires to prosecute, and it is not desirable that the sanction should be an abstract thing which may float about the world like bit of thistle down until it comes into contact with some possible prosecutor.

A sanction is not a direction to prosecute. It leaves the private prosecutor to exercise his unfettered discretion as to whether he will proceed or not.

When the Collector orders a prosecution he puts himself in the position of a prosecutor, and, by that very fact, disqualified from performing the judicial or quasi-judicial function of deciding whether to grant a sanction or not.

Where, on a complaint being made to the Collector of a District against one of his subordinates, the Collector, *suo motu*, passed an order for the prosecution of the applicant under S. 182, Indian Penal Code: *Held* that the order was merely an executive order and not a sanction.

Where the Collector acted *suo motu* and without notice to the complainant, it would be merely an executive order. As such, it is a mere *brutum fulmen* and has not the effect of a sanction. **Dodumal v. The Crown**, 10 S.L.R. 65=17 Cr. L.J. 305=35 Ind. Cas. 481.

PRATT, J.C. and CROUCH, A.J.C.

(4) Crim. Pro. Code, Ss. 109, 195, 439—Sanction—False statement before a Judicial Officer of one District making inquiry into the sufficiency of security under S. 109, Crim. Pro. Code, taken by a Magistrate of another District—S. 193 of Penal Code.

Held, that a Magistrate of one District has no jurisdiction to make an inquiry into the sufficiency of security taken under S. 109, Crim. Pro. Code, 1898, from a vagrant by a Magistrate of another District even if the latter authorizes the former to do so, as a Magistrate of District has no power to delegate his powers to a Magistrate of another District, consequently no person making a false statement in that inquiry can be prosecuted for perjury under S. 195, Crim. Pro. Code. In such a case the sanction granted by the inquiring Judicial Officer to prosecute the person under S. 193, Indian Penal Code, for intentionally making a false statement before him is illegal and is liable to be set aside even on revision (a). **Khuda Bakhsh v. The Crown**, 52 P.W.R. 1916 (Cr.).

SHAH DIN, J.

References:—(a) 18 P.R. 1906=19 P.W.R. 1906; 77 P.W.R. 1914=6 P.R. 1914 (Cr.), F.

(4-a) Crim. Pro. Code, S. 195—Proper Court to apply to for sanction—Notice—Order granting sanction.

Ordinarily an application for sanction to prosecute for giving false evidence should be made

Sanction to Prosecute—(Continued).

to the Court in which the alleged false evidence was given. When application is made to another Court it is incumbent on such Court to send notice to the opposite side to show cause.

An order granting sanction to prosecute should show the reasons why sanction was granted. *Nga Aung Gyl v. King-Emperor*, 9 Bur. L.T. 202.

ORMOND, J.

(4-b) *Crim. Pro. Code (Act V of 1898)*, S. 195—*Indian Penal Code (Act XLV of 1860)*, S. 193.

An order granting sanction to prosecute for giving false evidence ought to specify the statement alleged to be false.

It is no offence to make a false statement to the Police. *Nga Po Yin v. King-Emperor*, 9 Bur. L.T. 203.

ORMOND, J.

(4-c) *Crim. Pro. Code (1898)*, Ss. 195, 476—*Sanction to prosecute—Order granting or refusing sanction by lower Court—Appeal—Power of superior Court to convert proceedings into one under S. 476—Jurisdiction.*

When a case of perjury or forgery is brought to the notice of the District Court under S. 195, *Crim. Pro. Code*, that Court has power to convert proceedings to obtain or to revoke sanction refused or granted in a lower Court under S. 195, into proceedings under S. 476, *Crim. Pro. Code*. *Ambica Prasad v. King-Emperor*, 1 Pat. L.J. 607.

ROE, J.

(8) Sanction when necessary—Irregularity, when not curable. See ACT XI OF 1878 (ARMS), No. 4, 8 L.B.R. 452.

(6) Abetment of forgery—Sanction of Civil Court to prosecute—Document produced by party in Civil Court—Prosecution without sanction whether legal. See *CRIM. PRO. CODE*, No. 152, 14 A.L.J. 74.

(7) Criminal breach of trust committed by Chairman of Union Panchayat—Sanction for prosecution whether necessary—Authority to give sanction. See *CRIM. PRO. CODE*, No. 162, (1916) M.W.N. 384.

(8) Civil Court taking action under S. 476, *Crim. Pro. Code*—Interference of High Court in revision under S. 439, *Crim. Pro. Code*—Legality—High Court's interference under S. 115, *Civ. Pro. Code*, when justifiable—Sanction to prosecute—Whether notice necessary. See *CRIM. PRO. CODE*, No. 351, U.B.R. (1916), 3rd Qr., p. 83.

(9) Granting sanction to prosecute witness before the close of trial—Impropriety—No ground for quashing proceedings. See *CRIM. PRO. CODE*, No. 337, 9 S.L.R. 176.

(10) Jurisdiction of District Court to grant sanction as an appellate Court. See *CRIM. PRO. CODE*, No. 150, 67 A.L.R. 1916.

(11) False statements made by witness before committing Magistrate in the mofussil—High Court's power to direct prosecution for perjury—Case sent to nearest First Class Magistrate. See *CRIM. PRO. CODE*, No. 347, 43 O. 542.

Sanction to Prosecute—(Concluded).

(12) False information to the Police—Legality of sanction. See *CRIM. PRO. CODE*, No. 3, 24 C.L.J. 134.

(13) Order of Small Cause Court refusing sanction—Appeal to District Judge—Maintainability—Position and powers of District Judge. See *CRIM. PRO. CODE*, No. 158, 1 Pat. L.J. 206.

(14) See *CRIM. PRO. CODE*, No. 338, 29 P.R. 1916 (Cr.).

(15) Judicial proceedings—'Court'—Person giving false evidence in such inquiry—Competency of Magistrate to grant. See *CRIM. PRO. CODE*, No. 2, 34 P.R. 1916 (Cr.).

(16) Court abolished but re-established with curtailed territorial limits — Jurisdiction — Sanction for prosecution for offence committed before abolition. See *CRIM. PRO. CODE*, No. 147, 16 Cr.L.J. 787.

(17) Procedure. See *CRIM. PRO. CODE*, No. 145, 17 Cr.L.J. 29.

(18) Contradictory statements—Opportunity to explain to be given. See *CRIM. PRO. CODE*, No. 159, 17 Cr.L.J. 93.

(19) Statement made by a person in the course of proceedings under S. 476 of the *Crim. Pro. Code*—No right to cross-examine the witness—Statement cannot go into evidence at the trial if the witness is not forthcoming. See *EVIDENCE ACT*, No. 20, 18 Bom. L.R. 284.

(20) See *LETTERS PATENT*, N.W.P., No. 1, 17 Cr. L.J. 537.

(21) Order by a Magistrate under S. 476, *Crim. Pro. Code*—His successor in office referring the matter to a Subordinate Magistrate—Conviction after receipt of report by latter officer—Irregularity—Curable defect—S. 537, *Crim. Pro. Code*. See *CRIM. PRO. CODE*, No. 351-a, 1 Pat. L.J. 553.

(22) Sanction by District Magistrate after withdrawal of prosecution. See *CRIM. PRO. CODE*, No. 264-a, 36 Ind. Cas. 842.

Scheduled Districts Act.

See ACT XIV OF 1874.

Search Warrant.

See *CRIM. PRO. CODE*, S. 96.

(1) When illegal. See *CRIM. PRO. CODE*, No. 25, 12 P.W.R. 1916 (Cr.).

(2) Search warrant—Inquiry prior to issue thereof under S. 100, *Crim. Pro. Code*—Nature of proceedings—Judicial proceeding. See *CRIM. PRO. CODE*, No. 2, 34 P.R. 1916 (Cr.).

(3) See *CRIM. PRO. CODE*, No. 24, 17 Cr. L.J. 549.

Security.

See ACT I OF 1910 (PRESS), No. 3, (1916) 2 M.W.N. 497.

Security for Good Behaviour.

See *CRIM. PRO. CODE*, Ss. 107—110, 112, 114, 121, 123.

See *SURETY*.

(1) Evidence. See *CRIM. PRO. CODE*, No. 61, 17 Cr. L.J. 184.

Security Proceedings.

(1) See REVISION, No. 4, 19 O.O. 186.

(2) Sureties, fitness of, in bad livelihood cases. See SURETY, No. 2, 17 Cr. L.J. 95.

(3) Immoveable properties, if to be considered in deciding fitness of surety. See SURETY, No. 1, 17 Cr. L.J. 97.

Sentence.

See APPEAL.

See CRIM. PRO. CODE, Ss. 35, 123, 397, 423.

See PREVIOUS CONVICTION.

See REVISION.

(1) *Enhancement of sentence—In lieu of one week's imprisonment, Rs. 50 fine or in default one week's rigorous imprisonment amounts to—Where particularly accused had already suffered 4 days' imprisonment—Ss. 423 and 439 of Crim. Pro. Code.*

Held, that Rs. 50 (fifty) fine or in default one week's rigorous imprisonment altered by the appellate Court instead of one week's rigorous imprisonment only, amounts to enhancement of sentence, particularly where the accused has already undergone several days' imprisonment. Mam Chand v. The Crown, 5 P.W.R. 1916 (Cr.)=17 Cr. L.J. 212=34 Ind. Cas. 324.

RATTIGAN, J.

(2) *Perverse finding—Misconduct in procedure—Heavy sentence—Penal Code (Act XLV of 1860), Ss. 147, 152.*

Case in which it was held that there was a lamentable miscarriage of justice and very heavy sentences passed as the result of a series of judicial blunders.

Savage sentences are sometimes passed as the combined result of erroneous view of the law, unjustifiable and sometimes perverse findings of fact, and misconduct in procedure. *Badri Prasad v. Emperor, 17 Cr. L.J. 343=35 Ind. Cas. 519.*

WALSH, J.

(3) *Heavy, reduction of, See ACT XI OF 1878 (ARMS), No. 5, 17 Cr. L.J. 80.*

(4) *Playing with cards for insignificant stakes, See BOM. ACT IV OF 1967 (PREVENTION OF GAMBLING), No. 3, 18 Bom. L. R. 940.*

(5) *To be awarded in excoise cases. See PUN. ACT I OF 1914 (EXCISE), No. 1, 63 P.L.R. 1916.*

(6) *Appeal—Right of—Joint trial—Non-appealable, against some accused and appealable sentence against one—Appeal at instance of former—Maintainability. See CRIM. PRO. CODE, No. 288, 31 M.L.J. 837.*

(7) *Different trials—Concurrent sentences—Legality. See CRIM. PRO. CODE, No. 13, 24 C.L.J. 54.*

(8) *Several sentences of different kinds—Applicability of S. 35, Crim. Pro. Code—Sentences how to run—Sentence when defective in form. See CRIM. PRO. CODE, No. 11, 23 C.L.J. 596.*

(9) *'Concurrent sentences'—Of imprisonment, what is implied in. See CRIM. PRO. CODE, No. 277, 17 Cr. L.J. 480.*

(10) *Passed by trial Court under S. 457, Indian Penal Code—Sessions Judge altering the*

Sentence—(Concluded).

conviction under S. 411—Whether such alteration makes the trial by trying Magistrate illegal. See JOINT TRIAL, No. 2, 49 P.W.R. 1916 (Cr.).

(11) *One act constituting two offences—Conviction for both offences, and separate punishment, legality of. See PENAL CODE, No. 6, 1 Pat. L.J. 373.*

(12) *Provocation—Reduction of. See PENAL CODE, No. 103, 35 P.R. 1916 (Cr.).*

(13) *Enfranchisement of sentence. See PENAL CODE, No. 32, 31 P.R. 1916 (Cr.).*

(14) *Murder—Provocation grave not sudden. See PENAL CODE, No. 99, 17 Cr. L.J. 190.*

(15) *Private defence, limits of the right of—Absence of warning, effect of. See PENAL CODE, No. 97, 17 Cr. L.J. 335.*

(16) *Accused convicted under several provisions of the Penal Code—Sentence how to be awarded. See PENAL CODE, No. 4, 14 A.L.J. 738.*

(17) *Offence by a man of 65 years—Age how far to be taken into account in passing sentence. See PENAL CODE, No. 70, (1916) M.W.N. 1.*

(18) *Wrongful confinement—Execution of decree—Arrest of judgment-debtor—Protection while returning from Court—Stay en route—Liability of bailiff to punishment. See PENAL CODE, No. 123, 121 P.L.R. 1916.*

(19) *See PENAL CODE, No. 31, 107 P.L.R. 1916.*

(20) *Serious riot—Revision—Reduction of. See REVISION, No. 5, 17 Cr.L.J. 300.*

Separate Punishment.

One act constituting two offences—Conviction for both offences, and, legality of. See PENAL CODE, No. 6, 1 Pat.L.J. 373.

Separate Sentences.

(1) *See PENAL CODE, No. 32, 31 P.R. 1916 (Cr.).*

Servant.

(1) *Manager or agent, if has sufficient possession—Nature of possession of—Order under S. 145, Crim. Pro. Code, if can be made against servants of landlord. See CRIM. PRO. CODE, No. 94-a, 5 L.W. 118.*

Sessions Case.

Committal for offences under Ss. 457 and 75, I.P.O.—Charge under S. 75, omission of, by Sessions Court—Conviction under Ss. 457 and 511, I.P.O.—Previous convictions admitted by prisoner—Legality of sentence—Interference in appeal. See CRIM. PRO. CODE, No. 225, 9 L.W. 403.

Sessions Judge.

See MAGISTRATE, JURISDICTION OF.

(1) *Power of, to call for proceedings before an inferior Court—Discretion of—Interference in revision. See CRIM. PRO. CODE, No. 168, 14 A.L.J. 146.*

(2) *Charge, amendment of, by, after expression of opinion by assessors, whether legal. See CRIM. PRO. CODE, No. 184, 50 P.W.R. 1916 (Cr.).*

Sessions Judge—(Concluded).

(3) Reference to High Court—District Magistrate—Decision by. See CRIM. PRO. CODE, No. 312, 18 Bm. L.R. 796.

(4) Revision, concurrent jurisdiction of, and District Magistrate in. See CRIM. PRO. CODE, No. 309, 8 L.B.R. 361.

(5) Revision, power of, to review orders passed in. See CRIM. PRO. CODE, No. 306, 8 L.B.R. 377.

(6) Sentence passed by trial Court under S. 457, Indian Penal Code, altering the conviction under S. 411—Whether such alteration makes the trial by trying Magistrate illegal. See JOINT TRIAL, No. 2, 49 P.W.R. 1916 (Cr.).

(7) District Magistrate, inferiority of, to, for purposes of revision. See REVISION, No. 2; 19 O.C. 108.

Setting aside Conviction.

(1) Under Penal Code, S. 325. See PENAL CODE, No. 32, 31 P.R. 1916 (Cr.).

Shanars.

Are not a "servile caste" but one of the members of which it is improper to inflict so degrading a punishment as confinement in stocks. See MAD. REG. IX OF 1915 (ZILA MAGISTRATE), No. 1, 17 Cr.L.J. 1.

Small Cause Court.

Order of Small Cause Court refusing sanction to prosecute—Appeal to District Judge—Maintainability—Position and powers of District Judge. See CRIM. PRO. CODE, No. 158, 1 Pat. L.J. 206.

Stamp Act (1899).

(1) S. 62 (b), and Sch. I, Art. 35—*Amaldustak, whether it requires stamp—Conviction under S. 62 (b), if maintainable—Schedule of Stamp Act, if exhaustive.*

The schedule attached to the Stamp Act must be treated as exhaustive.

An agreement for a lease, whereby no rent is reserved and no premium paid or money advanced, is not included in the schedule and does not require a stamp.

Held, on a construction of *amaldustak* which was for a term of seven years but wherein no rent was fixed, that the document did not require stamp, and so the conviction of the executant of the document under S. 62 (b) of the Stamp Act was set aside. *Mussammat Sunder Kuer v. King-Emperor*, 20 G.W.N. 923 = 1 Pat. L.J. 366 = 17 Cr.L.J. 495 = 36 Ind. Cas. 175.

ROE and JWALA PRASAD, JJ.

(2) S. 64, cl. (c)—"Any other act," meaning of—Document insufficiently stamped—Prosecution under the section, if maintainable.

The words "any other Act" in cl. (c) of S. 64 of the Indian Stamp Act, mean an act of a like nature to those which are specified in cls. (a) and (b); and thus the mere fact that a person puts a stamp on a document, which he knows not of proper value, would not bring the case within cl. (c) of the section (a). *Chhak*

Stamp Act (1899)—(Concluded).

Mal v. King-Emperor, 24 O.L.J. 441 = 21 O.W.N. 248 = 17 Cr.L.J. 466 = 36 Ind. Cas. 146.

SANDERSON, C.J., and RICHARDSON, J.

c. Reference:—23 M. 155, R.

(3) Ss. 65, 70—Offence under S. 65—Prosecution without Collector's sanction under S. 70—Illegality. *Crown v. Ramjhal*, 21 P.R. 1915 (Cr.) = 38 P.W.R. 1915 (Cr.) = 16 Cr.L.J. 787 = 31 Ind. Cas. 613. See Final Part, 1915, Col. 228.

St. 3 & 4 Will. IV, c. 85 (Government of India Act, 1833).

S. 43. See ACT I OF 1910 (PRESS), No. 1, (1916), 2 M.W.N. 385.

St. 24 & 25 Viet., c. 67 (Indian Councils Act, 1861).

Ss. 22, 23. See ACT I OF 1915 (EMERGENCY LEGISLATION CONTINUANCE), No. 1, 20 C.W.N. 1327.

St. 24 & 25 Viet., c. 104 (Charter Act).

(1) Powers of High Court under—How to be construed. See CRIM. PRO. CODE, No. 115, 16 Cr.L.J. 767.

(2) S. 15. See CRIM. PRO. CODE, No. 102, 4 L.W. 110.

St. 5 & 6 Geo. V, c. 61 (Government of India Act, 1915).

(1) High Court—Powers of superintendence—Interference with order passed under S. 145, Crim. Pro. Code. See HIGH COURT, JURISDICTION OF, No. 1, 1 Pat. L.J. 336 (S.B.).

(2) S. 107. See CRIM. PRO. CODE, No. 109, 17 Cr.L.J. 348.

(3) Government of India. See CRIM. PRO. CODE, No. 91-b, 5 L.W. 165.

Stay of Criminal Proceedings.

(1) Stay of criminal proceeding—Institution of civil suit after criminal prosecution—Incompetency of Sessions Judge to stay criminal proceedings—Opinion of Civil Court not binding on Criminal Court—Revision—S. 439 of Act V of 1899.

Held, that a Sessions Judge has no power at all to stay criminal proceedings pending before a Magistrate subordinate to him.

Held, also, that the decision of a Civil Court, especially of a Small Cause Court, can have no influence on the proceedings in a Criminal Court.

Held, further that criminal proceedings are not to be stayed where a civil suit in connection therewith has been instituted long after the prosecution was started. *Tirath Ram v. Arura Mal*, 9 P.W.R. 1916 (Cr.)

LE-ROSSIGNOL, J.

(2) Staying criminal proceedings—Charge under Ss. 406 and 420, Penal Code—Several persons claiming the property—Civil suit brought by the accused after the charge was framed against him that the property belonged to him—Ss. 344 and 439—Crim. Pro. Code—Where proceedings are to be stayed.

Stay of Criminal Proceedings—(Concluded).

Held, that, to avoid a regrettable conflict of decisions between the Civil and Criminal Courts the criminal proceedings in a case under Ss. 406 and 430, Penal Code, should be stayed where several persons have turned up to claim the property, the subject of the charge, and the accused has brought a civil suit to declare that the property belongs to him without unnecessary delay.

In this case the civil suit was brought on 4th October after the charge was framed against the accused on 3rd October, and the accused's excuse was that the Civil Courts were closed during September.

Held, also, that it is not advisable to stay criminal proceedings as a matter of course, but each case should be duly dealt with according to its own particular circumstances. *Nur Din v. The Crown*, 8 P.W.R. 1916 (Cr.) = 17 Cr. L. J. 205 = 34 Ind. Cas. 317.

CHEVIS, J.

- (3) *Stay of proceedings in a criminal case—Practice—Point of issue to be appropriately decided by Civil Court—Decision of a Civil Court affecting a criminal case—Power of Court under S. 344 of Crim. Pro. Code—Revision—S. 439 of the same Code.*

Held, that the parties should not be encouraged to resort to the Criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a Civil Court (a).

Held, also, that a Court of Justice has inherent jurisdiction to stay proceedings in a case pending before it, and S. 344, Crim. Pro. Code, empowers a Criminal Court to adjourn an inquiry or trial for any reasonable cause.

Held, further, that, although a decision of a Civil Court is not technically binding upon a Criminal Court, but it is in favour of an accused, it creates such a doubt in his guilt that it would almost become impossible for the latter Court not to give him its benefit. *Pars Ram v. Jalal Din*, 4 P.W.R. 1916 (Cr.) = 32 Ind. Cas. 135 = 17 Cr. L.J. 7.

SHADI LAL, J.

References :—(a) 33 P.R. 1910 (Cr.) = 50 P.W.R. 1910 (Cr.) = 8 Ind. Cas. 1161 = 12 Cr. L.J. 50, F.

- (4) *Criminal proceedings, stay of, pending disposal of civil proceedings. Mahomed Ibrahim Ravuthar v. Kattayan*, 16 Cr. L.J. 637 = 30 Ind. Cas. 461. See Final Part, 1915, Col. 228.

- (5) By Sessions Judge—Propriety. See CRIM. PRO. CODE, No. 25, 12 P.W.R. 1916 (Cr.).

Stocks.

- (1) Punishment of putting in—Test for determining whether it is degrading to inflict the punishment—*Shandrs*. See MAD. REG. IX OF 1816 (ZILA MAGISTRATE), No. 1, 17 Cr. L.J. 4.

Stolen Property.

- (1) Recovery of—Conduct—Evidence. See EVIDENCE ACT, No. 2, U.B.R. 1915, 2nd Qr., p. 114.

Stolen Property—(Concluded).

- (2) Possession of—House-breaking—Presumption. See EVIDENCE ACT, No. 25, 17 Cr. L.J. 32.

Subordinate Magistrate.

Power of District Magistrate to commit accused for trial on evidence recorded by—. See CRIM. PRO. CODE, No. 8, 12 N.L.R. 146.

Subordination of Courts.

- (1) *Single Judge of High Court, position of.*

A single Judge of the High Court sitting alone cannot be said to be an authority subordinate to any other Bench of the High Court. A Judge sitting to transact work properly allotted to him is the High Court itself just as any other Bench. *Ramjas v. Mahadeo Pershad*, 17 Cr. L.J. 537 = 36 Ind. Cas. 595.

RICHARDS, C.J., and BANERJI, J.

Succession Certificate.

Application for—Allegations false—Enquiry under S. 476, Crim. Pro. Code—Order for prosecution under Ss. 193, 209, I.P.C.—Appeal pending in High Court—Stay of criminal proceedings. See PENAL CODE, No. 62, 20 C.W.N. 1116.

Suicide.

Appearance of accused—Surety for appearance—Failure to appear—by accused—Forfeiture of surety-bond. See CRIM. PRO. CODE, No. 367, 18 Bom. L.R. 683.

Summons.

Partition proceedings submitted to Collector for confirmation—Issued to accused to appear before Collector—Refusal to take summons—Penal Code, S. 174—Revision. See U.P. ACT III OF 1901 (LAND REVENUE), No. 1, 14 A.L.J. 1069.

Surety.

See CRIM. PRO. CODE, Ss. 106 to 110, 112, 114, 121, 514.

- (1) *Surety, fitness of—Immoveable properties, if to be considered.*

The sufficiency of a surety should be considered from a general view of his stability and the property which he holds.

The sufficiency of surety is not to be regarded simply from the point of view of the moveable property which he possesses. It is obvious that a man may possess Rs. 1,000 to-day when he passes a bond and get rid of it to-morrow when the bond is passed and have no property against which the Court can proceed. On the other hand, if he has immoveable property, though that cannot be attached under S. 514, Crim. Pro. Code, it is nevertheless a much better safeguard. A man can always raise money on his immoveable property if it is not encumbered; and he would probably prefer to do that than go to jail in the event of his bond being forfeited. Per *Chitty, J. Nasuruddi Karikar v. Emperor*, 17 Cr. L.J. 97 = 32 Ind. Cas. 833.

CHITTY and WALMSLEY, JJ.

Surety—(Concluded).**(2) Sureties, fitness of—in bad livelihood cases.**

In a bad livelihood case, where three sureties were required, it is not necessary that each one of the three should live in the immediate neighbourhood of the accused. **Romesh Chandra Dutta Chowdhury v. Emperor**, 17 Cr. L.J. 95 = 32 Ind. Cas. 687.

SHARFUDDIN and TEUNON, JJ.

(3) Appearance of accused—for appearance—Failure to appear—Suicide by accused—Forfeiture of surety bond. See CRIM. PRO. CODE, No. 367, 18 Bom. L.R. 683

(4) Surety's immoveable properties, to be taken into consideration in deciding as to their fitness. See CRIM. PRO. CODE, No. 44, 17 Cr. L.J. 91.

Survey.

Surveyor—Placing boundary marks and measuring lands—No authority to, the lauds—Act done in good faith—Obstruction to surveyor—Offence committed. See PENAL CODE, No. 48, 31 M.L.J. 305.

Survey and Boundaries Act (Madras).

See MAD. ACT IV OF 1897.

Temple.

(1) Hindu—Whether a public place—Gaming—Meaning. See MAD. ACT III OF 1889 (TOWNS NUISANCES), No. 1, 31 M.L.J. 285.

(2) Dispute as to possession and management—Whether a dispute as to 'use of land' within S. 145 or 147, Crim. Pro. Code. See CRIM. PRO. CODE, No. 106, 17 Cr. L.J. 235.

Tenancy Act (Bengal).

See BEN. ACT VIII OF 1885.

Thatch hut.

(1) Whether a building. See PENAL CODE, No. 195, 17 Cr. L.J. 536.

Theft.

See PENAL CODE, Ss. 378 to 381.

(1) House-breaking with intent to commit—Completion of the offence—Causing grievous hurt by stabbing, thereafter—Offence committed. See PENAL CODE, No. 206, 27 P.R. 1916 (Cr.).

(2) Joinder of charges—Offences of same kind—Two acts of, in same night—Legality of single trial for both offences. See CRIM. PRO. CODE, No. 196 a, 26 Ind. Cas. 673.

Thief.

(1) In custody of chowkidar—Rescue—No offences. See PENAL CODE, No. 78, 17 Cr. L.J. 164.

Thumb Impressions.

See EVIDENCE.

(1) Examination of accused—of accused and opinion of experts on such impressions inadmissible—Evidence Act (I of 1872), S. 73. See CRIM. PRO. CODE, No. 340, 17 Cr. L.J. 316.

Tolls.

Right to collect. See CRIM. PRO. CODE, No. 107, 24 O.L.J. 437.

Town Areas Act (U.P.).

See U.P. ACT II OF 1914.

Towns Nuisances Act (Madras).

See MAD. ACT III OF 1889.

Trade Mark.

See PENAL CODE, S. 478.

(1) *Trade mark, infringement of—Merchandise Marks Act (IV of 1889), S. 15—Limitation—Acquiescence.*

There is nothing in S. 15 of the Merchandise Marks Act, 1889, to prevent prosecution, provided that the infringement alleged against the accused was in point of time within the period limited in the section.

The owner of a trade mark cannot stand by for several years while his trade mark is being infringed continuously and then bring a criminal complaint in respect of some recent instance in which there has been an infringement. **Abdul Majid v. Emperor**, 17 Cr. L.J. 488 = 36 Ind. Cas. 168.

TWOMEY, J.

References :—10 Ind. Cas. 787 = 4 Bur. L.T. 83 = 12 Cr. L.J. 246, F.

(2) See CRIM. PRO. CODE, No. 24, 17 Cr. L.J. 543.

(3) Importer using a distinctive mark has property in mark. See PENAL CODE, No. 217, 14 A.L.J. 1080.

Transfer of Criminal Cases.

See CRIM. PRO. CODE, S. 528.

See MAGISTRATE, JURISDICTION OF.

(1) *Transfer, grounds for—Expression of opinion by Judge in counter case—Judge's competence to try subsequent case—Principles that influence the Court in granting or refusing application for transfer.*

The basis of all applications for transfer of criminal cases must be that the accused must have a reasonable apprehension that he will not receive a fair trial (a).

The accused has no reasonable ground for apprehension that he will not have a fair trial, merely because the Judge in a former proceeding, arising out of a counter case to the one now coming before him, as expressed certain views upon the evidence in the former case as to which of the two versions is correct.

Judges are presumed to be upright men who will approach each case from the point of view of that case alone, and not permit their minds to be affected in any way by anything that has gone before that case.

Judges are not believed to be so easily prejudiced, because one incidental part of the case before them has been decided in a previous case; they will shut their eyes entirely to anything that may be alleged in favour of the accused in a subsequent trial.

Held that a Judge is not incompetent to try a case of rioting merely because he has tried and decided a counter-case and expressed an opinion. **Amrit Mondal v. King-Emperor**, 1 Pat. L.J. 899.

SHARFUDDIN and ROE, JJ.

References :—(a) 1 O.W.N. 426; 36 C. 904; 33 A. 589, F.

Transfer of Criminal Cases—(Concluded).

(2) Case under S. 110, Crim. Pro. Code—Jurisdiction to transfer under S. 526. See CRIM. PRO. CODE, No. 65, 78 P.L.R. 1916.

(3) See CRIM. PRO. CODE, No. 206, 24 C.L.J. 444.

Trespass.

See CRIMINAL TRESPASS.

See HOUSE TRESPASS.

See PENAL CODE, Ss. 441, 460.

(1) Murder—Death caused in lurking house. See CRIM. PRO. CODE, No. 184, 50 P.W.R. 1916 (Cr.).

(2) Criminal—Possession must be actual not juridical—Crim. Pro. Code, S. 345. See PENAL CODE, No. 192, 8 L.B.R. 425.

Trial.

See JOINT-TRIAL.

See RE-TRIAL.

Criminal trial—Duty to produce before the Magistrate all persons said to have witnessed the offence tried.

All persons said to have witnessed the offence tried should be produced before the Magistrate, though it is not necessary for a Public Prosecutor to tender in the Session Court any witness whom he may have reason to believe will give false evidence. *Kalmi v. The Crown*, 12 P.R. 1916 (Cr.)=39 P.W.R. 1916 (Cr.)=17 Cr. L.J. 267=34 Ind. Cas. 987.

CHEVIS and SCOTT-SMITH, JJ.

Reference:—19 C.W.N. 28, R. ' .

Ultra Vires.

(1) See ACT VII OF 1878 (FOREST), No. 2, 10 S.L.R. 9.

(2) Ordinances 3 and 5 of 1914—Power of Governor-General in Council to pass Act embodying provisions of ordinances—Ordinance 3 of 1914—S. 11, effect of. See ACT I OF 1916 (EMERGENCY LEGISLATION CONTINUANCE), No. 1, 20 C.W.N. 1927.

(3) See CRIM. PRO. CODE, No. 85, 22 P.R. 1916 (Cr.).

(4) Delegation of power to Local Government—Notification of Local Government not. See ORDINANCE III OF 1914 (FOREIGNERS), No. 3, 17 Cr. L.J. 67.

Union Chairman.

Obstruction to public thoroughfare—removing obstruction, use of insulting and abusive language by—Offence, if committed 'as such public servant'—Sanction, if necessary. See CRIM. PRO. CODE, No. 163, 4 L.W. 556

Union Panchayat.

Chairman of—Criminal breach of trust committed by him—Chairman whether a "public servant"—Sanction for prosecution—Power to remove him from office. See CRIM. PRO. CODE, No. 162, (1916) M.W.N. 384.

U.P. Land Revenue Act.

See U.P. ACT III OF 1901.

U.P. Municipalities Act.

See U.P. ACT I OF 1900.

U.P. Town Areas Act.

See U.P. ACT II OF 1914.

Unlawful Assembly.

See PENAL CODE, Ss. 143, 147, 148, 149, 154.

(1) See CRIM. PRO. CODE, No. 232, 17 Cr. L.J. 92.

Unwritten Laws.

See ACT I OF 1910 (PRESS), No. 1, (1916) 2 M.W.N. 385.

Vakalatnama.

(1) Village Munsiff—Public servant not removable from office—Authentication of. See CRIM. PRO. CODE, No. 164-b, 36 Ind. Cas. 869.

Valuable Security.

Whether acknowledgment of receipt of insured parcel is. See PENAL CODE, No. 180, 1 Pat. L.J. 391.

Village Chowkidar Act.

See BEN. ACT VI OF 1870.

Village Magistrate.

(1) Complaint to—Discharge of accused—Award of compensation under S. 250, Crim. Pro. Code. See CRIM. PRO. CODE, No. 209, 4 L.W. 73.

(2) Prosecution launched as result of information given to—Discharge of accused—Order of compensation as against informant—Validity. See CRIM. PRO. CODE, No. 211-a, 32 M.L.J. 78.

(3) Magistrate if includes. See CRIM. PRO. CODE, No. 211-a, 32 M.L.J. 78.

Village Munsiff.

(1) Whether public servant under S. 197, Crim. Pro. Code. See PUBLIC SERVANT, No. 1, 17 Cr. L.J. 394.

(2) Public servant not removable from office—Authentication of vakalatnama. See CRIM. PRO. CODE, No. 164-b, 36 Ind. Cas. 869.

Village Police Regulation.

See MAD. REG. XI OF 1816.

Waiver.

See ACT I OF 1910 (PRESS), No. 3, (1916) 2 M.W.N. 497.

War.

See ORDINANCE VI OF 1914 (COMMERCIAL INTERCOURSE WITH ENEMIES), No. 1, 31 M.L.J. 178.

Warrant.

(1) Running away to avoid arrest under, of Civil Court, when no offence. See PENAL CODE, No. 47, 17 Cr. L.J. 71.

(2) Execution by Nazir of warrant addressed to bailiff—Resistance—No offence—No date mentioned in warrant within which it is to be executed—Illegality. See PENAL CODE, No. 44-a, 1 Pat. L.J. 550.

Warrant Case.

Discharge of accused for absence of complainant—Legality. See CRIM. PRO. CODE, No. 214, 20 C.W.N. 698.

Whipping Act.

See ACT IV OF 1909.

Withdrawal of Prosecution.

(1) Sanction by District Magistrate after. See CRIM. PRO. CODE, No. 264-a, 36 Ind. Cas. 842.

Withdrawal Petition.

Meaning of compromise and—filed by complainant praying that the case may be struck off without hearing—Whether compromise or withdrawal—Procedure in warrant cases for. See CRIM. PRO. CODE, No. 208, 20 C.W.N. 1209.

Witness.

See APPROVER.

See CRIM. PRO. CODE, S. 288.

See EVIDENCE.

See EVIDENCE ACT.

Contradictory statements by witness in one and the same deposition—Prosecution for perjury—Presumption in favour of good faith. See PENAL CODE, No. 53, 9 S.L.R. 202.

Workman.

(1) Contractor not artificer labourer or. See ACT XIII OF 1859 (WORKMAN'S BREACH OF CONTRACT), No. 4, 9 Bur. L.T. 108.

(2) Breach of contract—Jurisdiction of Magistrate where employer resides or carries on business. See ACT XIII OF 1859 (WORKMEN'S BREACH OF CONTRACT), No. 3, 10 S.L.R. 56.

Workmen's Breach of Contract Act.

See ACT XIII OF 1859.

Wrongful Confinement.

See PENAL CODE, S. 342.

Execution of decrees—Arrest of judgment-debtor—Protection while returning from Court—Stay *en route*—Liability of bailiff to punishment—Sentence. See PENAL CODE, No. 123, 121 P.L.R. 1916.

Youthful Offender.

Punishment. See ACT VIII OF 1897 (REFORMATORY SCHOOLS), No. 1, 14 A.L.J. 1158.

Zilla Magistrate Regulation.

See MAD. REG. IX OF 1816.

SUPPLEMENT.

Digest of Mysore Chief Court Reports. (Criminal Cases).

Caste.

Defamation of caste as whole—'Viloma Jati,' a defamatory expression—Publication—Privilege. See PENAL CODE (MYSORE), No. 1, 20 Mys. 285.

Commitment.

Commitment to Sessions Court when illegal. See CRIM. PRO. CODE, No. 1, 20 Mys. 319.

Crim. Pro. Code.

Ss. 207, 254, 526 (1) (e) and (iv)—*Commitment to a Court of Session.*

It is illegal for a Magistrate to commit for trial to a Court of Session a case which he is competent to try, unless he is of opinion that the offence under enquiry cannot be adequately punished by him.

When it is expedient for the ends of justice that a case triable by a Magistrate should be tried by a Court of Session, the Chief Court can make an order under S. 526 (1)(e) and (iv), Crim. Pro. Code.

A Magistrate committed to the Court of Sessions two cases, one of dacoity exclusively triable by a Court of Session, the other of offences under Ss. 355 and 448 of the Penal Code which he himself was competent to try; his reason for committing the latter case was that it was counter to the former, the prosecution witnesses in one case figuring as defence witnesses in the other and the accused persons in one as witnesses in the other.

The charge of dacoity being withdrawn in the Court of Sessions, the Sessions Judge referred the case to the Chief Court to quash the commitment.

Held, that the commitment was illegal and the case should be tried by the Magistrate himself, the circumstances not requiring an order by the Chief Court under S. 526. *In re Dawood Khan*, 20 Mys. 319.

MILLER, C.J. and PARAMASIVA AIYER, J.

Defamation.

• Defamation of a caste as a whole—'Viloma Jati,' a defamatory expression—Publication—Privilege. See PENAL CODE (MYSORE), No. 1, 20 Mys. 285.

Penal Code (Mysore).

S. 499—*Expl. 2 and Excep. 9—Defamation of a caste as a whole—'Viloma Jati,' a defamatory expression—Publication—Privilege.*

A caste as a whole may be defamed as a collection of persons within the meaning of Expl. 2 to S. 499 of the Penal Code. The expression *Viloma Jati* used of a caste is a defamatory expression and its use may be

Penal Code (Mysore)—(Concluded).

punishable as a defamation. The protection afforded by the 9th exception to S. 499 was held not to extend to the publication in a newspaper available to the public in general, of an imputation made for the protection of the interests of the caste to which the makers of the imputation belonged. *Borayya v. Bhojappa*, 20 Mys. 285.

MILLER, C.J. and PARAMASIVA IYER, J.

Regulation III of 1899 (Mysore General Clauses).

S. 6. See REGULATION IV OF 1906 (MYSORE MINES), No. 1, 20 Mys. 292.

Regulation IV of 1906 (Mysore Mines).

S. 17—*Amendment of—General Clauses Regulation (III of 1899), S. 6.*

Where an undesirable who was expelled from the premises of a Mining Company by an order issued by the Superintendent of that Company under S. 17 of Regulation IV of 1906, re-entered after the amendment of that section in 1914.

Held, that his re-entry did not amount to an offence. *Government v. Annamalai alias Gundal*, 20 Mys. 292.

MILLER, C.J. and CHANDRASEKHARA AIYER, J.

Regulation VII of 1906 (Mysore Municipal).

S. 96.

The procedure laid down in S. 96 explained. An intimation or application by an intending builder must conform to the requirements prescribed if it is to be regarded as sufficient notice under sub-S. (1). Where, therefore, it is unaccompanied by the plan prescribed by bye-law, it cannot be regarded as a valid notice for the purpose of enabling the applicant under sub-S. (4) to proceed with the work as being in accordance with the specification contained in a notice given by him.

The powers of a Municipal Council in dealing with a notice given under sub-S. (1) must be exercised as defined in sub-Ss. (2) and (3), with strict reference to the work proposed in the notice. It is not competent to a Municipal Council to refuse to deal with such a notice until some formality not required by the Municipal Regulation is satisfied; and such a refusal may be ignored by the applicant as if the Municipal Council had taken no action on his application. *M. S. Muddalya v. Government*, 20 Mys. 279.

CHANDRASEKHARA AIYER and PARAMASIVA IYER, JJ.

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1916. FINAL PART (Section II--Civil).

(TWELFTH YEAR OF ISSUE.

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(FINAL PART --SECTION II--CIVIL).

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" Bombay " " XI.	Mysore Chief Court Reports, Vol. XX,
" Calcutta " " LXIII.	Pts. 10 to 12.
" Madras " " LXXIX.	Punjab Record (1916).
Allahabad Law Journal " XIV.	" Law Reporter (1916).
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Burma Law Times " VIII, Pt. 10 (from p. 258 to the end).	Nagpur Law Reports, Vol. XII.
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	" " Vols. XXXI to XXXVI.

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To

THE HON'BLE SIR CHARLES ARNOLD WHITE, Kt.,

(BAR-AT-LAW)

FORMERLY CHIEF JUSTICE OF THE HIGH COURT OF JUDICATURE, MADRAS
AND NOW MEMBER, COUNCIL OF THE SECRETARY OF STATE FOR INDIA, .

WHOSE APPRECIATION AND ENCOURAGEMENT

IN CONNECTION WITH THIS COMPILATION

THE COMPILERS DESIRE VERY GRATEFULLY TO ACKNOWLEDGE

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ABBREVIATIONS EXPLAINED.

REPORTS.

A.	Indian Law Reports, Allahabad Series.*
A.L.J.	Allahabad Law Journal.*
A.W.N.	Allahabad Weekly Notes.
B.	Indian Law Reports, Bombay Series.*
B.H.C.	Bombay High Court Reports.
B.L.R.	Bengal Law Reports.
Bom. L.R.	Bombay Law Reporter.*
Bur. L.R.	Burma Law Reports.
Bur. L. T.	Burma Law Times.*
C.	Indian Law Reports, Calcutta Series *
C.L.J.	Calcutta Law Journal.*
C.L.R.	Calcutta Law Reports.
C.W.N.	Calcutta Weekly Notes.*
C.P.L.R.	Central Provinces Law Reports.
Cr. L.J.	Criminal Law Journal of India.
I.A.	Law Reports, Indian Appeals.*
Ind. Cas.	Indian Cases.*
L. W.	Law Weekly.*
L.B.R.	Lower Burma Rulings.*
M.	Indian Law Reports, Madras Series.*
M.H.C.	Madras High Court Reports.
M.L.J.	Madras Law Journal.*
M.L.T.	Madras Law Times.*
M. W. N.	Madras Weekly Notes.*
M.I.A.	Moore's Indian Appeals.
Mys.	Mysore Chief Court Reports.*
N.L.R.	Nagpur Law Reports.*
N.W.P.H.C.	North-West Provinces High Court Report
O.C.	Oudh Cases.*
Pat. L. J.	Patna Law Journal.*
P.R.	Punjab Record.*
P.L.R.	Punjab Law Reporter.*
P.W.R.	Punjab Weekly Reporter.*
S.L.R.	Sind Law Reporter.*
T.L.R.	Travancore Law Reports.
U.B.R.	Upper Burma Rulings.*
W.R.	Sutherland's Weekly Reporter.

OTHER ABBREVIATIONS.

Appl.	Applied.
Appr.	Approved.
D. or Distd.	Distinguished.
Disc.	Discussed.
Diss.	Dissented from.
Exp.	Explained.
F.	Followed.

(F B.)	Full Bench.
Obs.	Observed.
(P.C.)	Privy Council.
R. or Refd. to	Referred to.
(S.B.)	Special Bench.

(N B) — (1) This publication embodies Cases from the Reports marked above with asterisks.

(2) In the Punjab Record and the Punjab Law Reporter, the cases are known by their numbers and not by the pages where they are printed; (e.g.) 4 P.R. 1911 would mean Case No. 4, in the Punjab Record of 1911. The same explanation applies to the Punjab Law Reporter also. It has also to be remarked that the Punjab Record and the Punjab Law Reporter have been divided into two sections, Civil and Criminal.

(3) For Cases from Reports other than those published in India, the volumes and pages are printed exactly in the manner they are to be found in the original cases wherein they are referred to.

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7	714	254	1394	581	1025
21	450	260	1189	590	772
27	1198	271	624	627	174, 705, 720, 939, 1028, 1207
37	51	280	468		419
52	519	286	1122	669	977
56	1354	289	1267	676	814
59	696	292	571	679	20
62	1304	297	225	689	677
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111	309	358	434	34	1027
115	168	361	1189	51	988
117	768	366	1237	55	109
122	1070	380	471	60	420
126	1001	398	1077	64	525
131	22	407	482	69	698
138	1108	411	1123	74	1097
148	1109	416	773	86	377
150	461	425	30	109	20
154	1063	433	1331	112	1058
163	307	438	1363	118	1153
178	1408	440	815	126	767
181	163	446	1448	134	476
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184	1298	461	1398	166	112
188	371	465	159	189	112
191	461	469	450	194	112
197	152	474	1362	200	710
201	1037	481	430	207	108
204	416	484	559	210	317
209	1298	488	1125	235	58
212	1411	494	1348	239	1006
214	1443	502	1122	248	305
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223	879	520	794	270	741
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392	354	170	915	973	1244
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439	358	201	1445	1031	797
446	1346	207	413	1052	1085
451	56	211	69	1085	1042
473	942	217	616	1104	240
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570	532	417	753	62	353
588	563	432	829	67	120
600	731	441	445	74	38
606	1271	447	397	77	748
614	1271	459	800	80	1345
621	740	467	1046	84	138
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646	538	511	1203	107	833
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675	1272	558	98	159	800
679	1270	574	761	195	376
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419	1105	896	1119	140	223
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494	122	959	1400	217	1203
501	634	965	551	225	1299
509	515	981	987	236	48
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543	1162	997	1430	242	327
544	1095	1010	1104	244	1413
548	530	1018	141	249	1443
554	1383	1026	303	252	879
565	826	1029	793	255	775
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673	138	18	1070	347	402
683	130	23	168	349	478
689	57	25	1001	353	728
693	38	30	1070	361	1398
700	357	35	96	363	336
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727	126	41	1108	373	169
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781	37	57	157	393	1122
792	668	65	1063	396	4218
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808	124	85	166	415	575
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521	782	997	817	126	534
527	1330	1002	1125	134	663
534	306	1009	240	156	509
538	773	1017	1399	163	1299
549	30	1024	815	172	741
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645	1931	1099	1348	258	744
650	1363	1103	819	292	1394
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666	159	1141	1037	323	110
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671	571	1161	756	340	374
673	1398	1166	1133	343	731
677	1362	1171	1274	347	829
684	724	1183	49	355	507
705	1329	1189	494	360	1419
709	1177	1199	9	372	833
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782	953	53	288	199	1302
786	1272	55	893	201	1328
796	1218	56	289	205	733
803	515	57	1113	207	20
806	990	59	463	209	547
810	489	60	1427	222	1384
818	19	61	45	224	552
821	1182	63	1058	226	1227
826	883	64	1408	228	449
838	240	67	1234	234	1121
846	815	69	1160	236	24
850	1125	74	282	239	1157
856	817	77	287	242	1176
862	1399	80	1409	243	1085
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432	751	149	1192	188	424
436	1365	158	847	192	1441
440	1223	162	708	195	1390
443	942	165	895	201	1418
453	632	175	560	210	762
453	60	180	659	231	228
473	260	187	97	232	981
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501	641	245	1284	268	1203
506	1244	275	108	272	413
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* Read 26 Mys 299 for 20 Mys 229.

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† Read 40 M 105 for 40 M 115.

‡ Read 31 Ind Cas 700 for 31 Ind Cas 700.

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† Read 32 Ind Cas 526 for 32 Ind Cas 525.

‡ Read 128 P R 1916 for 128 P R 1915.

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† Read 31 Ind Cas 700 for 21 Ind Cas 700.

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FINAL PART.

SECTION II—(CIVIL CASES).

Abadi.

(1) Abadi — Malguzari village in Central Provinces — Landlord proprietor of the whole site — Tenant — Bare licenses — Transfer by tenant — Whether binding on the landlord — Express or implied permission of latter allowing transferee to occupy — Rights of such transferee — Prescription by latter — Nature of acts necessary to show adverse title. *Narain v. Behari*, 11 N.L.R. 126 = 31 Ind. Cas. 307. See Final Part, 1915, Col. 2.

(2) Non-proprietor living outside abadi — Whether can be said to have abandoned site inside the abadi. See ABANDONMENT, No. 2, 108 P.W.R. 1916.

(3) See BURDEN OF PROOF, No. 6 (5), 32 Ind. Cas. 370.

Abandonment.

(1) Second appeal — Finding of fact — Adverse possession — Abandonment of land — Grounds — Misunderstanding of facts.

The Courts dismissed the plaintiff's suit for possession of a certain land having found that the plaintiff's father had abandoned the same, for there was a mortgage by plaintiff's father in favour of the defendant which he had failed to redeem.

Held, that the alleged mortgage was not by plaintiff's father, nor of his share, and, even if the mortgage were by him, it would not establish abandonment within the period of limitation prescribed for redemption. The case having been decided on a misunderstanding of facts was remanded for re-decision. *Muhammad Chiragh Shah v. Choghatta*, 99 P.L.R. 1916 = 86 Ind. Cas. 221.

SCOTT-SMITH, J.

(2) Limitation — Abandonment — Adverse possession — Neighbour tethering cattle — Non-proprietor residing outside the village — Its effect on his residential house in the village

Abandonment—(Continued).

which has fallen down — Possession goes with title — Art. 142 of Act IX of 1908.

A non-proprietor by merely living outside the actual village abadi cannot be said to have abandoned the site inside the abadi on which he once had his residential house which had fallen down and had not been rebuilt for many years.

The rule laid down in Art. 237 of Mr. Rattigan's Digest of the Punjab Customary Law, even if applicable in such a case, is of no avail where the proprietary body have made no attempt to enforce the penalty mentioned therein.

The fact that one of the proprietors, whose house is near, began to use the vacant site by tethering his cattle there does not make any difference.

Possession in the case of vacant site is presumed to go with the title, and its mere use by a neighbour for the purpose of tethering his cattle thereon cannot be regarded as adverse possession and consequently Art. 142 of Act IX of 1908 does not apply. *Lachman Das v. Narsingh Das*, 108 P.W.R. 1916 = 101 P.L.R. 1916 = 36 Ind. Cas. 207.

CHEVIS, J.

(3) Ground of relief.

It is open to a party who claims a relief on more grounds than one, to give up any of the grounds at any time he likes before the case is decided. *Horde v. Muhammad Abdul Hasan Khan*, 30 Ind. Cas. 207.

STUART and KANHAIYA LAL, A.J. CS.

(4) Abandonment — Rights of lessee's transferee — Whether extinguished by abandonment. See BEN. ACT VIII OF 1885 (BENGAL TENANCY), No. 43, 33 Ind. Cas. 98.

(5) Of tenancy. See BEN. ACT VIII OF 1885 (BENGAL TENANCY), No. 44, 30 Ind. Cas. 583.

Abandonment—(Concluded).

(5-a) Of holding—Cultivation by sub-tenant—Ejectment. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 12 (a), 32 Ind. Cas. 586.

(6) Requisites of. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 37, 33 Ind. Cas. 488.

(7) See ADVERSE POSSESSION, No. 5, 19 O.C. 374.

Abatement.

(1) *Appeal—Death of one of several respondents pending appeal—Rights of respondents joint—Failure to bring on record legal representative within time—Effect—Abatement of whole suit—Ignorance of law—No excuse—Failure to prove impossibility to become aware of respondent's death—Dismissal of suit.*

Where, pending an appeal against a decree dismissing a suit for possession of lands, one of the defendants died and his legal representative was not brought on record within a period of six months from the date of his death.

Held, that the appeal abated *in toto* and against all the respondents (a).

Where the interests of defendants-respondents are joint and the decree could not be reversed without the representative of the deceased respondent being brought on record, the whole appeal must abate (b).

Held that, in the present case, as the plaintiff's suit could not have proceeded at all unless the deceased respondent in his capacity as co-mortgagee had been impleaded in the first instance, the lower Court was right in holding that the whole suit abated.

Ignorance of law is not a sufficient excuse for failing to bring the legal representative of a deceased respondent within time (c).

Held that, in the present case, the plaintiff failed to prove that he was not aware of the death of the respondent until such time as it was practically impossible for him to file an application within the expiry of six months from the date of his death. *Inayat v. Ganga*, 3 P.R. 1916=32 Ind. Cas. 829.

SHADI LAT and LESLIE-JONES, JJ.

References:—(a) and (b) 22 B. 718; 26 B. 203 and 34 C. 1020, *Not Appr.*; 41 P.R. 1915 and 22 A. 430, *Rel. on.* (c) 204 P.L.R. 1912, F.; 41 P.R. 1915, R.; 113 P.R. 1907, D.

(2) *Abatement same as dismissal of a suit—Decree—Appeal.*

Sadasiva Iyer, J.—Where there is an appeal to the District Court and a second appeal to the High Court, S. 115, Civ. Pro. Code, cannot apply.

An order declaring a suit to have abated is a decree from which an appeal lies. The practice in the Madras Courts is that, when a suit has abated, the Court also *ipso facto* dismisses the suit, that is, it takes it off from the file of pending suits. An abatement of a suit has the same effect as the dismissal of it. The abatement of the suit and the passing of an order which has the force of a decree dismissing the suit, are treated as closely connected, if not identical, proceedings.

Abatement—(Concluded).

The Rules Committee might make this clear by the enactment of a rule that, in cases where suits have abated without the necessary or formal order, a decree dismissing the suit should be drawn up as on the date of the abatement, unless the abatement is set aside by appropriate proceedings.

The power under S. 15 of the Charter Act can only be exercised in extraordinary proceedings and subject to the enactments of the Indian Legislature.

Moore, J.—The District Munsif's order dismissing the suit on the ground that it has abated under O. XXII, r. 4 (3) of the Civ. Pro. Code by reason of the application which had been made under sub-r. (1) of O. XXII, r. 4 of the Civ. Pro. Code to make the legal representative of the deceased defendant a party not having been represented within the time fixed by law is a decree and appealable as such. The legislature intended that an abatement of a suit has the same effect as the dismissal of it. *Suppu Nayakan v. Perumal Chetty*, (1916) M. W.N. 301=30 M.L.J. 456=19 M.L.T. 364=34 Ind. Cas. 372.

SADASIVA AIYAR and MOORE, JJ.

(3) *Decree for damages for slander reversed in appeal—Death of defendant during pendency of second appeal—Appeal whether abates.*

Plaintiff obtained a decree for damages for slander. On appeal this decree was set aside and the suit was dismissed. Plaintiff then appealed to the Chief Court and, after the second appeal was filed, defendant died.

Held, that the appeal did not abate. *Nga Kyet Sein v. Mi Kyn Mya*, U.B.R. 1916, 1st Qr., 105=9 Bur. L.T. 38=34 Ind. Cas. 249.

MCCOILL, J.C.

References:—26 B. 597; 26 M. 499, R.

(4) First suit by mortgagor to redeem in his personal right—Abatement of suit—Second suit to redeem by his co-parceners whether barred. See CIV. PRO. CODE (1882), No. 27, 18 B-m. L.R. 33.

(5) Order of abatement—Whether decree—Appeal—Mitakshara—Suit by unmarried daughter—Death of plaintiff—Whether right to sue survives to her married sisters. See CIV. PRO. CODE (1908), No. 3, 14 A.L.J. 8.

(6) Application to set aside abatement of appeal—Sufficient cause—Limitation—Delay when may be excused. See CIV. PRO. CODE (1908), No. 548, 12 P.W.R. 1916.

(7) Nature of suit under S. 92, Civ. Pro. Code—Public trust—Suit by two worshippers with the sanction of the Advocate-General—Death of one plaintiff, if causes suit to abate—Court's power to add parties—Sanction of Advocate-General if necessary for such addition. See CIV. PRO. CODE (1908), No. 180, 3 L.W. 305.

(8) Application for substitution made more than 6 months after appellant's death—No objection by respondents—Effect. See LIMITATION ACT (1908), No. 144, 30 C.W.N. 983.

Abatement of Appeal.

See ABATEMENT OF SUIT.

See CIV. PRO. CODE (1908), O. XXII.

- (1) *Abatement—Action for malicious prosecution—Plaintiff dying pending his appeal—Action abates—Probate and Administration Act, S. 89—"Other personal injuries not causing death"—Scope of—Construction of statutes—Rule regarding.*

Where a suit for damages for malicious prosecution was dismissed without costs and the plaintiff died pending his appeal, *held* that the appeal abated and that the plaintiff's legal representatives were not entitled to prosecute the appeal.

The rule that personal actions abate with the death of the person injuring or injured is a well-established rule applying equally to India as to England.

S. 89 of the Probate and Administration Act has no direct application to cases where the legal representatives being the undivided sons of the deceased had not and were not in a position to take out probate or letters of administration.

The words "other personal injuries not causing death" in S. 89 of the Probate and Administration Act do not exclusively refer to injuries similar to assault only, but also include injuries similar to defamation, such as injuries caused by malicious prosecution, and wrongful search (a).

The first rule of construction of a statute is to give the words their ordinary and natural meaning. But it is also a recognized canon of construction that where the language is not clear and unequivocal the Legislature should not be taken to have intended any substantial alteration of the existing law by words of doubtful import.

Ordinarily where several specific instances are mentioned followed by a general term with the word 'other' prefixed to it, where the rule of *ejusdem generis* is applied, the meaning of the general term should be settled with reference to all the instances preceding it. *Motiram v. Samraji*, (1916) 2 M.W.N. 280=31 M.L.J. 772.

ABDUR RAHIM, O.C.J. and KRISHNAN, J.
Reference:—(a) 31 C. 993, *Diss. from*.

(2) See DAMAGES, SUIT FOR, No. 1, 20 M. L.T. 303.

Abatement of Rent.

See LANDLORD AND TENANT.

See RENT.

Lease—Lessee's possession disturbed by persons with paramount rights of pasturage over premises demised—Lessee's right to. See BEN. ACT VIII of 1885 (TENANCY), No. 68, 34 Ind. Cas. 851.

Abatement of Suit.

See ABATEMENT OF APPEAL.

See CIV. PRO. CODE (1908), O. XXII.

Abatement of Suit—(Concluded).

(1) Adjudication directing, on account of plaintiff's death, whether decree—Appeal. See CIV. PRO. CODE (1908), No. 6, 111 F.W.R. 1916.

(2) Suit for malicious prosecution against manager of joint Hindu family—Abatement—Cause of action—Survival—Legal representative applying for setting aside abatement—Refusal—Appeal. See CIV. PRO. CODE (1908), No. 549, 31 Ind. Cas. 4.

Abkari Act.

See MAD. ACT I OF 1886.

Aboriginal Tribes.

In Chota Nagpur—Law of inheritance applicable. See ACT X OF 1865 (SUCCESSION), No. 14, 20 C.W.N. 1082.

Absconding Offender.

Absconding Hindu co-parcener—Joint family property—Attachment of share—Validity and effect—Rights of Government and of after-born-sons of the absconder. See HINDU LAW (JOINT FAMILY), Nos. 4 and 3, 20 M.L.T. 58 and 60.

Abuse of Process.

Of Court—What amounts to. See ATTACHMENT BEFORE JUDGMENT, No. 1, 3 L.W. 82.

Abwab.

- (1) *Moharrari lease—Provision for enhanced rent for collection charges—Construction of contract.*

The question whether any particular item is or is not an *abwab* must depend upon the construction of the contract of lease in each case, and the question in each case is whether the sum claimed is really part of the rent agreed upon to be paid as consideration for the lease.

A *kabuliat* after describing the land let out stated the sudder *jama* as Rs. 21 7-3, and the enhanced rent for a *badish* (collection charges) as Rs. 3-1-0, the total *jama* being described as Rs. 24-8-3. The *kabuliat* provided for the collection of the aforesaid rent according to the kists mentioned above on failure of payment of the rent within the time limited. *Held* that the sum of Rs. 3 1-0 was on a proper construction of the *kabuliat* a part of the consideration for the lease and was as much part of the rent as the sudder *jama* and was not an *abwab*. The stipulation for the payment of the collection charges is not a stipulation, or reservation for the payment of arbitrary or indefinite cesses, but was a definite clause in the engagement contracted between the parties which had to be given effect to. The landlord was therefore entitled to the amount so claimed by him as collection charges. *Upendra Lal Gupta v. Ataula*, 36 Ind. Cas. 404.

CHATTERJEA and SHEEPHANKS, JJ.

References:—31 C. 834=8 C.W.N. 529; 8 C. 730; 17 C. 131=16 I.A. 152=13 Ind. J. 251=5 Sar. P.O.J. 408=8 Ind. Dec. (N.S.) 625, R; 17 Ind. Cas. 172=16 C.L.J. 225; 7 Ind. Cas. 177=16 C.L.J. 293=40 C. 806; 12 C.W.N. 75; 17 C. 726, D.

Abwab—(Concluded).

(2) Written lease—A definite amount over and above amount stated as rent, but forming part of consideration, *il.* See BEN. ACT VIII OF 1885 (BENGAL TENANCY), No. 37, 21 C.W.N. 108.

Acceleration.

See HINDU LAW (WIDOW), No. 19, 18 Bom. L.R. 954.

Accession.

Mortgagee in possession bringing adjacent land under cultivation, if accession to the mortgaged holding.

It would be stretching the interpretation of the word "accession" much too far to suggest that a mortgagee who is in possession of 10 acres of land and, while in such possession brings 8 acres adjacent to it under cultivation, does so as an accession to the mortgaged holding. *Nga Cho v. Mi Se Mi*, U.B.R. (1916), 2nd Qr., 110—36 Ind. Cas. 7.

SAUNDERS, J.

Accounts.

(1) *Mutual dealings—Oral settlement of accounts—Cause of action.*

In cases of mutual dealings even an oral settlement of accounts will give rise to a substantive cause of action. *Aiyasami Chetty v. Chinnai Nalnar*, 3 L.W. 338=34 Ind. Cas. 431. SADA-SIVA AIYAR and MOORE, JJ.

*References:—*21 M. 366, F.; 16 M. 339, *Not F.*

(2) *Mutual, open and current accounts—Limitation—Test to be applied—Balance—Its evidential value in case of literate and illiterate person—Interest and compound interest on payments and advance made and balance—Limitation Act (1908), Arts. 57 and 85.*

Art. 85, Limitation Act (1908) does not apply to a case where (a) the plaintiff alone has been the striker making advances and receiving part payments from time to time and the balance has always been in plaintiff's favour, (b) no mutual and reciprocal demands have taken place, and (c) the defendant has never been in a position to make any demand.

A suit for recovering money on account of advances made by the plaintiff to the defendant in kind (grain) and cash is not governed by Art. 57 of the said Limitation Act.

A suit based on accounts leading up to a balance struck is maintainable, but not on the balance itself.

There is no general rule to the effect that a debtor cannot go behind the balance struck by him; the striking of a balance is merely a piece of evidence, the value of which mostly depends on the circumstances of each case.

Where such a balance has been struck by an educated man of business, the presumption ordinarily is that he has understood the accounts and its evidential value is great, but such is not the case where the striker is an illiterate person. In the latter class of cases the accounts should be thoroughly scrutinized

Accounts—(Continued).

by the Court through a commissioner or otherwise and the plaintiff should be allowed only what is actually due thereon.

But this does not mean that, in the case of an express or implied contract to pay interest, compound interest is not allowable.

When balances are struck from time to time, the ordinary practice is to add interest to principal each time a balance is struck, and so compound interest is bound to come in. But where repayments are made between any two balances, the debtor is entitled to interest on each repayment from the date of the repayment to the next balance just in the same way as the creditor is entitled to interest on any future advance from the date of that advance till the next balance and to interest on the former balance. *Budh Ram v. Raji Ram*, 103 P.W. R. 1916.

CHEVIS, J.

(3) *Limitation—Open, current and mutual account—Limitation Act (1908), Art. 85, Sch. I.*

Where the account of the plaintiff Bank showed that the defendant borrowed a sum of money, and on various dates during the period of the account certain sums were paid by the defendant which were all credited to the account and set off against the pre-existing debt, interest being calculated every half year and the balance carried over to the following half year, held that the account indicated nothing more than the record of a loan transaction between the plaintiff Bank and the defendant, and the payments made by the defendant were paid in part discharge of the obligation under which the defendant lay with respect to the Bank, and the suit being brought more than three years after the date of the transaction was barred by time, the account not being mutual account within the meaning of Art. 85 of the Limitation Act. *The Bank of Multan, Limited v. Kamta Prasad*, 14 A.L.J. 949=35 Ind. Cas. 199.

PIGOTT and LINDSAY, JJ.

(4) *Account, suit for—Principal and Agent—Proprietor appointed by a co proprietor as common manager for payment of debts on the estate, whether an agent of latter and, on his death, of his sons—Limitation—Indian Limitation Act, 1877 (Act XV of 1877), S. 8 and Sch II, Art. 89—Demand—Discharge and minority of some of the claimants to an account.*

In 1894 one N.M. a part proprietor of an estate, entered into an agreement with his co-proprietor the respondent under which the latter was appointed agent for the purpose of collecting rents and profits from the estate, in order gradually to pay off a heavy debt, rendering accounts of his management to N.M., who died in July 1899 leaving three sons, two of whom were minors. For about two years after the death of N.M. the respondent continued to manage the estate as before. The agency was terminated by a notice dated the 16th January, 1902. In September 1904, the three sons sued the respondent claiming an

Accounts—(Continued).

account for the whole period of the agency. The Subordinate Judge ordered an account from Srabau 1303 B.S. to Magh 1308 B.S. (July-August 1896 to 16th January 1902), but the High Court on respondent's appeal limited the account to five months Bhadra to Magh 1308 B.S.

Held, that in the absence of any cross appeal to the High Court or of any memorandum such as is required to be filed under S. 561 of the Code of Civil Procedure, 1882, it was not competent for the plaintiff to get in this appeal any further remedy than the restoration of the order of the Subordinate Judge, and, that, having regard to the fact that it was not contended that after the death of N.M. the position of the respondent was altered or that he became trustee in place of an agent, Art. 89 of Sch. II of the Indian Limitation Act, 1877, applied, and the order of the Subordinate Judge should be restored:

Held, also, that inasmuch as the two plaintiffs, who were minors did not come of age until after suit and the appellant who was of age was not capable of giving a discharge which would bind the two minors, S. 8 of the Indian Limitation Act, 1877, did not apply.

The High Court acting on paragraph 3 of plaint held that from its language the Court must suppose the demands were going on as long as the business was in existence, although the dates of the demands were not given or proved, *held*, that there was nothing in the pleading which would justify the inference which the High Court had drawn, and in the absence of evidence no such inference could probably be drawn adversely to the claim of the plaintiffs (a). *Nobin Chandra Barua v. Chandra Madhab Barua* 20 M.L.T. 430=21 C.W.N. 37=18 Bom. L.R. 1032=14 A.L.J. 1199=31 M.L.J. 886=24 C.L.J. 509=(1916) 2 M.W.N. 565 (P.C.)=5 L.W. 452=36 Ind. Cas. 1.

LORD SHAW, LORD FARMOR and MR. AMEER ALI.

Reference :—(a) 10 C. 108, —Partly affirmed and partly reversed.

(5) Suit for money—Taking of accounts incidentally necessary—Suit whether one for accounts—Jurisdiction of Small Cause Court. See ACT IX of 1887 (PROVL. S.C. COURTS), No. 27, 3 L.W. 143.

(6) See CIV. PRO. CODE (1882), No. 12, 89 M. 1026.

(7) Claim for, against strangers, incompetent. See CIV. PRO. CODE (1908), No. 168, 10 S.L.R. 12.

(8) Fraud—Re-opening of suit for, Evidence. See CIV. PRO. CODE (1908), No. 353, 35 Ind. Cas. 603.

(9) In suit on mortgage wherein, if adjusted once for all in preliminary decree—Subsequent payment by mortgagee, if can be added. See CIV. PRO. CODE (1908), No. 617, 35 Ind. Cas. 95.

Accounts—(Concluded).

(9-a) Suit for money based on—Necessity for passing preliminary decrees. See CIV. PRO. CODE (1908), No. 413, 36 Ind. Cas. 210.

(10) See CONSTRUCTION OF DEEDS, No. 4, 10 S.L.R. 58.

(11) Ss. 60, 61—Appropriation—Payment in discharge of turning. See CONTRACT ACT, No. 60, 1 Pat. L.J. 474.

(12) Suit for—Costs of suit pending reference for account. See COSTS, No. 2, 20 C.W.N. 368.

(13) Suit for accounts—Preliminary decree—Appeal by defendant against the whole decree—Defendant whether bound by valuation in plaint. See COURT FEES ACT, No. 4, 30 M. L.J. 402.

(14) Evidence of adoption—Absence of entry in—Evidence of surrounding circumstances. See HINDU LAW (ADOPTION), No. 10, 12 N. L.R. 164.

(15) Books of account how proved. See HINDU LAW (DEBTS), No. 5, 74 P.W.R. 1916.

(16) Manager of a jaghir appointed by Government—Account demanded of monies received by the manager in respect of plaintiff's share—Limitation. See LIMITATION ACT (1908), No. 192, 3 L.W. 192.

(17) Partnership—Suit for, by representatives of a deceased partner—Parties Cause of action. See LIMITATION ACT (1908), No. 31, 33 Ind. Cas. 561.

(18) Saving of limitation—Debiting interest in account book sufficient. See LIMITATION ACT (1908), No. 72, 9 P.W.R. 19:6.

(19) Suit on, of dealings—Letter by debtor with Rs. 100 sent by insurance—Acknowledgment of liability—Limitation, if saved. See LIMITATION ACT (1908), No. 57, 4 L.W. 148.

(19-a) See MALABAR LAW (ALIENATION), No. 2, 32 Ind. Cas. 459.

(20) See MORTGAGE (GENERAL), No. 48, 34 Ind. Cas. 899.

(21) Failure of mortgages in possession to keep Effect. See MORTGAGE (REDEMPTION), No. 15, 99 P.R. 1916.

(22) Mortgagor allowed in possession under a lease—Non-payment of lease amount—Mortgagee's suit for—Maintainability of. See MORTGAGE (USUFRUCTUARY), No. 4, 34 Ind. Cas. 701.

(23) Commissioner—Taking of—Power to decide questions of law—Court's jurisdiction to decide the questions. See QUESTION OF LAW, No. 1, 18 Bom. L.R. 798.

(24) Temple Committee—Suit for declaration of supervisorship and for production and inspection of accounts—Limitation. See RELIGIOUS ENDOWMENTS ACT, No. 1, 4 L.W. 186.

(25) Successive executors—Non-liability of second executor for his predecessor—Estate in embarrassment—Sale of property by executor. See WILL, No. 18, 32 Ind. Cas. 267.

Account Suit.

See CIV. PRO. CODE (1908), No. 60, 4 L.W. 411.

Accounts stated.

Closed account—Open and current account—Balance. See LIMITATION ACT (1908), No. 131, 148 P.W.R. 1916.

Accounts, Suit for.

(1) *Pecuniary jurisdiction of Civil Courts in.*

A Munsiff can, in a suit for accounts, pass a decree for a sum in excess of his pecuniary jurisdiction. But he cannot entertain a suit for account which is valued by the plaintiff at a figure above the limits of his pecuniary jurisdiction. *Gopikissan v. Padamraj*, 12 N.L.R. 174.

MITRA, OFFG. A.J.C.

Reference :—9 N.L.R. 112, F.

(2) Suit for account by agent against principal, if maintainable. See PRINCIPAL AND AGENT, No. 6, 12 N.L.R. 174.

Accretions.

(1) Whether the section applies to, from bed of private river. See BEN. REG. XI OF 1825 (BENGAL ALLUVION AND DILUVION), No. 1, 1 Pat. L.J. 536.

Acknowledgment.

See LIMITATION ACT, 1908, S. 19.

(a) Insolvency of manager of joint family—Entry of debt in schedule attached to petition—Saving of limitation as against other members. See HINDU LAW (JOINT FAMILY), No. 33, 36 Ind. Cas. 359.

(1) Of sonship. See LEGITIMACY, No. 1, 31 M. L.J. 607.

(1-a) By third party—Remedies of decree-holder. See LIMITATION ACT (1908), No. 81, 32 Ind. Cas. 603.

(2) Joint Hindu family—Unambiguous declaration of intention to separate—Subsequent management by one member on behalf of all—Acknowledgment by such manager if binding on the others. See LIMITATION ACT (1908), No. 80, 3 L.W. 231.

(3) Agreement to refer to arbitration—Conditional promise to pay what is found due when amounts to an acknowledgment. See LIMITATION ACT (1908), No. 34, 4 L.W. 48.

(4) Plea that money received had been more than repaid—Not an acknowledgment of subsisting liability. See LIMITATION ACT (1908), No. 50, 41 P.R. 1916.

(5) Written statement in former suit—Statement that certain persons are necessary parties—Effect—Essentials of an. See LIMITATION ACT (1908), No. 58, 9 S.L.R. 143.

(6) Difference between part payment and. See LIMITATION ACT (1908), No. 65, 3 L.W. 576.

(6-a) Mention of debt in schedule of insolvency petition—Of debt—Saving of limitation. See LIMITATION ACT (1908), No. 67, 36 Ind. Cas. 399.

Acknowledgment—(Concluded).

(7) Entry in *dakhalnama* whether amounts to an. See MORTGAGE (REDEMPTION), No. 14, 14 A.L.J. 834.

(8) See PARTNERSHIP, No. 8, 8 L.B.R. 363.

(9) Admission by partner in insolvency petition—Effect on other partners. See PARTNERSHIP, No. 9, 36 Ind. Cas. 389.

Acquiescence.

(1) *Acquiescence, what amounts to—Doctrine not to be invoked in favour of party taking possession of land by wrongful means.*

The plaintiff sued for recovery of possession of land on declaration that it was included within his tenancy under the defendant's landlords who had induced him to give up possession of the land upon a promise to pay consideration for it or in exchange to give lands situated elsewhere, neither of which, however, was given to the plaintiff.

Held—That mere quiescence is not acquiescence.

That the plaintiff did not stand by in such a manner as to induce the defendants to believe that he assented to the acts of the defendants and the doctrine of acquiescence had no application in the circumstances of the case.

That the defendants acquired no title to the lands and the Court should not assist them, in disregard of the principles of justice, equity and good conscience, to retain possession of land which they had seized by questionable methods.

That a Court of equity will not have recourse to the doctrine of estoppel or acquiescence for the benefit of a party who does not come into Court with clean hands. *Jaharaddi Mandal v. Debnath Nath Choudhury*, 20 C.W.N. 657 = 33 Ind. Cas. 762

MOOKERJEE and NEWBOULD, JJ.

(1-a) *Owner standing by—Act done in good faith Setting up legal right when it would be fraudulent to do so—Bar of claim.*

A person who acts in such a way as would make it fraudulent for him to set up his legal rights will not be allowed to set up those rights.

Plaintiffs sued the defendants for possession of certain land after demolishing a house and *chabutra* built thereon. The defendants contended that they were built on their own site and that in any event the plaintiffs were not entitled to get a decree for possession as they did not object to the construction of the building and acquiesced in their construction. There was evidence to show that the defendants expended about Rs. 1,000 on the strength of their belief that the land on which they put up the building belonged to them and the plaintiffs were aware of their own rights at that time and stood by and thereby encouraged the defendants in the expenditure they incurred. Further the circumstances proved in the case showed that the plaintiffs were aware that the defendants were acting in the belief that they had a right to build. *Held* that it was unlikely that the defendants would have embarked recklessly on a scheme of building at considerable cost without believing that they had a

Acquiescence—(Concluded).

right to build and the plaintiffs having stood by they were barred by the law of acquiescence from claiming the removal of the house. *Held* also that so far as *chabutra* was concerned the circumstances having shown that the defendants could not have built in the mistaken belief that the site belonged to them the direction of the District Judge for its demolition was correct. **Mohammad Hafizullah Khan v. Chithru Khan**, 86 Ind. Cas. 1001.

LINDSAY, J.

References:—16 A. 328 = A W.N. (1894) 99 = 8 Ind. Dec. (N.S.) 214; 15 Ch. D. 96 = 43 L.T. 95 = 28 W.R. 911, R.

(2) Suit for ejectment—Proprietary title—Appeal. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 50, 31 Ind. Cas. 857.

(3) And necessity—Questions of fact. See ALIENATION, No. 1, 107 P.R. 1916.

(4) Effect of. See PROBATE, No. 1, 23 C.L.J. 82.

Acts.

- 1.—IMPERIAL ACTS.
- 2.—BENGAL ACTS.
- 3.—BOMBAY ACTS.
- 4.—PUNJAB ACTS.
- 5.—C.P. ACTS.
- 6.—MADRAS ACTS.
- 7.—U.P. ACTS.
- 8.—ODISH ACTS.
- 9.—PUNJAB ACTS.

I.—Imperial Acts**Act XXXII of 1839 (Interest).**

Debt payable in kind and at specified time—Whether interest allowable thereon. **Govindan Nair v. Gheseel**, 35 M. 464 = 30 Ind. Cas. 432. See Final Part, 1915, Col. 10.

Act XIX of 1841 [Succession (Property Protection).]

Ss. 5, 3 and 4—Curator—Conditions necessary before appointing a curator under S. 5. **Madan Gopal v. Mussammet Narbada**, 11 P.R. 1915 = 28 Ind. Cas. 248 = 17 P.L.R. 1916. See Final Part, 1915, Col. 10.

Act V of 1841 (Lottery).

(1) See CIV. PRO. CODE (1908), No. 592, 9 Bur. L.T. 228.

Act XXI of 1848 (Gaming).

(1) See CIV. PRO. CODE (1909), No. 592, 9 Bur. L.T. 228.

Act XXI of 1850 (Caste Disabilities Removal).

Joint Hindu family—Mortgages by father—Suit by minor son to challenge the mortgage after his conversion to Muhammadanism—Major part of mortgage money spent on immoral purposes—Effect—Liability of minor son—Burden of proof. **Kishen Singh v. Bhagwan Das**, 89 P.R. 1915 = 31 Ind. Cas. 476. See final Part, 1915, Col. 11.

I.—Imperial Acts—(Continued).**Act XXVIII of 1855 (Usury Laws Repeal).**

Usury—Abrogation of—Equitable considerations. See MAHOMEDAN LAW—DOWER, No. 2, 14 A.L.J. 1055.

Act XV of 1856 (Hindu Widows Re-marriage).

(1) *Hindu widow—Re marriage—Inheritance—Son by a former marriage—Death before re-marriage—No right to inherit property—Effect of death after re-marriage—Widows whose caste permit re marriage—Applicability of the Act—Transfer from widow—Prescription—Nature of estate.* **Kashirao v. Ukarda**, 11 N.L.R. 116 = 31 Ind. Cas. 290. See Final Part, 1915, Col. 12.

(2) S. 2. See HINDU LAW—WIDOW, No. 32, 32 Ind. Cas. 338.

Act II of 1857 (Calcutta University).

See LEGAL PRACTITIONERS, No. 1, 24 C.L.J. 382.

Act XXXV of 1858 [Lunacy (District Courts)].

(1) *Inquisition, proceedings in—Petitioner, whether entitled to have inquiry conducted so long as he has witnesses available—Discretion of Court to stop proceedings for proper grounds.*

Under Act XXXV of 1858 a Judge has got a discretion to stop the proceedings in the inquisition for proper grounds, as, for instance, where medical evidence shows that further inquiry is unnecessary. A petitioner is not entitled, under the Act, to have the inquiry conducted so long as he is able to tender witnesses for examination. **Rahima Bibi v. Hamida Bibi**, 3 L.W. 402 = 33 Ind. Cas. 857.

SADASIVA AIYAR and MOORE, JJ.

References:—8 A.L.J. 179 = 9 Ind. Cas. 207, F.

(2) *Manager, appointment of, if bars an adoption by the lunatic—Finding of lunacy, effect of—Construction of Statute—Capacity to write an intelligent letter, if conclusive test of sound mind—Adoption by a lunatic, when valid—Adoption, whether amounts to alienation of property.*

An order appointing a manager under the provisions of the Lunacy Act, XXXV of 1858, has not the effect of incapacitating the lunatic from making an adoption till the order is set aside. The only effect of a finding under Act XXXV of 1858 that a person is a lunatic is to raise a presumption that he continues to be of unsound mind until the contrary is shown (a).

An adoption is not an act which amounts to an alienation of property like a lease or mortgage.

In addition to affecting the status, an adoption has, in the opinion of Hindus, religious efficacy, and it will not be right for the Court to hold that a Hindu was deprived by any Statute of the power of making an adoption unless there were clear and unambiguous words to that effect.

The mere fact that a person can write an intelligent letter is not a conclusive test that he is not a lunatic.

I.—Imperial Acts—(Continued).**Act XXXV of 1858 [Lunacy (District Courts)]—(Concluded).**

An adoption made by a person who was adjudged a lunatic under Act XXXV of 1858 will be valid if it is satisfactorily shown that the adoptive father was of sound mind at the time he made the adoption. **Amanchi Seshamma v. Amanchi Padmanabha Row**, 3 L.W. 290 = 19 M. L. T. 243 = 33 Ind. Cas. 578.

WALLIS, C.J. and SRINIVASA AYYANGAR, J.

References :—(a) 11 Beav. 105 ; (1907) 2 Ch. 236, 245, F.

(3) S. 22—Lunatic—Appointment of guardian—Evidence.

It is not right that a person should be adjudged as of unsound mind unless it is clearly proved that he is so. In such cases he should be placed under medical observation of a qualified practitioner whose statement should be recorded by the Court itself. No proper enquiry appeared to have been made in the case and it was remanded for re-decision after proper enquiry. **Bhagwan Singh v. Musammat Mohan Bai**, 96 P. L. R. 1916 = 36 Ind. Cas. 219.

SCOTT SMITH, J.

Act XX of 1863.

See RELIGIOUS ENDOWMENTS ACT.

Act XXIII of 1863 (Waste Lands).

S. 18—The act applies to all lands—Burden of proof on those who plead it—Land sold under it—False description in notice, under it, effect of—Suit to recover land three years after the sale thereof under the Act—Survey (of maps) as evidence of title, value of.

Waste Lands Act, 1863 (XXIII of 1863) applies to all lands whether held by the Government or other people.

The Waste Lands Act, 1863, is drastic in its character, and makes a great invasion on private rights, and consequently those pleading it must bring the matter strictly within its provisions.

Where a plot was sold by the Government acting under the Waste Lands Act, 1863, as waste land, and the notice issued under the Act advertised the sale of the plot in a certain pergunnah whereas it was not in that pergunnah; and the plaintiff after more than three years after the lands had been delivered by the Government to the purchaser, brought the suit in the ordinary Civil Court against the Government to recover possession of the plot.

Held, that inasmuch as the said notice was misleading the whole of the proceedings as against the plaintiff failed for want of proper basis; that S. 18 of the Act was clearly applicable to the proceedings before the Special Court, and that Court alone, as constituted under the Act, and that the plaintiff's suit was not barred by that section. **The Secretary of State for India in Council v. Maharaja**

I.—Imperial Acts—(Continued).**Act XXIII of 1863 (Waste Lands)—(Concl'd.).**

Radha Kishore Manijya Bahadur, 14 A.L.J. 1205 = 18 Bom. L.R. 1027 = 20 M.L.T. 549 (P.C.) = (1917) M.W.N. 26 = 21 C.W.N. 291.

LORD DUNEDIN, LORD MOUTON, SIR JOHN EDGE and MR. AMEER ALI.

Act III of 1865 (Carriers).

Carriers by sea whether common carriers. **Sea CONTRACT ACT**, No. 66, 18 Bom. L.R. 126.

Act X of 1865 (Succession).

(1) See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 8, 9 Bur. L. T. 236.

(2) **Ss. 7, 9, 10—Domicile of origin—Domicile of choice—Acquisition and abandonment of domicile—Burden of proof.**

The deceased was born at Goa, in Portuguese territory. When fourteen years of age he came to Bombay and lived there uninterruptedly, with the exception of brief visits to Goa, till June 1915, when he died at the ripe old age of seventy years. He married the plaintiff in 1903. He carried on a fairly flourishing coach-building business and provided himself with a house adjoining his factory. It appeared that the deceased had intended to retire to Goa and spend the closing years of his life there. Previous to his death, he made a will whereby he gave a legacy to plaintiff of Rs. 7 a month for her life. The plaintiff having claimed that the deceased had a Portuguese domicile, and that under the law of Portugal she was entitled to a moiety of his estate:

Held, that the deceased had acquired a domicile of choice in Bombay; that in spite of his intention to return to Goa that domicile superseded his domicile of origin; and that the devolution of his estate was governed not by the Portuguese law, but by the provisions of the Indian Succession Act, 1865.

The domicile of origin is that which a person acquires at his birth from his parents and follows the domicile of the parents. It is not necessarily in itself local, that is to say, merely the place of birth. The domicile of origin once ascertained in law clings and adheres to the person until he chooses to divest himself of it by substituting a domicile of choice for the domicile of origin. The domicile of choice is acquired by a combination of fact with intention. The fact is residence, and the intention is that the residence should be permanent. This domicile can also be discarded by a fact and intention, namely, the fact of abandoning the residence accompanied by the intention that that abandonment shall be final. Upon the mere abandonment of one domicile of choice without the acquisition of another the domicile of origin revives *proprio vigore* and without the need of any further act or intention on the part of the person.

The law leans very strongly in favour of the retention of the domicile of origin. Where a person alleges that a man has acquired a domicile of choice, he must prove that that man

J.—Imperial Acts—(Continued).**Act X of 1866 (Succession)—(Continued).**

had that intention. **Carolina Dos Santos v. Damiao Joseph Pinto**, 18 Bom. L.R. 715=86 Ind. Cas. 227.

BEAMAN, J.

(3) S. 8. See **LEGAL PRACTITIONERS**, No. 1, 24 C.L.J. 382.

(4) S. 9. See No. 2, *supra*.

(5) S. 10. See No. 2, *supra*.

(6) S. 50, *scope of—Will—Placing of mark under direction of testator, of valid affixture of mark—Attestation—Attesting witness.*

The placing of a mark by some person on a will in the presence of the testator and by his direction is not an 'affixture by him of his mark to the will' within the meaning of S. 50 of the Indian Succession Act; but a signature put under similar circumstances is a valid affixture (a).

The mere touching of a pen and handing it over to another who affixes the mark in testator's presence is not an affixture of his mark by the testator as required by the section (b).

A person who signs by direction of the testator cannot become of the two attesting witnesses as required by the section. **Radhakrishna Mudaliar v. Subraya Mudaliar**, 4 L.W. 255=81 M.L.J. 357=84 Ind. Cas. 849.

WALLIS, C.J. and PHILLIPS, J.

References:—(a) 25 C. 911; 27 Ind. Cas. 677, D. (b) 85 M. 607, R.

(6-a) S. 50—*Absence of attestation clause—Validity of will.*

Where a document alleged to be a will does not contain an attestation clause, it cannot be considered as a valid will duly executed in accordance with the provisions of S. 50 of the Succession Act. **F. Burton v. Jacobson**, 30 Ind. Cas. 263.

LINDSAY, J.C., and KANHAIYA LAL, A.J.C.

(7) S. 57—*What amounts to revocation of the will—Tearing whether amounts to revocation.* See **WILL**, No. 2, 20 C.W.N. 304.

(8) S. 111—*Scope and applicability—Validity of gift over.* See **HINDU LAW (WILL)**, No. 1, 20 C.W.N. 169.

(9) Ss. 179, 190. See **PRACTICE AND PROCEDURE**, No. 2, 9 Bur. L.T. 124.

(10) S. 187—*Plaintiff claiming as heir of a legatee—Proof of will—Grant of probate necessary—Defendant (executor, applying for probate)—Non-payment of stamp—Probate not granted—Defendant in possession of the estate—Plaintiff whether can maintain action for administration against defendant—S. 4, Court Fees Act.* **Alamelammal v. P.N.K. Suryaprakasaraaya Mudaliar**, 29 M.L.J. 680=34 M. 988=31 Ind. Cas. 491. See **Final Part**, 1915, Col. 18.

(11) S. 190. See No. 9, *supra*.

(12) Ss. 311, 312—*Demonstrative legacy—Interest whether payable thereon—Time from which interest payable.* See **WILL**, No. 8, 43 O. 201.

I.—Imperial Acts—(Continued).**Act X of 1865 (Succession)—(Concluded).**

(13) S. 312. See No. 12, *supra*.

(14) S. 392—*Aboriginal tribes in Chota Nagpur—Inheritance—Law applicable, Succession Act or custom—Special notification under S. 392 issued at the appellate stage, whether has retrospective effect—Historical works, referred to in appeal—Propriety.*

Notification, dated 2nd May 1913, issued by the Government of India under S. 392 of the Succession Act at the appellate stage of a case did not apply where there had already been a decision of a competent Court regarding the rights of parties.

In the case of codified law the ordinary practice of the legislature is to make special provision when it thinks fit to do so for the saving of custom, usage and ordinary rights. There is no authority that, after customary law has been stereotyped in the form of a statute which contains no provision saving custom, it is open to a Court to give effect to custom, much less to a custom inconsistent with the statute. As the Succession Act contains no clause saving custom, the Courts are not competent to accept custom as a reason for deviating from the provisions of the Act.

References to works of history (not given in evidence or referred to in the Court of first instance) at the appellate stage are irregular and to be avoided (a). **Tunl Oraon v. Leda Oraon**, 20 C.W.N. 1032=1 Pat. L.J. 225=36 Ind. Cas. 206.

MULLICK, J.

Reference:—(a) 12 M. 495, R.

Act XI of 1865 (Small Cause Courts).

S. 1. See **LEGAL PRACTITIONERS**, No. 1, 24 C.L.J. 382.

Act XX of 1865 (Pleaders, Mukhtars and Revenue Agents).

Ss. 2, 4, 5. See **LEGAL PRACTITIONERS**, No. 1, 24 C.L.J. 382.

Act XXIX of 1865 (Pleaders Amending Act).

See **LEGAL PRACTITIONERS**, No. 1, 24 C.L.J. 382.

Act I of 1868 (General Clauses).

S. 2 (i), (ii). See **LEGAL PRACTITIONERS**, No. 1, 24 C.L.J. 382.

Act IV of 1869 (Divorce).

(1) S. 3, cls. (1), (2) and (3) and S. 10—*Place where husband and wife reside or last resided together—Court—Jurisdiction.*

Where, in a case for dissolution of marriage instituted in the District Court of Amballa, it appeared that the petitioner and his wife last lived and cohabited together at Bangalore, that the wife, at the time of the institution of the proceedings, did not reside and had not for many years resided, within the District of Amballa, but had, at the time of the institution of the proceedings, been living at Calcutta.

I.—Imperial Acts—(Continued).**Act IV of 1889 (Divorce)—(Continued).**

Held that, in the circumstances, and having regard to the definitions of the terms 'High Court,' 'District Judge,' and 'District Court,' in S. 3, Divorce Act, the District Judge of Amballa had no jurisdiction. **Morton v. Morton**, 76 P.R. 1916=124 P.W.R. 1916=139 P.L.R. 1916 (S.B.)=35 Ind. Cas. 367.

RATTIGAN, SCOTT SMITH and LE ROSSIGNOL, JJ.

(2) S. 10—What amounts to 'abandonment' or 'desertion'—*Suit for divorce—Maintainability*. **Bridget Theresa Mary Glancy v. James Glancy**, 8 L.B.R. 106=31 Ind. Cas. 264 (F.B.). See Final Part, 1915, Col. 20.

(3) S. 10. See No. 1, *supra*.

(4) Ss. 10 and 22—*Judicial separation—Cruelty of what kind requisite for divorce*.

To justify a decree for divorce the adultery of the husband coupled with desertion without reasonable cause for two years or upwards, or adultery of the husband coupled with such cruelty as without adultery would entitle the wife to a divorce *a mensa et toro*, must be proved. Where the adultery of the husband is established, but the requisite desertion is not, no decree for divorce can be granted.

The cruelty requisite to entitle a wife to a divorce, *a mensa et toro* must be such as endangers life, limbs or health, bodily or mental, or a reasonable apprehension of it. **Ma Cho v. Maung Sein**, 8 L.B.R. 385=36 Ind. Cas. 381.

FOX, C.J., TWOMEY and ROBINSON, JJ.

(4-a) Ss. 10 and 22—*Divorce—Repeated acts of cruelty—Cumulative effect of such acts*.

Where in a suit for divorce it is shown that the respondent had been guilty of repeated acts of cruelty and the plaintiff had not formally complained on each occasion, or threatened divorce proceedings, such repeated acts would amount to cruelty, though each act in itself may not be sufficient ground for a divorce. **Ma Pan Nyun v. Maung Aung That**, 36 Ind. Cas. 962.

ORMOND, J.

(5) S. 14—*Divorce—Wife's adultery—Decree nisi not granted on account of proved adultery of husband—Delay*.

An application by the husband for a decree for a dissolution of the marriage on the ground of his wife's adultery was dismissed by the District Judge on the ground that the husband was himself guilty of a persistent course of adultery. It also appeared that there was unexplained delay before any complaint was made by the husband as regards his wife's abandonment of him; and also that both the husband and the wife had combined to withhold facts from the Court. On appeal:

Held, that the High Court would not, under the circumstances, interfere with the exercise of the learned Judge's discretion in refusing the application. **Palmer v. Palmer**, 18 Bom. L.R. 818=36 Ind. Cas. 800.

BATCHELOR, AG.C.J., and SHAH, J.

I.—Imperial Acts—(Continued).**Act IV of 1889 (Divorce)—(Concluded).**

(6) S. 17—*Decree for dissolution of marriage passed by Court of Divisional Judge at Nagpur—Confirmation of decree by Bombay High Court—Application for alimony and maintenance of children lies to Nagpur Court—Nagpur Court not subordinate to the Bombay High Court—Civ. Pro. Code (1908), S. 24 (1) (a)*. **Minale Wallace v. Arthur Wanace**, 17 Bom. L.R. 948=40 B. 109=31 Ind. Cas. 331. See Final Part, 1915, Col. 20.

(7) Ss. 19, 57—*Re-marriage before expiry of six months as required by S. 57—Validity—English and Indian Law*. **J. S. Battle v. G. E. Brown**, 38 M. 452=30 Ind. Cas. 413. See Final Part, 1915, Col. 21.

(8) S. 20—*Suit for nullity of marriage—Impotence—Proof—Necessity*. **Edward Charles Dawson v. Matty Dawson**, 29 M.L.J. 183=30 Ind. Cas. 565 (F.B.). See Final Part, 1915, Col. 21.

(9) S. 22. See Nos. 4, 4-a, *supra*.

(10) Ss. 22, 31—*Divorce, petition for, by wife—Adultery and desertion—Delay in petitioning, when cured—Desertion and delay, meaning of*. **Ma Array v. Maung E Po**, 8 Bur. L.T. 32=37 Ind. Cas. 604=8 L.B.R. 356=9 Bur. L.T. 207. See Final Part, 1915, Col. 22.

(10-a) S. 31. See No. 10, *supra*.

(11) S. 37—*Wife living with co respondent—Alimony—Discretion of Court*.

Held that the power to order permanent alimony to the wife, after a decree for divorce obtained by the husband on the ground of adultery, is a matter of discretion. In a case where there was no suggestion that the husband's conduct led to the wife's misconduct, and the wife was in fact under the roof of the co-respondent, the Court refused to exercise its discretion. **W. E. McGowan v. John George McGowan**, 14 A.L.J. 786=38 A. 668.

WATKIN, J.

Reference:—5 B.L.R. 71, R.

(12) S. 57. See No. 7, *supra*.

Act VII of 1870.

BEE COURT FEES ACT.

Act I of 1871 (Cattle Trespass).

S. 20—*Charge of illegal distraint—Malicious prosecution—Suit for damages—Maintainability*.

A suit for damages for malicious prosecution is not confined to criminal proceedings alone, nor would such an action lie for all criminal prosecutions. The cases for which such a suit lies are those in which there is either (a) damage to man's reputation or (b) danger to his liberty or (c) damage to his property.

Per Seshagiri Iyer, J.—A suit for damages for malicious prosecution under S. 20 of the Cattle Trespass Act lies, for, though in such an accusation there may not be either danger to the liberty or damage to the property of the accused, still, there may be "damage to the reputation" of the person accused, considering

I.—Imperial Acts—(Continued).**Act V of 1881 (Probate and Administration).**

- (1) S. 23—*Application for letters of administration—Objection by persons claiming as adoptees—Question of adoption when to be gone into.*

When the applicant is entitled to a share of the estate, whether the caveator establishes his adoption or not, then it is not usually necessary to go into the question of adoption, because the applicant has established his right under S. 23, Probate and Administration Act. But where the caveator, if he establishes his adoption, totally excludes the applicant from inheriting, then the question of the adoption must be gone into, unless the Court thinks it unnecessary to grant letters of administration to any one. *Nga Ba Sin v. Nga Po Han*, U.B.R. (1915) 4th Qr., p. 101=33 Ind. Cas. 659.

MCCOLL, J.C.

References:—5 L.B.R. 78, *Expt.*; C.A. 266 and 275 of 1910, R.

- (1-a) Ss. 31 to 33 and S. 41—*Grant of letters to guardian of minor not being executor or residuary legatee—Grant of letters for moveable property—Protracted trial of administration proceedings.*

Ss. 31 to 33 of Act V of 1881 do not allow the grant of letters of administration to the guardian of a minor, who is not executor or residuary legatee.

Where an estate consists mainly of moveable property, no letters of administration is required to recover the said property.

Proceedings under the Act to obtain letters of administration should not be protracted by the Court by entering into questions which cannot be finally determined in such proceedings (a). *Ma Kyin v. Ma Shwe Hmi*, 36 Ind. Cas. 266.

FOX, C.J., and TWOMEY, J.

References:—(a) 3 Ind. Cas. 719=5 L.B.R. 78, R.

- (1 b) S. 32. See No. 1-a, *supra*.

- (1-c) S. 33. See No. 1-a, *supra*.

- (1-d) S. 41. See No. 1-a, *supra*.

(2) S. 50—*Revocation, application for—Question of genuineness of Will if arises—Just cause—Fraudulent concealment from Court by person cited of transfer of his interests—Assignee not cited in consequence—Assignee if may apply for revocation when a assignment subsequent to testator's death.* *Mokhadayini Dasi v. Karnadhar Mandal*, 19 C.W.N. 1104=31 Ind. Cas. 702. See Final Part, 1915, Col. 33.

(3) Ss. 50-59—*Probate, revocation of—Reversioner, if can come and be heard in probate proceedings—Applicant's duty in applying for probate—District Judge, when can issue special citation—Statement as to relations of the deceased, misleading the Court, effect of—Grant of probate defective—Person, when bound by proceedings to which he was no party—Burden of proof—Knowledge of proceedings—Acquiescence—Quiescence—Waiver.* *Shyama Charan v. Prefulla Sunderi*, 31 C.L.J. 657=19 C.W.N. 882=20 Ind. Cas. 161. See Final Part, 1915, Col. 35.

I.—Imperial Acts—(Continued).**Act V of 1881 (Probate and Administration) —(Continued).**

- (3-a) S. 50, cl. (5)—*Inaccurate inventory—Revocation of probate—Discretion.*

It is not a proper exercise by the Court of its discretion under S. 50 (5) of the Probate and Administration Act to revoke a probate granted 7 years previously merely on the ground that the inventory submitted when the probate was granted under estimated the testator's assets, in a case where the value of the estate left by the testator which consisted of trade assets and was large was almost a matter of conjecture, perfect accuracy being hardly to be expected. *Maddali Venkataswamy v. Subbarayudu*, 34 Ind. Cas. 135.

SADASIVA AIYAR and MOORE, JJ.

(4) Ss. 53, 55—*Scope of O. XI, Civ. Pro. Code—Applicability to probate proceedings—Affidavit of assets actually received how to be obtained in probate proceedings—Interrogatories—Method of administration—Power of Court to settle interrogatories.* See CIV. PRO. CODE (1908), No. 391, 43 C. 300.

- (5) S. 55. See No. 4, *supra*.

(6) Ss. 56, 76, 98. See CIV. PRO. CODE (1908), No. 280, 31 Ind. Cas. 499.

- (6-a) S. 69. See No. 3, *supra*.

- (6-b) S. 76. See No. 6, *supra*.

- (7) S. 82. See No. 17, *infra*.

- (8) Ss. 82 and 90—*Administrator's powers of alienation—Effect of alienation by administrators and some of the heirs—Mahomedan Law—Indian Succession Act (X of 1865), S. 269.*

The Probate and Administration Act applies to Mahomedan estates and overrules all rules of Mahomedan Law that are inconsistent with the provisions of the Act.

An administrator appointed under the Probate and Administration Act has no power to mortgage or transfer without the previous permission of the Court under S. 90 (3) of the Act, and he is strictly bound by the terms in which the permission is given.

Permission to sell does not include permission to mortgage, and a mortgage executed in professed exercise of a power to sell is voidable under S. 90 (4) of the Act at the instance of any person interested in the property.

The powers of an executor under a will are much wider and are limited only by any restrictions contained in the will appointing him.

After grant of probate or letters of administration no person other than such grantee shall have power to represent the estate of the deceased.

Semble.—Alienations of an estate by an heir not being the executor or administrator will be valid to the extent of the share of the alienor in the property alienated. *Ram Dhon Dhor v. Sharf ud-Din*, 9 Bur. L.T. 236.

FOX, C.J. and TWOMEY, J.

(9) Ss. 82 and 92, *applicability of, to cases not governed by Hindu Wills Act, XXI of 1870—*

1.—Imperial Acts—(Continued).

Act V of 1881 (Probate and Administration) —(Continued).

*Mofussil will—Joint executors—One executor taking probate—Another executor if disentitled to act without probate—Executor if can renounce for consideration—Compromise between co-executors, if valid—Relator executor's right of, if exists even though claim is barred—Limitation Act (1909), Art. 120, whether governs claim of executor for moneys spent on behalf of estate—Limitation law, if applicable to administration actions—S. 91, Civ. Pro. Code (1908). **A.C. Chidambaram Mudalliar v N. Krishnasami Pillai**, 2 L.W. 241=28 M.L.J. 285=28 Ind. Cas. 321=39 M. 365. See Final Part, 1915, Col. 37.*

(10) S. 83—Effect when read with O. XXIII, r. 3, Civ. Pro. Code. See PROBATE, No. 3, 20 C.W.N. 586.

(11) S. 86—Appeal—Difference of opinion—*Letters Patent*, cl. (15)—Signatures, comparison of—Reversing the appreciation of fact **Panchumoni Dassi v. Chandra Kumar Ghose**, 22 C. L.J. 298=31 Ind. Cas. 319. See Final Part, 1915, Col. 37.

(12) Ss. 86, 90—Administrator's application to sell, granted against opposition—Appeal—Order if appealable as decree or irrespective of whether order is decree or not—Interlocutory orders under the Act, if appealable. **Sarat Chandra Pal v. Benode Kumari Dassi**, 20 C.W.N. 28=33 Ind. Cas. 143. See Final Part, 1915, Col. 38.

(13) S. 89. See ABATEMENT OF APPEAL, No. 1, (1916) 2 M.W.N. 280.

(14) S. 89. See DAMAGES, SUIT FOR, No. 1, 20 M.L.T. 303.

(15) S. 90—Alienation with sanction of Court—Effect—Validity of transaction—Burden of proof. See SPECIFIC PERFORMANCE, No. 4, 23 C.L.J. 606.

(16) S. 90. See Nos. 8, 12, *supra*.

(17) Ss. 90, 82—Estate of deceased Muhammadan—Administrator—Powers of alienation—Permission of Court—Necessity to obtain before alienation—Powers different from that of executor under Will—Muhammadan Law—Whether affected by the Probate and Administration Act—Administrator—His powers to bind the estate—Nature and extent thereof.

Under the Probate and Administration Act, 1881, an administrator must comply strictly with the provisions of S. 90 of the Act. Unlike an executor whose powers depend largely on the terms of the Will appointing him and who has power to sell or mortgage unless the Will forbids it, an administrator has no power to alienate at all without first obtaining permission of the Court and he is strictly bound by the terms in which the permission is given(a).

The statutory provisions of the Probate and Administration Act apply to Muhammadan estates overriding any rules of Muhammadan Law that are inconsistent with them. It

1.—Imperial Acts—(Continued).

Act V of 1881 (Probate and Administration) —(Concluded).

follows from S. 82 of the Act that a person appointed as administrator to the estate left by a deceased Muhammadan is the only person clothed with authority to act as representative of the estate who could bind the shares of the other heirs, and the administrator could not do so effectually unless he complied with the provisions of S. 90. **Ram Dhon Dhor v. Sharf-ud din**, 34 Ind. Cas. 128.

FOX, C.J. and TWOMEY, J.

Reference:—(a) 1 A. 710, D.

(18) S. 92. See No. 9, *supra*.

(19) S. 98.—Submission of accounts by executor—No power to call for yearly accounts—Legatee's right to inspection of accounts—Refusal—Remedy—Administration suit—Executor—When becomes a trustee.

S. 98 of the Probate and Administration Act requires the executors to file an inventory of the property within six months and such further time as the Court may allow and then to file an account after he completed his administration. The section makes it quite clear that there should be one initial inventory and one final account after the completion of the administration. The section does not warrant an order requiring a series of yearly accounts(a).

Generally speaking, an executor dismisses the character of executor and becomes a trustee when the funeral and testamentary expenses and the debts are discharged, the legacies paid and sums set apart for investment in the trust created by the will (b).

When such accounts are submitted, the sole duty of the Court is to satisfy itself that the accounts filed *prima facie* satisfy the requirements of the section; and the Court cannot embark on a judicial inquiry into the correctness of the account and to require the production of the vouchers (c).

A legatee or a person interested in administration has the right to inspect the accounts of the executor (d). If he is denied inspection or is not satisfied with the result of his inspection, he may file an administration suit and ask for administration by the Court. **Hemandas Ramrakhiomal v. Cheliaram Dhalumal**, 9 S. L.R. 134=32 Ind. Cas. 551.

PRATT, J.C.

References:—(a) 25 C. 250, R. (b) 33 B. 429 (433), R. (c) 31 C. 628, R. (d) 68 R.R. 128, R.

(20) S. 98 (3).

S. 98 (3) of the Probate and Administration Act does not make it obligatory on the Court to require an executor or administrator to exhibit an inventory or account. S. 98 (1) imposes the duty of doing this on the executor or administrator. If he does not do it the Court may require him to do it, but that is a matter for its discretion. **Moolla Cassim v. Moolla Abdul Rahim**, 9 Bur. L.T. 118=8 L.B.R. 422=35 Ind. Cas. 950.

FOX, C.J. and TWOMEY, J.

(21) S. 98. See No. 6, *supra*.

I.—Imperial Acts—(Continued).**Act XXVI of 1881.**

See NEGOTIABLE INSTRUMENTS ACT.

Act II of 1882.

See TRUSTS ACT.

Act IV of 1882.

See TRANSFER OF PROPERTY ACT.

Act V of 1882.

See EASEMENTS ACT.

Act VI of 1882.

See COMPANIES ACT, 1882.

Act XIV of 1882.

See CIV. PRO. CODE, 1882.

Act XV of 1882 (Presidency Small Cause Courts).

(1) S. 19 (3)—*Jurisdiction—Suit for declaration of title—Monies in hands of third person—Recovery not prayable in same suit—Declaration, if an incidental relief—Suit, whether cognizable by the Presidency Small Cause Courts—Assignment of an incorporeal right—Requirements of, under Hanafi Law—Condition repugnant to the grant, effect of, on construction—Transfer of Property Act (IV of 1882), S. 130—Actionable claim, gift of, whether governed by S. 129.*

Where in a suit a declaration of title to monies in third person's hands is prayed for and the recovery of the monies themselves could not be sued for in the same suit the declaratory relief is not a merely incidental or subsidiary relief and the suit is not cognisable by a Small Cause Court.

The assignment of monies due under a policy or under promissory notes which must supersede the policy is an assignment of an incorporeal right and is therefore not governed by the technical rules of Mahomedan Law as to gifts in all its rigidity even where both the parties are Mahomedans (a).

Under the Hanafi Law the gift of an incorporeal right is valid and complete provided the donor has done all he could be reasonably expected to do to put the donee in a position to get the benefit of the right gifted and also has divested himself of all the indicia of title to the subject-matter of the gift.

In a consideration of the question whether the donor had done all acts necessary to divest himself of and clothe the donee with all the indicia of title, the fact that the gift deed contains an invalid condition is irrelevant.

A condition in a deed of gift that the right gifted shall be divested on the donee predeceasing the donor's title according to Hanafi Law and the deed should be construed as a deed of absolute gift.

A transfer even by way of gift of an actionable claim is not governed by Chap. VII of the Transfer of Property Act, and S. 129 has therefore no application to a transfer by way of gift governed by S. 130 in Chap. VIII. **Captain**

I.—Imperial Acts—(Continued).**Act XV of 1882 (Presidency Small Cause Courts)—(Continued).**

Syed Yacoob Sahib Sirdar Bahadur v. Pacha Bibi, 4 L.W. 339.

SADASIVA AIYAR and NAPIER, JJ.

Reference :—(a) 35 C. 1, R.

(2) S. 19 (3)—*Civ. Pro. Code—Claim proceedings—Suit to establish right—Jurisdiction of Small Cause Court. Rajammal v. Narayanasamy Naliker*, (1915) M.W.N. 376=28 M.L.J. 600=29 Ind. Cas. 908=39 M. 219. See Final Part, 1915, Col. 48.

(3) S. 38—*Full Bench of the Small Cause Court, powers of—Full Bench, if a Court of appeal—Suit instituted in the Small Cause Court—Decree passed—New trial—Application to the Full Bench preferred—Full Bench, if can allow suit to be withdrawn—Fresh suit, institution of, if essential—Withdrawal of suit, effect of.*

The Full Bench of the Presidency Court of Small Causes exercising jurisdiction under S. 38 of the Presidency Small Cause Courts Act is not a Court of appeal (a).

The legal effect of permission to withdraw a suit is to put the plaintiff in the same position as if he had not filed the suit (b).

Where the plaintiff obtained a decree in a suit before a single Judge of the Court of Small Causes and before the Full Bench of the same Court applied for permission to withdraw the suit in order to add that claim to a previously instituted suit in respect of the same cause of action to avoid the bar of O II, r. 2, Civ. Pro. Code.

Held that the Full Bench was competent to grant such permission since the addition of the claim by way of amendment of the prior suit may be said to be a fresh suit filed for it. **Krishnaswami Pillai v. Doraisami Ammal**, 36 Ind. Cas. 1003=5 L.W. 147.

SRINIVASA AIYANGAR, J.

References :—(a) 1 L.W. 529, Rel. on. (b) 31 C. 965; 10 C.W.N. 8; 15 C.W.N. 998, R.

(4) Ss. 38, 69—*Application under S. 38—No order for re-trial or revival of suit—Reference to High Court before motion to defendant whether lies. See CONTRACT, No. 4, 30 M.L.J. 207.*

(5) Ss. 41, 43 and 46 to 49, *scope of—Ejectment order against plaintiff passed by Small Cause Court—Subsequent suit by plaintiff to set aside the order—Occupancy right set up—Power of Courts to set aside order of other Courts—Express provision by legislature—'Suit for trying the title,' meaning of—High Court, power of, to supersede orders of Small Cause Courts—Specific Relief Act (I of 1877), S. 42—Suit for a bare declaration—Long practice if can confer jurisdiction.*

When a Court is given jurisdiction by legislature to do certain acts or pass decrees or orders in certain matters, its action cannot be set aside by any other Court unless expressly authorised by the legislature in that behalf.

1.—Imperial Acts—(Continued).

Act XV of 1882 (Presidency Small Cause Courts)—(Concluded).

The order passed by a competent Court having jurisdiction cannot be interfered with except in the manner provided by legislature unless such order is vitiated by fraud.

Where an order of ejectment under S. 43 of the Presidency Small Cause Courts Act had been passed at the instance of the defendant and the plaintiff thereupon brought a suit in the City Civil Court, Madras, for a declaration of his alleged right of occupancy and for an injunction restraining the defendant from executing the order of the Small Cause Court.

Held, that the suit was in effect one to have the order of the Small Cause Court superseded by the decree prayed for, that the case fell within S. 46, cl. 2 of the Act, and that under Ss. 47 and 49 of the Act, the High Court was the only forum prescribed for the purpose and that the City Civil Court had therefore no jurisdiction to entertain or try such a suit.

The words "suit for trying the title to the property" occurring in S. 49 of the Act include a suit in which any title, whether of a full owner or of a holder of a limited right, which is alleged by the party aggrieved by the said ejectment order, has to be adjudicated upon.

Scope and applicability of Ss. 46 to 49 of the Presidency Small Cause Courts Act considered.

Held also that a suit for bare declaration of occupancy rights was not maintainable under S. 42 of the Specific Relief Act as the plaintiff was a party to the ejectment order.

Practice cannot confer jurisdiction, however long continued it may be. **Abdul Rahiman Sahib v. Gangathara Iyer**, 4 L.W. 402.

OLDFIELD and KRISHNAN, JJ.

(6) S. 43. See No. 5, *supra*.

(7) S. 46. See No. 5, *supra*.

(7-a) S. 47. See No. 5, *supra*.

(7-b) S. 48. See No. 5, *supra*.

(7-c) S. 49. See No. 5, *supra*.

(8) S. 69—Presidency Small Cause Court—Reference—Contents and form. **V. Ramaswami Iyer v. The Madras Times Printing and Publishing Co. Ltd.**, (1915) M.W.N. 735=32 Ind. Cas. 610. See Final Part, 1915, Col. 49.

(9) S. 69. See ACT III OF 1909 (PRESIDENCY TOWNS INSOLVENCY), No. 7, 39 M. 689.

(10) S. 69. See No. 4, *supra*.

Act XIX of 1883 (Land Improvement Loans).

S. 7. See TRUSTS ACT, No. 13, 18 Bom. L.R. 438.

Act II of 1886 (Income Tax).

(1) Seizure of account books for ascertaining liability to pay income tax—Damages for wrongful seizure. See BOM. ACT V OF 1879 (BOMBAY LAND REVENUE CODE), No. 5, 18 Bom. L.R. 323.

(2) Ss. 2 (6) and 4 and Part IV, Sch. II—Income—Annuity in Mysore Province—Receipt

1.—Imperial Acts—(Continued).

Act II of 1886 (Income Tax)—(Concluded).

by agent in Mysore—Money remitted to annuitant temporarily resident in British India—Inability to pay tax. **Narasammal v. The Secretary of State**, 2 L.W. 1124=18 M.L.T. 524=(1916) M.W.N. 122=39 M. 885=31 Ind. Cas. 404. See Final Part, 1915, Col. 50.

Act VII of 1887 (Suits Valuation).

(1) S. 4—Suit by unsuccessful claimant—Value of suit for purposes of jurisdiction—O. XXI, r. 63, Civ. Pro. Code. **M. Narayan Singh v. Aiyasami Reddi**, 29 M.L.J. 728=39 M. 602=31 Ind. Cas. 188. See Final Part, 1915, Col. 50.

(2) S. 8. See COURT FEES ACT, No. 5, 31 Ind. Cas. 807.

(3) S. 8—Plaintiff—Right to value suit—Institution in Court of higher grade—Defendant when precluded from raising objections—Estoppel. See JURISDICTION (GENERAL), No. 2, 9 S.L.R. 164.

(4) S. 11—Valuation—Appeal—Jurisdiction. See PRE-EMPTION, No. 9, 20 C.W.N. 1099.

Act IX of 1887 (Provl. S.O. Courts).

(1) S. 17—Suit instituted in the Court of the Subordinate Judge invested with Small Cause Court powers—Transfer to Munsif's Court—Code of Civil Procedure (1908), S. 24 (4).

Held, that S. 24, sub-cl. 4 of the Code of Civil Procedure, contemplates a Court vested with the powers of a Court of Small Causes, and that, when a suit is transferred from that Court to another Court, the Court trying it is to be deemed a Court of Small Causes and its procedure is to be governed by the provisions of the Provincial Small Cause Courts Act. Therefore when such a suit is transferred to a Munsif from the Court of a Subordinate Judge vested with Small Cause Court's powers and the former passes an *ex parte* decree in the suit, an application to have the *ex parte* decree set aside must be accompanied by a deposit of the amount of the decree or a security in respect of the amount as required by the Provincial Small Cause Courts Act, S. 17, the provisions of which are mandatory. **Chhotey Lal v. Lakhmi Chand Magan Lal**, 14 A.L.J. 549=33 A. 425=34 Ind. Cas. 113.

BANERJI, J.

(2) S. 17—Application for review or rehearing—Deposit of amount less than decretal amount—Effect—Dismissal of application—Substantial compliance with S. 17—Insufficiency.

Where an applicant for review or rehearing of a Small Cause Suit on whom the duty of putting into the Court the amount due by him under the decree at the time of his presenting the application, deposits by mistake an amount which fell short of the amount by only 11 annas. *Held* that his application cannot be entertained.

A substantial compliance with the terms of S. 17, Provincial Small Cause Court, is not

1.—Imperial Acts—(Continued).

Act IX of 1887 (Provl. S. C. Courts)—(Contd.).

enough, as the wording of the section is clear. **Purna Chandra Sarker v. Rassoraj Pramanik**, 33 Ind. Cas. 133.

D. CHATTERJEE and BEACHCROFT, JJ.

(3) S. 17—Deposit of decretal amount or security while setting aside ex parte decree.

S. 17, Act IX of 1887, requires that at the time of presenting his application, the applicant must either deposit in Court the amount of the decree or give security as provided for, by S. 17 of that Act. **Jai Ram v. Purna**, 35 Ind. Cas. 635.

RAFIQUE, J.

References:—28 A. 470=5 A.L.J. 295, R.

(4) S. 17—Ex parte decree, application to set aside—Money ordered to be deposited on a certain day—Time extended till 3rd December 1912—Petition taken up on that date and dismissed for non-compliance with order—Legality of dismissal—Jurisdiction. **Sudalayadum Perumal Nadan v. Sivananj Nadachl**, 2 L.W. 729=18 M.L.T. 199=39 M. 533=30 Ind. Cas. 544. See Final Part, 1915, Col. 51.

(5) S. 17, sub-S. (1)—Dismissal for default—Decree passed ex parte.

An applicant for an order to set aside an order of dismissal for default is not an applicant for an order to set aside a decree *ex parte*. **Yusuf Akram v. Arfan Ali Khan**, 23 C.L.J. 147=35 Ind. Cas. 45.

MOOKERJEE and RICHARDSON, JJ.

Reference:—2 C.W.N. 691, F.

(6) S. 17, Proviso—What it actually requires. See CIV. PRO. CODE (1903), No. 378, 21 C.W. N. 30.

(7) Ss. 23 (1), 25—Return of a plaint under S. 23 (1)—High Court's power of interference—S. 25, Provincial Small Cause Courts Act, S. 115, Civ. Pro. Code, 1909—And S. 107, Government of India Act of 1915.

Where a Provincial Small Cause Court returned a plaint for presentation to a proper Court on the ground that the "suit involved a question of title which should be tried in a regular suit" and the plaintiff thereupon moved the High Court and obtained a rule, on a preliminary objection taken that the order under S. 23 (1) is not covered by S. 25 of the Provincial Small Cause Courts Act:

Held—That there is a good deal of distinction between disposing of a case and deciding a case. A case is something less definite than a suit. The meaning of the word "decided" as held in 13 C.W.N. 403, *Appr. (a)*.

Under S. 115 of the Civ. Pro. Code, the High Court would only interfere if the question were one of jurisdiction.

The Calcutta High Court's powers under the Charter Act have been exercised, with few exceptions, only in cases where jurisdiction has been exceeded or the Judge has ignorantly or perversely refused to exercise or made only a colourable pretence at exercising jurisdiction vested in

1.—Imperial Acts—(Continued).

Act IX of 1887 (Provl. S. C. Courts)—(Contd.).

him by law. This limited power should be exercised only when irreparable injury would be done to one of the litigants if matters were not set right (b).

S. 23 (1) of the Provincial Small Cause Courts Act is designed to meet cases in which a Small Cause Court Judge is satisfied that the question of title raised is so intricate that it should not be decided summarily, but in a Court in which the evidence is recorded in full and the decision is open to appeal. The matter is one of discretion, and where discretion is vested in a Court, it is not open to interference unless it has been exercised ignorantly or perversely. **Babu Gunga Prasad v. Nandu Ram**, 20 C.W.N. 1080=1 Pat. L.J. 465.

SHARFUDDIN and ROE, JJ.

References:—(a) 13 C.W.N. 403; 15 C.W.N. 666, R. (b) 15 C.W.N. 682; 15 C.W.N. 353, R.

(8) S. 25—Suit for recovery of money—Document purporting to be receipt for amount, genuineness of, doubted—Revision.

Where, in a suit for recovery of money, the defendant put forward a document which purported to be a receipt for the amount, but the genuineness of which was doubted by the Small Cause Court:

Held, that there was no error of law or procedure which justified the exercise of the revisional jurisdiction under S. 25 of the Provincial Small Cause Courts Act. **Hukam Singh v. Makhan Lal**, 73 P.W.R. 1916=32 Ind. Cas. 793.

SHADI LAL, J.

(9) S. 25—Entrustment of a bundle containing money to the 1st defendant—Bundle placed in an unlocked box along with 1st defendant's money—Loss of the bundle—Liability for the loss—Barter and bailee—Care, degree of—Contract Act, S. 151—Negligence, whether a question of law—Finding regarding negligence by the First Court—Interference with the finding in revision, whether legal—Finding of fact when interfered with in revision. **Kayarohana Chettiar v. Nagalinga Chettiar**, 2 L.W. 638=18 M.L.T. 119=(1915) M.W.N. 533=30 Ind. Cas. 493. See Final Part, 1915, Col. 53.

(10) S. 25—Revision—Limitation—Wrong decision—Limitation Act, 1908, Art. 68—Punjab Loans Limitation Act of 1901. **Sher Khan v. Gokai Chaud**, 171 P.L.R. 1915=107 P.W. R. 1915=30 Ind. Cas. 429. See Final Part, 1915, Col. 54.

(11) S. 25—Costs—Order depriving plaintiff of his costs—No sufficient ground—Open revision—Promissory note—"On demand"—Mortgage—Debtor—Duty to seek out creditor. **Meghraji v. Johnson**, 11 N.L.R. 189=31 Ind. Cas. 860. See Final Part, 1915, Col. 55.

(12) S. 25—Interference of High Court on questions of fact. See CIV. PRO. CODE (1903), No. 696, 20 C.W.N. 1110.

(13) S. 25—*Bona fide* application by decree-holder for extension of time—Whether a step in

I.—Imperial Acts—(Continued).**Act IX of 1887 (Provl. S. C. Courts)—(Contd.).**

aid of execution—Court holding application not *bona fide*—Interference in revision. See EXECUTION OF DECREE, No. 10, 14 A.L.J. 890.

(14) S. 25—Revision—Interference only discretionary. See LANDLORD AND TENANT, No. 10, 3 L.W. 408.

(15) S. 25. See PLEADER AND CLIENT, No. 1, 20 P.W.R. 1916.

(16) S. 25. See TRUSTEES, No. 1, 35 Ind. Cas. 204.

(17) S. 25. See No. 7, *supra*.

(18) S. 25 and Sch. II, Art. 15—Contract for delivery of cattle—Suit for specific performance or compensation—Maintainability in Small Cause Court. See SPECIFIC PERFORMANCE, No. 7, 20 C.W.N. 1020.

(19) S. 27—Small Cause suit—Execution on Small Cause side—Order—Appeal—Revision. See EXECUTION OF DECREE, No. 1, 3 L.W. 24.

(20) S. 35—Small Cause Court—Suit filed—Transfer to Munsif's Court—Appeal—Revision. See SMALL CAUSE SUIT, No. 1, 14 A.L.J. 705.

(21) Sch. II (ii). See JURISDICTION OF SMALL CAUSE COURT, No. 1, 33 Ind. Cas. 728.

(22) Sch. II, cl. 7—*Suit for enhanced Kattubadi—Second appeal.*

A suit claiming enhanced Kattubadi on the ground that the defendant has committed default in the payment of the money rate is not a suit to enhance the rent under cl. 7, Sch. II, Provincial Small Cause Court. Such a suit is cognizable by a Small Cause Court. So no second appeal lies in such a suit. *Chelukuri Sitaramayya v. Yenkata Rangayya Appa Rao*, 31 Ind. Cas. 871.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—19 M. 329; 22 M. 11; 24 M. 508, F.

(23) Sch. II, cl. (8)—*Special authority to try rent suits under Small Cause Court procedure, if may be conferred generally on the Court.* *Safer Ali Mondal v. Golam Mondal*, 19 C. W.N. 1236=22 C.L.J. 249=31 Ind. Cas. 177. See Final Part, 1915, Col. 56.

(24) Sch. II, Art. 13—*Scope and applicability—S. 102, Civ. Pro. Code—Nature of suit how to be determined—Wajib-ul-ars—Presumption as to its correctness—S. 82, C.P. Land Revenue Act.*

Art. 13, Sch. II, Act IX of 1887, relates primarily to dues claimed from the person liable to pay them as such, but does not cover a suit against a person who has improperly collected the dues from those liable to pay the same (a).

For the purposes of S. 102, Civ. Pro. Code, the nature of the suit must be determined from the claim as laid without regard to the nature of the defence (b).

There is a presumption in favour of the correctness of the *wajib-ul-ars* under S. 82,

I.—Imperial Acts—(Continued).**Act IX of 1887 (Provl. S. C. Courts)—(Contd.).**

O. P. Land Revenue Act (c). *Dhanya v. Tanya*, 12 N.L.R. 47=32 Ind. Cas. 998.

DRAKE-BROCKMAN, J.C.

References:—(a) 26 A. 358, F.; 29 M. 202, Cons. (b) 15 B. 400; 32 B. 356; 24 M. 508, R. (c) 6 N.L.R. 49, R.

(25) Art. 13—*Jurisdiction—Provincial Small Cause Courts Act, Art. 13—Suit by hereditary archaka for his dues.* *Subaraya Acharya v. Kesava Upadhyaya*, (1915) M.W.N. 846=31 Ind. Cas. 206. See Final Part, 1915, Col. 57.

(26) Art. 15. See No. 18, *supra*.

(27) Art. 31, scope of—*Suit for money—Accounts, taking of, incidentally necessary—Spilt whether one for accounts—Maintainability in a Small Cause Court—Jurisdiction.*

If, for the purpose of granting relief to the plaintiff in a suit, it is necessary to take accounts, the suit, though ostensibly laid for the recovery of a definite sum of money, is really one for accounts within the meaning of Art. 31 of the Provincial Small Cause Courts Act, and a Small Cause Court has no jurisdiction to try the same.

Art. 31 of the Provincial Small Cause Courts Act governs all cases where the relationship of the parties is such that one of them is bound to render accounts to the other. *Mariappa Nadan v. Arunachalam Chetty*, 3 L.W. 149 = (1916) M.W.N. 169=33 Ind. Cas. 16.

SADASIVA AIYAR, J.

Reference:—24 M.L.J. 693, 695, F.

(28) Sch. II, Art. 31—*Right of fishery—Small Cause suit—Second appeal.*

A suit for recovery of a sum of money on the ground that a certain tank was the joint property and that the defendant caught and appropriated the entire fish from the tank for his own benefit being a suit of small cause nature, no second appeal lies. *Narain Das v. Harakh Narain Lal*, 31 Ind. Cas. 797.

PIGGOTT, J.

Reference:—23 A. 437, R.

(29) Sch. II, Art. 31—*Suit for account, what is—Account between silk merchant and dyer and dresser of silk.* *Kallias Chandra Mandal v. Kiracenda Ghosh*, 10 Ind. Cas. 883=24 C. L.J. 187. See Final Part, 1911, Col. 43.

(30) Sch. II, Art. 32—*Suit for salvage.*

A suit for services rendered in saving cargo from a leaky boat is not a suit for salvage and is not excluded from the cognizance of a Court of Small Causes under Art. 32 of the second schedule of the Provincial Small Causes Court Act. *M. Y. Pillai v. C. K. Selkh Ebrahim*, 9 Bur. L.T. 163=36 Ind. Cas. 10.

ROBINSON, J.

(31) Art. 35, cls. (d), (e), (f)—*Tying dog's bone to plaintiff's bullock—Pollution—Loss of caste—Damages—Expenses for purificatory ceremonies—Suit for recovery thereof—Cognisability by Small Cause Court—*

I.—Imperial Acts—(Continued).**Act IX of 1887 (Prov. S. C. Courts)—(Concl'd.).**

Maxim 'qui facit per alium facit per se'—Applicability.

The defendant, not intending to cause pollution to the plaintiff's well, dug a well on the plaintiff's house, and gave the water to the plaintiff's house. The defendant discovered the bona fide intention of the plaintiff. The plaintiff was then exonerated and according to the custom of the caste, had to spend Rs. 50 for necessary purification. Plaintiff filed a suit for the recovery of the said sum of Rs. 50 in the Small Cause Court.

Held, that the suit was not cognizable by the Small Cause Court (a).

Where the object is to cause loss of reputation, the liability of the defendant should not be affected by the mere fact that he achieves his end by applying the necessary force through an animal. To such an act the maxim '*qui facit per alium facit per se*' should be manifestly applied.

To cause loss of reputation is to inflict a personal wrong of a serious description, a suit for compensation for which falls under cl. (d) or cl. (e) of Art. 35, Seb. II, Provincial Small Causes Courts Act. **Nama v. Gopalaya**, 12 N. L.R. 7=32 Ind. Cas. 236.

DRAKE-BROCKMAN, J.C.

References—(a) 36 B. 443; 13 W.R. 131; 5 C. 925; 15 W.R. 179; 3 A. 747; 22 W.R. 395; 10 A. 13, R.

(32) Sch. II, Art. 35 (g). See **SMALL CAUSE COURT**, No. 1, 19 O.C. 236.

(32-a) Sch. II, Art. 35—'Maintenance', meaning of—*Amount payable under order of District Court for education and maintenance of minor.*

A suit for the recovery of the amount payable under an order of the District Court by the guardian of the property of a minor to the guardian of his person for the education and maintenance of the minor, is not a suit for maintenance within the meaning of Art. 38 of the second schedule to the Provincial Small Causes Courts Act.

For the purpose of Art. 38, the word 'maintenance' means a sum of money payable by a person under an obligation to support another, either by the general law to which he is subject or under a specific contract. **Manika Naiker v. Swarnathammal**, 32 Ind. Cas. 547.

KUMARASWAMI BASTRI, J.

(33) Sch. II, Art. 11—Suit for contribution—Second appeal if *liba*. See **CONTRACT ACT**, No. 69, 23 C.L.J. 125.

Act VII of 1899.

See **SUCCESSION CERTIFICATE ACT**.

Act VIII of 1890.

See **GUARDIANS AND WARDEN ACT**.

Act IX of 1890

See **RAILWAYS ACT**.

I.—Imperial Acts—(Continued).**Act IV of 1893 (Partition).**

(1) S. 2—*Order for sale—Plaintiff praying for division of a house in a particular way not precluded from asking for sale under the Act—Division inexpedient.*

In a suit for partition of a house the plaintiff asking that the partition may be made in a particular way, which the Court considers inexpedient, is not thereby precluded from asking for the sale of the house under the provisions of S. 2 of the Partition Act. **Mazli v. Haldar Husain**, 14 A.L.J. 35=33 Ind. Cas. 810.

RAFIQ, J.

References—5 C.W.N. 128; 24 M. 639; 32 B. 103, R.

(2) S. See **PARTITION**, No. 6, 20 C.W.N. 1206.

(3) S. 1—*Dwelling-house—Members of family—Joint tenancy or tenancy in common—Stranger purchasing share of house—Right to compel him to accept money valuation—Requirements of the section.* **Kundaudas Nanumal v. Deumal Lillaram**, 9 S.L.R. 81=30 Ind. Cas. 936. See **Final Part**, 1915, Col. 74.

Act I of 1894.

See **LAND ACQUISITION ACT**.

Act XII of 1896 (Excise).

Rules framed under the Excise Act. See **LICENSE**, No. 1, 14 A.L.J. 1035.

Act X of 1897 (General Clauses).

(1) See **LIMITATION ACT** (1908), No. 29, 101 P. R. 1916.

(2) S. 3—*Nature of Nankar.* See **NANKAR**, No. 2, 19 O.C. 49.

(3) S. 3 (25)—*Proper use of preamble in Acts.* See **EASEMENTS**, No. 1, 20 C.W.N. 1158.

(4) S. 3 (25). See **NANKAR**, No. 1, 18 O.C. 380.

(5) S. 6—*Applicability.* See **CIV. PRO. CODE** (1903), No. 115, 20 C.W.N. 952.

(6) S. 13. See **LEGAL PRACTITIONERS**, No. 1, 24 C.L.J. 384.

(7) S. 27. See **C.P. ACT XI OF 1899 (C.P. TENANCY)**, No. 2, 12 N.L.R. 42.

Act II of 1899.

See **STAMP ACT**, 1899.

Act IX of 1899 (Arbitration).

Ss. 19 and 5—*Civ. Pro. Code, Ss. 10 and 151—Reference to arbitration—Suit filed after reference—Court's power to stay suit.*

S. 19 of the Indian Arbitration Act is intended to afford means of indirectly compelling a reference where there has been no reference to named arbitrators but only an agreement to refer and where the Court is satisfied that there is no sufficient cause why the matter should not be referred. But though S. 19 of the Arbitration Act is not intended to confer power on the Court to stay proceedings after a reference, the Court has inherent power to stay

I.—Imperial Acts—(Continued).**Act IX of 1899 (Arbitration)—(Concluded).**

proceedings if it be necessary for the ends of justice. (S. 151, Civ. Pro. Code).

Where the Court has intimation that the parties had prior to the institution of the suit referred matters in dispute to an arbitration, that is to say, that the matters in dispute were already referred before another tribunal, a tribunal to which the law gives full recognition, on such intimation the Court should either adjourn the trial of the suit until an award has been published, or insist on the plaintiff obtaining leave of the Court to revoke the reference.

So long as the authority delegated to the arbitrator is not revoked, and it cannot be revoked except by leave of the Court, he has power to make an award, and there would be no impropriety of conduct on the part of the arbitrator in proceeding with the reference after suit filed unless he has notice that there has been an application for leave to revoke the authority conferred on him to some Court competent to grant such leave (a).

There can be no indecent competition between the two tribunals so long as the Court exercises towards the private tribunal that courtesy which S. 10, Civ. Pro. Code, compels it to exercise towards another Court.

Where it appears desirable that the matters in dispute should be tried in Court, the proper course is not to ignore the arbitrator and proceed forthwith with the suit but to direct the defendant to take the necessary steps to revoke his submission.

Where an application under S. 5 has been filed before a competent Court, the arbitrator might be guilty of improper conduct, in proceeding with the reference so long as the propriety of his doing so was still *sub judice*. **Dhanpatmal v. Kishinlal**, 10 S.L.R. 1=35 Ind. Cas. 536.

GROUCH, A.J.C.

Reference :—(a) 7 S.L.R. 1, F.

Act VI of 1901 (Assam Labour and Emigration).

S. 22 (3)—Collector's order closing recruiting depot—*Legality—Liability of Collector or Government for damages—Remoteness of damage—Defamation—Liability of Government.* **Ross v. Secretary of State for India**, 29 M.L.J. 280=39 M. 781=31 Ind. Cas. 224. See Final Part, 1915, Col. 82.

Act VIII of 1904 (University).

(a) Ss. 1, 3, *University—If can hold property in trust—Trust constituting a charitable gift—Illegal conditions, effect of—University, if can accept grant subject to condition—Trustees—Exclusion of one trustee, effect of—Students—Students of other University.* **Jitendra Nath Palit v. Lokendra Nath Palit**, 22 O.L.J. 593=34 Ind. Cas. 657. See Final Part, 1915, Col. 1921.

(b) S. 3. See No. a, *supra*.

I.—Imperial Acts—(Continued).**Act VIII of 1904 (University)—(Concluded).**

(1) Ss. 3, 4, 15 and 25 (1) and (2) (e)—*Regulations of the Madras University*, Nos. 60, 61, 96 (iii), (iv); and (vi)—*Senate and the Syndicate, functions of—Regulation 61 if ultra vires of the Senate—Power of Senate to impose veto of Government on matters reserved for it by Statute.*

The general scheme of the Madras Universities Act (VIII of 1904) is that the Senate should have the legislative power, the Syndicate, the Executive Government of the University, the powers of the Senate being subject, in certain matters, to the control of the Government, that the Senate should be a general rule in the form of Regulations under S. 25 of the Act and that the Syndicate should deal with the administration of specific matters and the application of the Regulations to them. A proceeding of the Syndicate which is contrary to the Regulations would be void, and the Syndicate cannot adopt a measure or pass resolutions or whatever else they may be termed, which would be in conflict with, or effect a modification of, the existing Regulations, or bring about a result such as, by the Act, is reserved to the Senate to effect by the passing of a Regulation.

Where a Statute expressly or by implication leaves the determination of certain matters to the Body Corporate created by it, the latter has no power to delegate its authority on matters within its competence to a third person. Consequently Reg. 61, if and in so far as it purports to extend the right of protest and the Government's power of veto to a resolution other than a Regulation under S. 25 of Act VIII of 1904 or a resolution on any other matter requiring Government sanction, is *ultra vires* of the Senate. *In re G. A. Natesan*, 31 M.L.J. 634=40 M. 125.

COUTTS TROTTER and KUMARASWAMI SASTRI, JJ.

Act III of 1907 (Provl. Insolvency).

(1) Ss. 4, 6—*Appar in insolvency proceedings—What parties entitled to notice—Annual Practice*, O. LVIII, r. 2—*Limitation Act* (1908), S. 14, *applicability of.* **Trasi Deva Rao v. Parameshwara**, 27 Ind. Cas. 141=29 M.L.J. 451=39 M. 74. See Final Part, 1915, Col. 83.

(2) Ss. 4, 16, 47, 51—*Act of Insolvency by agent—Effect upon principal—Creditor applying to declare principal an insolvent—Service of notice upon agent whether sufficient—Scope of S. 16—Relation back—Agency when terminated.* **Kalianji Singji Bhal v. The Bank of Madras**, 29 M.L.J. 788=3 L.W. 13=(1916) M.W.N. 12=39 M. 693=31 Ind. Cas. 583. See Final Part, 1915, Col. 84.

(3) Ss. 4 (a), 16, 18, 19, 36—*Trust created by debtor in favour of three of the creditors for discharge of debts—Validity—Void in S. 36, meaning of—What amounts to "valuable consideration"—"Third person" meaning of, in S. 4—Property when vests in Official Receiver.*

I.—Imperial Acts—(Continued).**Act III of 1907 (Provl. Insolvency)—(Contd.).**

Two traders being unable to pay their debts convened a meeting of their creditors and entered into an agreement which provided *inter alia* that all the properties of the debtors should be handed over to three trustees who were themselves creditors of the debtors, that the trustees were to realise the outstandings due to the debtors, sell their properties and pay the creditors *pro rata*.

Nearly 2 years after the execution of the trust deed, the two debtors put in a petition in insolvency and were adjudged insolvents.

Held that the trustees were transferees "in good faith and for valuable consideration" within the meaning of Ss. 36 and 38 (c) of the Provincial Insolvency Act, and that the transfer made *bona fide* to the trustees by the two debtors cannot therefore be avoided (a).

A responsibility taken by a person to whom properties are transferred in consideration of his taking such onerous work would fall within the expression 'valuable consideration' (b).

The words 'third person' in S. 4 (a) of the Act were not intended to exclude the conveyance to some of the creditors themselves as trustees for the general body of creditors.

The word 'void' in S. 36 of the Act means only 'voidable' (c).

The word 'purchaser' in S. 36 is used not in the ordinary legal sense of one who has bought a property under a contract of sale and purchase, but means a person who has given valuable consideration (d).

Reading Ss. 16, 18 and 19 of the Provincial Insolvency Act together, it would seem to be the duty of the Court, if it intends the Official Receiver to become vested with the title to the insolvent's property, to make an order under S. 18 appointing a receiver. The practice which obtains in the mofussil of treating the Official Receiver as vested with the properties of the insolvents as soon as an adjudication order is made, without preliminary order under S. 18 appointing a receiver, seems to be illegal. **Official Receiver of Trichinopoly v. Soma Sundaram Chettiar**, 30 M.L.J. 415 = 34 Ind. Cas. 602.

SADASIVA AIYAR and MOORE, JJ.

References :—(a) 19 O. 223 ; 36 B. 765, D.; 10 B.H.C. 927, R. (b) 22 O. 14 ; 29 B. 498 ; (1875) 10 Ex. 153, R. (c) (1914) M.W.N. 247, R. (d) (1888) 20 Q.B.D. 732, F.

(4) Ss. 4 (b) and 46 (1)—*Revision by Chief Court confined to questions of law—Whether question of "intention" with which a transfer of property has been made is one of law or fact.*

Under S. 46 (1) of the Provincial Insolvency Act, III of 1907, it is not open to the Chief Court to interfere with an order of the District Judge made in appeal, unless it finds that some question of law has been wrongly decided (a).

The fact whether a transfer of property was made with the intention of defeating or delaying creditors is a question of fact and not of

I.—Imperial Acts—(Continued).**Act III of 1907 (Provl. Insolvency)—(Contd.).**

law (b). **Har Parahad v. Bhagat Singh**, 109 P.R. 1916 = 36 Ind. Cas. 594.

JOHNSTONE, O J. and SCOTT-SMITH, J.

References :—(a) 16 A. 476 (F B.); 27 A. 197; 21 B. 250, R. (b) 20 C. 93 (P C.); 2 C.W.N. 385 ; 3 O.W.N. 255 ; 21 A. 496 P.C.; 19 O. 253 ; 8 O.W.N. 690 ; 1 P.R. 1908 ; 36 P.R. 1399 ; 36 M. 453, R.

(5) S. 6. See No. 1, *supra*.

(6) Ss. 6, 15 and 47—*Dismissal of petition for benefit of the Act on the ground of disbelief in the facts stated or on intention to perpetrate a fraud—When such dismissal improper.*

Where a petition in insolvency was rejected by the District Judge on the ground that he did not believe (1) that the applicant's crops were destroyed or (2) that the cost of cultivation was as high as the applicant stated, and also on the ground (3) that the petition was made to swindle one Po Kyin who had purchased and paid for certain cattle which the applicant subsequently fraudulently disposed of to his own son ;

Held that the Court should not have dismissed the petition on the first two grounds under S. 15, as under that section the Court would only dismiss it if it was satisfied that the petitioner had not the right to present the petition under S. 6 and it was not as found.

Held further that the Courts should not have dismissed it on the third ground as the fraud, if any, had already been committed and the insolvency proceedings could not in any way prevent Po Kyin from recovering any compensation that he might be entitled to. **Maung Po Mya v. Maung Po Kyin**, 8 Bur. L.T. 282 = 30 Ind. Cas. 943.

ORMOND and TWOMEY, JJ.

(7) S. 7—*Leave to withdraw after adjudication, incompetent.*

The Court would not allow an insolvency petition under S. 7 of the Provincial Insolvency Act to be withdrawn after an adjudication order has been made.

No suit can be withdrawn after judgment has been pronounced, and a decree made, and it seems that it would be equally absurd to allow an insolvency petition to be withdrawn after an adjudication order has been made.

Per Pratt, J.C.—It may be that under the English Bankruptcy Act leave to withdraw may be given after a receiving order has been made. But even if that were so, that is not an analogous case, for a receiving order does not make the debtor a bankrupt or deprive him of legal title to his property. Here the withdrawal of a petition would be of no avail unless it implies an annulment of the adjudication. The Act has specified in S. 42 the conditions on which the Court may annul an adjudication and it is impossible that it was intended that this same result could be produced by the simple device

1.—Imperial Acts—(Continued).

Act III of 1907 (Provl. Insolvency)—(Contd.).

of withdrawing the original petition. *Re application of Messrs. Fleming Shaw and Co.*, 10 S.L.R. 47=35 Ind. Cas. 539.

PRATT, J.C.

- (8) Ss. 12 (2) and 13 and *r.* 21, *Provincial Insolvency Rules—Creditor's petition—Notice to other creditors if essential—Adjudication without such notice, if valid—Private notice, if validates adjudication—General notice, whether can be dispensed with by creditors having private notice.*

Under S. 12 (2) of the Provincial Insolvency Act, notice of the date fixed for the hearing of a creditor's petition must be given to the other creditors of the bankrupt by publication in the local official gazette, and an adjudication without such notice is wholly irregular and must be set aside.

Private notice to a creditor does not, in the absence of the general notice, validate an adjudication.

Quare:—Whether creditors who have such private notice, can dispense with general notice? *Nachlappa Chetty v. Thangavalu Chetty*, 3 L.W. 495=34 Ind. Cas. 696.

SADASIVA AIYAR and MOORE, JJ.

References:—1 L.W. 1012=(1914) M.W.N. 899, *F.*

- (9) S. 13 (21). See No. 8, *supra*.

- (10) Ss. 12 and 47—*Creditor's petition—No adjudication—District Court, power of, to stay sale in the Sub-Court—Ad interim Receiver, appointment of, when to be made—Order, setting aside of, without notice, irregular, in the absence of deception.*

Certain creditors of one S. obtained decrees against him and in execution thereof had his properties attached and brought to sale. During the pendency of those proceedings in the Court of the Subordinate Judge of Cuddalore, another creditor of S. presented a petition to the District Judge of South Arcot for adjudicating S. an insolvent and obtained an order for the appointment of an *ad interim* Receiver and for the stay of sale. The very next day the creditors at whose instance the sale proceedings were being conducted applied to the District Judge for vacating his order of the previous day and this he did without notice to the petitioning creditor. On an appeal by the latter, *held* by the High Court that the District Judge had no jurisdiction to stay the sale which was proceeding in the Sub-Court either under S. 47 of the Provincial Insolvency Act or S. 151, Civ. Pro. Code, and that the order obtaining an *ad interim* Receiver and vesting the properties of the insolvent in him was illegal inasmuch as the discretion given to the Insolvency Court under S. 13, cl. (2) of the Provincial Insolvency Act, should ordinarily be exercised only in cases where the property of an insolvent alleged to be absconding has to be preserved from destruction or disappearance, and not in order to vest in the *ad interim* Receiver the properties attached by other Courts in execution.

1.—Imperial Acts—(Continued).

Act III of 1907 (Provl. Insolvency)—(Contd.).

Held further that the District Judge acted irregularly in vacating his first order without notice to the petitioning creditor as there was no deception practised upon him. *Bashyam Reddi v. Somasundaram Chetti*, 3 L.W. 250=32 Ind. Cas. 897.

SADASIVA AIYAR and MOORE, JJ.

- (11) S. 14, sub-Ss. 2, 3, and 4 and S. 46—*Non-observance of procedure—Appeal.*

Held that an order declaring a person insolvent which has been passed without observing the procedure laid down in S. 14, sub-Ss. 2, 3, and 4 of the Provincial Insolvency Act is bad in law and consequently is liable to be set aside in appeal. *Ralla Mal v. Jafar Ali*, 22 P.W.R. 1916.

SHAH DIN, J.

- (12) S. 15—*Petition by debtor for inequitable and collateral purposes—Court's power to refuse adjudication—Decree for maintenance of wife, not a debt provable in insolvency.*

Where a petition for insolvency is presented by the debtor not with the *bona fide* view of obtaining an adjudication but for an inequitable and collateral purpose, the Court has power to dismiss such petitions (a).

Maintenance ordered to a wife by a decree of the Court is not a debt proveable under the Insolvency Act; the reasons being that the amount is variable and may be altered by the Court in accordance with the means of the husband and that it might be determined at any time by the husband and wife resuming cohabitation (b). *Application by Pamanmal Hemanmal*, 10 S.L.R. 28=35 Ind. Cas. 541.

PRATT, J.C.

References:—(a) 32 A. 645, *F.* (b) (1885) L. R. 15 Q.B.D. 239, *F.*

- (13) S. 15, *Insolvency—Grounds for dismissing petition. Tuls Ram v. Ghulam Mahaluddin*, 10 P.W.R. 1913 (N.W.F.P.)=82 P.L.R. 1916. See Final Part, 1913, Col. 81.

- (14) S. 15. See No. 6, *supra*.

- (15) S. 15 (1)—*Applicability to petition presented by debtor. Ratta Malik v. Tirath Ram*, 25 P.R. 1915=29 Ind. Cas. 361=34 P.L.R. 1916. See Final Part, 1915, Col. 85.

- (16) S. 16. See Nos. 2 and 9, *supra*.

- (17) S. 16 (2)—*Decree against the estate of the deceased—Insolvency of heirs after decree but before execution—Remedy of decree-holder—Liability of estate in the hands of Official Receiver—S. 52, Civ. Pro. Code (1908). Gade Lakshme Narasimham Pantulu v. Pillalamarri Jagannadha Row Pantulu*, 18 M.L.T. 147=30 Ind. Cas. 256. See Final Part, 1915, Col. 87.

- (18) Ss. 16, 18, 36 and 46—*Sale by three members of a joint Hindu family—Subsequent insolvency of one member—Power of Court to set aside sale, extent of—Shares of other members if affected by the insolvency*

I.—Imperial Acts—(Continued).**Act III of 1907 (Provl. Insolvency)—(Contd.).**

of one member—Letters Patent appeal, if lies against the exercise of discretion by a single Judge—Practice.

An appeal lies under cl. 15 of the Letters Patent against the decision of a single Judge of the High Court exercising jurisdiction under S. 16 of the Provincial Insolvency Act, though the section gives only a discretion to the High Court to interfere in revision.

Where three members of a joint Hindu family executed a mortgage-deed and one of them was subsequently adjudicated an insolvent and steps were taken to have the sales conducted in accordance with the *fit* transactions.

Held that the shares of the other two members could not vest in the Official Receiver as they never appeared to be declared insolvent, and that the District Judge had no jurisdiction to deal with their shares under Ss. 16, 18 and 36 of the Act.

The Court has power to deal with the estate and interest of the insolvent only and the sale in respect of the share of the insolvent alone can be annulled and not that of the other members. *Palaniappa Mudali v. The Official Receiver of Tenkasi*, 14 L.W. 51 = 20 M. L.T. 334 = (1916) 2 M.W.N. 193 = 22 M.L.J. 81 = 35 Ind. Cas. 610.

SESHAGIRI Aiyar and PHILLIPS, JJ.

(19) Ss. 16, 22, 23, 46 (3)—*Proceedings in Insolvency—Release of property seized as that of the insolvent—Appeal from order of release—Need for leave of Court—Practice.*

In an insolvency proceeding, under Act III of 1907, after an order of adjudication, the District Judge, on the petition of a creditor seized certain property as that of the insolvent. Subsequently an application was filed by a person claiming the property as his own. The Court held an enquiry and released it.

Held that the order of release could not be referred to S. 16 of the Act but was passed by the Judge in the exercise of the jurisdiction vested in him by S. 22 read with S. 23 of the Act, and an appeal from it would lie only by leave of the District Court or of the High Court under S. 16 (3).

Where an order is appealable only by leave of the District Court or of the High Court, the memorandum of appeal should always be accompanied by a petition for leave to appeal, and it should be clear to the Judge sitting to receive petitions that the appeal is not presented as one which lies of right. *Balli v. Nand Lal*, 33 Ind. Cas. 777.

PIGGOTT and WATSH, JJ.

(20) Ss. 16 and 27—*Composition before adjudication—Sanction of Court—Conditions necessary for the grant of sanction—Adjudication—Proof of claims—Assent of majority of creditors—Discretion of Court.*

Under the Provincial Insolvency Act, composition before adjudication is an impossibility in spite of the wording of Ss. 16 and 27, because

I.—Imperial Acts—(Continued).**Act III of 1907 (Provl. Insolvency)—(Contd.).**

there is no provision for proof of debts until after adjudication. Even after adjudication, composition is impossible if the debts are not proved; for S. 27 (2) makes the assent of the majority in number and three-fourths in value of all the creditors whose debts are proved a *sine qua non*. The assent is not a mere formality.

Where a composition does not secure for the creditors anything more under it than what they would get if the bankruptcy proceedings had continued, and the composition seems to have the effect of compounding a fraud and is likely to involve the creditors in litigation, the Court will not sanction the composition.

The Court has a discretion which is recognised in S. 27 (6) of the Provincial Insolvency Act, and this discretion is exercised in the interests of commercial morality. *Re application by Messrs Fleming, Shaw and Co to declare the Firm of Sadiram Jannadas, Insolvents*, 9 S. L.R. 181 = 32 Ind. Cas. 565.

PRATT, J.C.

References:—(a) 4 S.L.R. 222; 13 Q.B.D. 438; 19 Q.B.D. 32, R.

(21) Ss. 16 (6) and 36—*Date of presentation of insolvency petition to an incompetent Court, if can be treated as date of adjudication—Date of presentation to proper Court, whether date of adjudication.*

An order of adjudication on an insolvency petition will not for the purposes of S. 36 of the Provincial Insolvency Act relate back to the date of presentation of the petition to a Court having no jurisdiction.

Quære:—Whether the date of presentation to the Court having jurisdiction can itself be treated as the date of adjudication? *Mohamed Maralkkar v. The Official Receiver, Tinnevely*, 36 Ind. Cas. 528 = (1917) M.W.N. 103 = 5 L.W. 123.

OLDFIELD and SADANIVA Aiyar, JJ.

(22) Ss. 16, 36, 43—*Insolvent an agriculturist—Lease of occupancy holding ordered to be surrendered—House ordered to be sold—Order illegal.*

A person who was an agriculturist by occupation was adjudicated an insolvent. Shortly before his insolvency he had granted a lease of his occupancy holding. The zemindar was the principal creditor. The District Judge ordered the land to be surrendered to the zemindar and the insolvent's house to be sold. Held that the order passed by the District Judge could not be supported because the occupancy holding and the house were property, the transfer or attachment of which being forbidden by law could not vest either in the Court or in the receiver. *Sagar Mal v. Girraj Singh*, 14 A.L.J. 1031.

RICHARDS, C.J. and RAFIQ, J.

(23) S. 18. See Nos. 3 and 18, *supra*.

(24) S. 19. See No. 3, *supra*.

(25) S. 20. See No. 30, *infra*.

1.—Imperial Acts—(Continued).

Act III of 1907 (Provl. Insolvency)—(Contd.).

(26) S. 22—Receiver—Court's functions—Remedy of purchaser in auction.

S. 22 of the Provincial Insolvency Act does not contemplate that a lengthy inquiry should be held in a complaint against the irregularities of a sale held by a Receiver in an insolvency case as if the matter was a regular claim for specific performance. Under that section the Court simply ratifies, reverses or modifies the executive acts of its officer and any order under that section does not preclude a party from pursuing his ordinary remedy by a suit for specific performance against the Receiver. **A.K.R.M.S. Raman Chetty v. A.V.P. Firm**, 9 Bur. L.T. 61=31 Ind. Cas. 884.

ORMOND and TWOMEY, JJ.

(27) S. 22—Application to the Court for directing the Receiver to execute a conveyance—No previous application to the Receiver—Order directing the Receiver to execute, without jurisdiction—"Person aggrieved," meaning of.

One V having been adjudicated insolvent his property vested in the Official Receiver. V had on 14-5-1908 executed in favour of his father, the respondent, a pro-note and an agreement, the latter providing that, in case the former were not discharged within a year it should be discharged by a conveyance of certain property. On 6-10-1913 the respondent asked the Court to order the Receiver to execute the necessary conveyance alleging that he had already put in an application for such execution either by the Court or Receiver and that no orders had been passed thereon. One of the creditors who held a mortgage over the property opposed the petition. The Receiver was not made a party originally to the proceedings in the lower Court. But the High Court remanded the case for the Receiver to be made a party. The Receiver had no objection to execute the conveyance and accordingly the Court directed the execution of the conveyance.

Held, on appeal by the mortgagee-creditor, that the application of the 6th October 1913, having been founded on the failure of the respondent's previous petition to the Court and not to the Receiver, in whom the insolvent's estate vested and who alone was competent to give the conveyance, the order of the Court was without jurisdiction, being unauthorized by S. 22 or any other provision of the Provincial Insolvency Act.

Even supposing that the application of the 6th October had been founded on the omission of the Receiver to pass any order on a petition to the Receiver himself, the order could not be supported as having been made under S. 22 of the Act inasmuch as the respondent was neither a "creditor" as his debt had been discharged when his right to the insolvent's property matured under the agreement, nor a "person aggrieved" as the receiver's failure or refusal to give the conveyance was in no way a binding adjudication on that right and affected neither it nor respondent's remedy by suit.

1.—Imperial Acts—(Continued).

Act III of 1907 (Provl. Insolvency)—(Contd.).

Nor could the order of the Court be supported as having been made in the exercise of the general powers of superintendence of the Receiver, its officer, as such was not the nature of the enquiry held by the lower Court in this case as appears from the fact that neither it nor the respondent originally made the Receiver a party and though in the inquiry after remand the Receiver did not apparently attempt to justify his conduct, the proceedings were continued on evidence adduced by the creditor.

A "person aggrieved" within the meaning of S. 22 of the Act is a man against whom a decision has been pronounced which wrongfully deprived him of something or wrongfully affected his title to something. The decision must have been such as to affect the right claimed, not merely to impede the person concerned in his assertion of it. **Munjuluri Sivaramiah v. Singamahanti Bhujangarao Garu**, 20 M.L.T. 486=(1917) M.W.N. 75=5 L.W. 255.

OLDFIELD and KRISHNAN, JJ.

(28) S. 22—Scope—Receiver—Auction-purchaser.

S. 22, Act III of 1907, does not require the Court to hold any enquiry. The section does not contemplate that a lengthy enquiry should be held as if the matter was a regular claim for specific performance. Under that section the Court simply ratifies, reverses or modifies the executive acts of its officer; and any order under that section does not preclude a party from pursuing his ordinary civil remedy. **Raman Chetty v. A.V.P. Firm**, 31 Ind. Cas. 884.

ORMOND and TWOMEY, JJ.

(29) S. 22. See No. 19, *supra*.

(30) Ss. 22, 20—Sale by Official Receiver—Terms of sale proclamation modified just before sale—Irregularity—Prejudice to creditors—Power to set aside sale—Court when will interfere with Receiver's discretion—Meaning of "person aggrieved." **Thiruvengkatachariar v. Thangayal Ammal**, 17 M.L.T. 432=29 Ind. Cas. 294=29 M.L.J. 755=39 M. 479. See Final Part, 1915, Col. 88.

(31) Ss. 22, 23—Civ. Pro. Code (Act V of 1908), S. 11—Evidence Act, S. 41—Claim to property attached by Receiver in Insolvency—Adjudication by Insolvency Court—Subsequent Civil suit for same relief, bar of.

A person who is a stranger to a bankruptcy proceeding, and whose property has been seized by the Receiver in the bankruptcy may either apply under S. 22 of the Provincial Insolvency Act to the Insolvency Court, or bring a suit in a Civil Court for a return of the property. A suit for mere declaration of title to the property is not maintainable as no declaration can be granted against a creditor who never claimed any title or interest or against the debtor who by becoming insolvent had lost all he ever had, or against the Receiver.

If the claimant proceeds by an application under S. 22, the adjudication of the Insolvency

I.—Imperial Acts—(Continued).

Act III of 1907 (Prov. Insolvency)—(Contd.).

Court would bar a subsequent suit in the Civil Court for the same relief because—(1) the adjudication amounts to conclusive proof as to the title in respect of the specific things claimed by the applicant, not merely against him, but absolutely within the meaning of S. 41 of the Evidence Act; (2) the application heard and disposed of by the Insolvency Court is a suit within the meaning of S. 11 of the Civ. Pro. Code so that the adjudication would operate as *res judicata* under that section (a), and (3) upon general principles of law apart from S. 11 of the Civ. Pro. Code, a litigant who has voluntarily elected to submit to the decision of one out of two alternative Courts which are open to him cannot turn round after an adverse decision, and litigate the same matter in another Court (b). *Pitaram v. Jujhar Singh*, 33 Ind. Cas. 798.

PIGGOTT and WALSH, JJ.

References:—(a) 91 P.R. 1912=141 P.L.R. 1912=92 P.W.R. 1912=14 Ind. Cas. 751; 22 M. 356, R. (b) 6 A. 269 (P.C.)=11 I.A. 37=4 Sar. P.C.J. 489; 11 Ch. D. 525=38 L.J. B.K. 120=40 L.T. 825=27 W.R. 858 (Eng.); 14 Ch. D. 365=43 L.T. 2=28 W.R. 876, *Appl.*

(32) S. 23. See Nos. 19 and 31, *supra*.

(33) S. 27—*Insolvency proceeding, scheme of arrangement proposed by insolvent in—District Judge, duty of, under Insolvency Act—Creditors, approval of scheme by—Scheme proposed by insolvent when rejected. Shafiq-uz zaman (Chaudhari) v. Deputy Commissioner, Barabanki*, 18 O.C. 125=30 Ind. Cas. 694. See Final Part, 1915, Col. 89.

(34) S. 27. See No. 20, *supra*.

(35) Ss. 27, 42 (1)—*Adjudication order, annulling of—Applicant, what to prove.*

S. 42 of the Provincial Insolvency Act is moulded on S. 35 of Statute 45 and 46 Vict., Chap. 52.

An order for annulment of adjudication can be made only upon proof of the existence of one or more of the circumstances specified in sub-S. (1) of the S. 42 of the Provincial Insolvency Act.

It is obligatory upon an applicant under S. 42 of the said Act to establish the existence of one or more of the circumstances mentioned therein.

Under S. 27 of the Provincial Insolvency Act, consent of all the creditors is not by itself necessarily sufficient to justify an order of annulment.

Quare:—Whether, if one or more of the circumstances mentioned in sub-S. (1) of S. 42 were proved to exist, the Court could, under the Indian Law, as under the English law (where the phraseology is slightly different), refuse to make an order of annulment. *Motilal Badhaktes v. Ganpatram*, 23 C.L.J. 220=34 Ind. Cas. 792.

MOOKERJEE and NEWBOULD, JJ.

(36) Ss. 31, 34—*Soured creditor—Code of Civil Procedure (1908), S. 68, cl. (2)—Rateable*

I.—Imperial Acts—(Continued).;

Act III of 1907 (Prov. Insolvency)—(Contd.).

distribution of assets. Parsotam Das v. E. V. David, 13 A.L.J. 893=30 Ind. Cas. 779. See Final Part, 1915, Col. 90.

(37) S. 34—*Provident Fund money—Remittance by money order—Post Office, agent—Attachment by decree-holder while money in custody of Post Office—No order of adjudication—Money not capable of being kept in Court.*

P was a Railway employee to whom certain money was payable on Railway Provident Fund Account. It was payable at Bareilly. His service had terminated; he requested the authorities to send him the money to Simla, and it was remitted to him by postal money order. While it was still in the custody of the Post Office, it was attached by the respondent who held a decree against P. P had applied at Simla to be adjudicated an insolvent but no order of adjudication was passed:

Held that the Post Office was acting as the agent of P and the attachment was good, and that the money could not be retained in Court as no order of adjudication has been passed. *H.W. Farmer v. Ganasjee*, 14 A.L.J. 236=33 Ind. Cas. 723.

TUDBALL, J.

(38) S. 34. See No. 36, *supra*.

(39) S. 34 (3)—*Insolvent's property purchased from bona fide purchaser—Validity of second purchase—Notice.*

Where a purchase of an insolvent's property in an execution sale has been for valuable consideration without notice, the purchaser from such a purchaser even with notice of insolvency acquires the right of his vendor and gets good title under S. 34 (3) against the Receiver. *Mudhu Sudan Pal v. Parbati Sundari Dasya*, 35 Ind. Cas. 643.

CHATTERJEE and NEWBOULD, JJ.

(40) Ss. 34, 35, 54—*Insolvency—Sale after adjudication—Receiver not a party—Application to set aside the sale—Bona fide purchaser, rights of. See CIV. PRO. CODE (1909), No. 107, 19 M.L.T. 357.*

(41) S. 35. See No. 40, *supra*.

(42) S. 36—*Mortgage by insolvent within two years of his adjudication—Burden of proving good faith and consideration—Question of onus not important where all the evidence is before the Court—Mortgage invalid under S. 59, Transfer of Property Act, if operates as a charge under S. 100 of that Act.*

Under S. 36 of the Provincial Insolvency Act, the onus of proving that a mortgage executed by an insolvent within two years of his being adjudged as such was made in good faith and for valuable consideration and was therefore binding on the Receiver is on the mortgagee (a).

Where all the evidence is before the Court, the question of burden of proof is not of great importance.

*I.—Imperial Acts—(Continued).***Act III of 1907 (Provl. Insolvency)—(Contd.).**

An instrument which is invalid under S. 59, Transfer of Property Act, as a mortgage, cannot operate to create a charge under S. 100, Transfer of Property Act (b).

Where a mortgage document is attested by only one witness, the question whether it is invalid as a mortgage is not one which it is necessary for the Court to consider in deciding whether the transfer is void under S. 36 of the Provincial Insolvency Act. **Anantarama Aiyar v. Yuseufji Omer Sahib**, 31 M.L.J. 133 = (1916) 2 M.W.N. 236 = 36 Ind. Cas. 903.

SADASIVA AIYAR and MOORE, JJ.

References :—(a) 19 C.W.N. 865; C.M.A. 209 of 1914, R. (b) 31 M. 337, F.; 33 C. 985, R.; 17 M.L.J. 39, Diss.

(43) S. 36—*Transfer of property by insolvent—Validity of—Burden of proof—Of good faith.*

S. 36 of the Provincial Insolvency Act is wider in its scope than S. 53 of the Transfer of Property Act. Under the former Act intent to defeat or delay a creditor is not necessary. All that is required is that the transfer must be made within two years of the adjudication of the insolvency of the debtor.

In order to determine the validity of the transfer by a debtor of all his property in lieu of a debt it is a matter for consideration whether a real transfer was intended by the transferor or it was merely fictitious, and whether it was made in good faith, the onus of proving good faith being upon the transferee. **Muhammad Habib-ullah v. Mushtaq Husain**, 14 A.L.J. 1183.

WALSH and SUNDAR LAL, JJ.

(44) S. 36, application under—*Fraudulent transfer by insolvent—Proper person to apply—Procedure.*

Where an application under S. 36 of the Provincial Insolvency Act (III of 1907) has been made before a District Court by a creditor, on the allegation that the insolvent had within two years of the insolvency order, made a fraudulent transfer of his property, such application being subsequently supported by the report of the Receiver, it is not competent for the Court to send the case down to a Munsif for an enquiry; the only proper course open to the Court is to issue notice upon the transferees to show cause why the transfer should not be annulled under S. 36 of the Provincial Insolvency Act (III of 1907). **Upendra Mohan Saha Chowdhary v. Brindaban Behari Saha Promanik**, 33 Ind. Cas. 188.

CHATTERJEE and BEACHCROFT, JJ.

(45) S. 36. See Nos. 3, 18, 21 and 22, *supra*.

(46) Ss. 36, 37—*Mortgage for substantial consideration—'Bona fides'—Test—Preference—Motive of the debtor—Determining factor—Pressure by creditor—Effect.* **F.F. Campbell & Co., Ltd. v. Mithomal Dwarakadas**, 9 S.L.R. 65 = 31 Ind. Cas. 50. See Final Part, 1915, Col. 92.

*I.—Imperial Acts—(Continued).***Act III of 1907 (Provl. Insolvency)—(Contd.).**

(47) Ss. 36, 44—*Mortgage by insolvent within 2 years of insolvency—Petition to set aside—Report by Official Receiver—Inquiry not by Court—No power to delegate functions to Official Receiver.*

The Provincial Insolvency Act, S. 44 (4) provides for a presumption in favour of the correctness of any statement in the Official Receiver's report. But that does not empower the Court to leave the duty of judicial inquiry, as a preliminary to ascertain under S. 46, to the Official Receiver, or to act in the proceedings under that section on evidence which it has not itself taken. The Official Receiver should be made a party to such proceedings. **Simil Rowther v. Kumarappa Chetti**, (1916) 2 M.W.N. 182 = 35 Ind. Cas. 675.

OLDFIELD and SADASIVA AIYAR, JJ.

Reference :—(a) 36 A. 519, F.

(47-a) Ss. 36 and 44—*Proceedings to set aside alienation by insolvent—Record of statements made before Official Receiver—Admissibility of such statements in proceedings before Court—Consent of parties—Onus of proof.*

In proceedings under S. 36 of the Act the Court is bound to take evidence and cannot rely on statements made before the Official Receiver (a).

In such cases the Court cannot treat the said statements either as affidavits of the persons making them or as evidence on commission taken by the Receiver. Where the statements were not treated as affidavits in the lower Court and were not shown to have been properly sworn to or to have been admissible as affidavits in the enquiry before the lower Court they cannot be refused as affidavits in the Appellate Court. And they cannot be treated as evidence taken on commission, because to enable a Commissioner to take evidence there must be the prior issue of a writ of commission to him by the Judge.

Mere omission to object to the inadmissibility of irrelevant evidence cannot cure the defect, if there was no deliberate consent to waive the objection.

In proceedings under S. 36 the burden of proving that a document executed by an insolvent was executed in fraud of creditors lay on the party asserting it (b). **Chinna Meera Rowther v. C. Kumarachakravathy Ayyangar**, 36 Ind. Cas. 906.

OLDFIELD and KRISHNAN, JJ.

References :—(a) 26 Ind. Cas. 32 = 36 A. 549 = 12 A.L.J. 889, R. (b) 19 A. 76 = 23 I.A. 106 = 7 Sar. P.C.J. 73 = 9 Ind. Dec. (N.S.) 51, F.

(47-b) Ss. 36 and 46—*Adverse order against creditor—Right of creditor to appeal against order.*

Where an order is passed against the interests of a creditor under S. 36 of the Act the latter is entitled to prefer an appeal against the said

1.—Imperial Acts—(Continued).

Act III of 1907 (Provl. Insolvency)—(Contd.).

order. **Kumarappa Chettiar v. Murugappa Chettiar**, 36 Ind. Cas. 771.

OLDFIELD and KRISHNAN, JJ.

(48) S. 37—*Mortgage to creditor, challenged as preference—Preference to be shown intentionally fraudulent—Pressure—Previous understanding.*

In order to determine whether an insolvent, at the date of a transaction sought to be annulled under S. 37 of the Insolvency Act, was unable to pay from his own money his debts as they fell due, money locked up which may be available at a later period for the payment of debts cannot be considered. But from this it does not follow that all unliquidated assets of the debtor must for that purpose be excluded from consideration (a).

A preference to a creditor, to come within the prohibition of S. 37, must be shown to have been fraudulent at, with reference to the state of mind of the debtor (b).

A preference given under pressure is no ground for annulment under S. 37. Such pressure need not be threat of criminal proceedings. Threat of Civil suits would equally take away from its spontaneous character.

A previous oral agreement to mortgage sufficient property would take a mortgage given later on out of the operation of S. 37. **Nripendra Nath Sahu v. Ashutosh Ghosh**, 20 C.W.N. 420 = 43 C. 640 = 33 Ind. Cas. 519.

HOLMWOOD and NEWBOULD, JJ.

References:—(a) (1893) 3 Ch. 95 at p. 101, R. (b) (1899) A.C. 419 at p. 121, R.

(49) S. 37—*Lease by insolvent of occupancy holding—Validity of.* **Desraj v. Sagar Mal**, 13 A.L.J. 1964 = 38 A. 37 = 31 Ind. Cas. 716. See Final Part, 1915, Col. 92.

(50) S. 37. See No. 16, *supra*.

(51) S. 42—*Insolvency—Absence of available assets no ground either for refusing or annulling adjudication—Appeal.*

Held, that absence of available assets is no ground either for refusing an order for adjudication of an insolvent or for annulling the adjudication once made. **Shera v. Ganga Ram**, 171 P.W.R. 1916.

SCOTT SMITH, J.

(52) S. 42 (1). See No. 35, *supra*.

(53) S. 43—*Irregular proceedings under this section liable to be set aside on appeal.*

Proceedings under S. 43 of Act III of 1907 are in the nature of criminal proceedings, and it is necessary that there should be a charge, a finding and a conviction as a foundation for the sentence, and everything should be strictly and accurately pursued; and if, in one of these particulars, a substantial defect should appear, it would be a good ground for reversing the proceedings. **Nawab v. Topan Ram**, 62 P.W.R. 1916 = 110 P.R. 1916 = 145 P.L.R. 1916 = 35 Ind. Cas. 494 = 17 Cr. L.J. 318.

RATTIGAN, J.

References:—17 C. 209; 27 B. 394; 27 Ind. Cas. 199; 30 Ind. Cas. 839, F.

1.—Imperial Acts—(Continued).

Act III of 1907 (Provl. Insolvency)—(Contd.).

(54) S. 43—*Insolvency Court—Jurisdiction to take action against debtor for acts of bad faith before order of discharge.*

Held, that a Court is not bound to defer taking action and awarding punishment, where necessary, in respect of acts and omissions mentioned in S. 43 of Act III of 1907, until the insolvent applies for an order of discharge. **Ram Behari Lal v. Jagan Nath**, 19 O.C. 89.

STUART, J.C.

(55) S. 43. *proceedings under—Order of adjudication, if cancelled—Decision of Subordinate Judge on the Small Cause side—Appeal—Revision—Procedural—Civ. Pro. Code IV of 1908, S. 115.*

The mere fact that proceedings under S. 43 of the Provincial Insolvency Act are contemplated, does not annul an order of adjudication once passed on an insolvent.

Quære:—Whether a Judge sitting in the Small Cause Court can divert himself of his powers as a Judge of that Court and immediately proceed to dispose of an oral application made to him to exercise his powers under S. 16, cl. 2 (b) of the Provincial Insolvency Act.

Where a Subordinate Judge exercising his jurisdiction as a Judge of the Court of Small Causes, decides on the question whether a judgment-debtor can be arrested in execution of a decree, the correctness of such a decision can be assailed only in a Court to which the Small Cause Court is subordinate and that Court is the High Court. **Seshaiyengar v. Venkatachalam Chettiar**, 31 Ind. Cas. 15 = 5 L.W. 220.

SESHAGIRI IYER, J.

(56) S. 43. See No. 22, *supra*.

(57) Ss. 42, sub-S. (3), 46, sub-Ss. (2) and (3)—*Appeal—Receiver—Court, if on authorise receiver to ascertain facts and report.*

Under sub S. (3) of S. 46 of the Provincial Insolvency Act, an appeal lies against an order under sub-S. (2) of S. 43 for imprisonment of the insolvent but not against an interlocutory order calling on the insolvent to show cause why an order should not be made against him under sub-S. (2) of S. 13.

Quære:—Whether the High Court can give leave to appeal against such order under sub-S. (3) of S. 16?

The receiver is an officer of the Court and when he has good grounds to believe that an enquiry should be made into the conduct of the insolvent, the Court can authorise him to ascertain the facts and to report them to it, with a view to the adoption of such steps as may be deemed necessary in the interests of justice. **Monmohan Roy v. Hemanta Kumar Mookerjee**, 23 C.L.J. 553 = 34 Ind. Cas. 777.

MOOKERJEE and RICHARDSON, JJ.

(58) S. 44—*Report of Official Receiver—Admissibility as evidence.*

The report of the Official Receiver is made evidence by the Act only for the purpose of

I.—Imperial Acts—(Continued).**Act III of 1907 (Provl. Insolvency)—(Ct.).**

by time. *Ram Kishen v. Mussammat Umrao Bibi*, 80 P.W.R. 1916=33 Ind. Cas. 730.

CHEVIS, J.

References:—(a) 34 A. 496 (F.B.)=16 Ind. Cas. 149=10 A.L.J. 3, F.; 30 Ind. Cas. 703=18 M.L.T. 200, *Diss.*

(64) S. 46 (2) (3). See No. 57, *supra*.

(65)—S. 46 (3)—*Appeal filed after time—Applicability of Ss. 5 and 12 (3) of the Limitation Act (1908)—Court's power to excuse the delay—Agreement by insolvent to transfer property to creditor in discharge of his debt—Application to direct the Official Receiver to execute the document on behalf of the insolvent—Receiver not made party—Material irregularity—Appeal treated as revision—S. 15, Charter Act. Manguluri Sivaramayya v. Singumahanti Bhujanga Rao*, 18 M.L.T. 200=30 Ind. Cas. 703=39 M. 593. See Final Part, 1915, Col. 94

(66) S. 46 (3). See No. 19, *supra*.

(67) S. 47—*Applicability of Sch. II, Civ. Pro. Code (1908), to proceedings under the Insolvency Act—Power to refer insolvency proceedings to arbitrators.*

Notwithstanding S. 47, Act III of 1907, the provisions of Sch. II of the Civ. Pro. Code (1908) are inapplicable to proceedings under Act III of 1907. These proceedings require the exercise of judicial discretion, and it would be acting contrary to the whole spirit of the Act for a Court, which has special jurisdiction thereunder, to delegate its powers and duties to an arbitrator. *Ladhu Singh v. Bhag Singh*, 50 P.R. 1916=135 P.W.R. 1916=151 P.L.R. 1916=34 Ind. Cas. 549.

RATTIGAN, J.

Reference:—88 P.R. 1887, *R.*

(68) S. 47. See Nos. 2, 6, 10 and 59, *supra*.

(69) S. 51. See No. 2, *supra*.

(70) S. 51. See No. 40, *supra*.

Act V of 1908.

See CIV. PRO. CODE, 1908.

Act IX of 1908.

See LIMITATION ACT, 1908.

Act XVI of 1908.

See REGISTRATION ACT.

Act III of 1909 (Presidency Towns Insolvency).

(1) Infants if may be adjudicated insolvents under. See INFANTS, No. 1, 20 C.W.N. 1065.

(2) Ss. 7, 36 (5) and 90—*Property purchased benami for the Insolvent—Property situate outside the Ordinary Original Jurisdiction of the High Court—Power of the Insolvency Court to adjudicate—Bankruptcy Act of 1883, Ss. 27 (1) and 103—Bankruptcy Act, 1869, S. 73—Letters Patent, Ss. 12 and 18.*

The Insolvency Court in Madras has jurisdiction under the Presidency Towns Insolvency Act III of 1909 to adjudicate upon claims of

I.—Imperial Acts—(Continued).**Act III of 1909 (Presidency Towns Insolvency)—(Continued).**

third parties relating to immoveable properties situated outside the limits of the Ordinary Original Jurisdiction of the High Court.

S. 36, cl. (5) of the Act which provides a summary procedure in cases where there is no dispute does not exlude the wide jurisdiction conferred on the Court by S. 7 to deal with cases of disputed title under the ordinary procedure, though that jurisdiction is of a discretionary character, and it is seldom that the Insolvency Court would deem it expedient to try difficult questions of title itself instead of referring the Official Assignee to an ordinary civil suit.

S. 18 of the Letters Patent is not controlled by S. 12.

The order passed in the Insolvency jurisdiction of the High Court dismissing, on the ground of want of jurisdiction, the application for garnishee summons taken out by the Official Assignee against the wife of the Insolvent on the allegation, that the purchase in her name of certain immoveable properties situate outside the ordinary original jurisdiction of the High Court 3 or 4 years before the petition in insolvency was filed, was merely benami for the insolvent himself, was reversed. *Official Assignee of Madras v. Vedavalli Ammal*, 20 M.L.T. 311=4 L.W. 425=36 Ind. Cas. 524.

ABDUR RAHIM, O.C.J. and SESHAGIRI IYER, J.

(3) S. 8 (2) (b). See No. 5, *infra*.

(4) Ss. 8 (2) and 39 (2) (a), (b), (c), (d), (f), and (g)—*Insolvent who has acted dishonestly is not entitled to a protection order—Appeal lies against a protection order Mahomed Haji Essack v. Shaikh Abdul Rahman*, 17 Bom. L.R. 989=40 B. 461=31 Ind. Cas. 507. See Final Part, 1915, Col. 96.

(5) Ss. 12 (1) (a), 13, 8 (2) (b), 86—*Sch. II, Ss. 25, 27—Creditor, if includes his benamidar—Official Assignee, if may examine petitioning creditor's claim and remove his name—Benamidar, onus of proof of advances on own behalf—"Person aggrieved"—Admission by attorney if binds client.*

It is open to the Official Assignee after the insolvency to examine the claim of the petitioning creditor and if he finds that in fact there is no debt due to the petitioning creditor, he must strike out the name of such creditor from the list.

A benamidar is not entitled to claim as a creditor in the insolvency. The persons who really advanced the moneys should come forward and prove their claims before the Court. *Mookerjee, J.*—The term "creditor" in the Presidency Towns Insolvency Act does not include the tenamidar of creditor.

Any person who makes an application to a Court for a decision or any person who is brought before the Court to submit a decision is, if the decision goes against him, thereby a person aggrieved by that decision, within the meaning of that expression in S. 86 of the Act.

I.—Imperial Acts—(Continued).

Act III of 1909 (Presidency Towns Insolvency) —(Continued).

An admission by an attorney, unless satisfactorily explained away, furnishes cogent evidence against the client. **Ketokey Churan Banerjee v. Sreemutty Sarat Kumari Dabee**, 20 C.W.N. 995.

SANDERSON, O. J., WOODROFFE and MOOKERJEE, JJ.

(6) S. 13. See No. 5, *supra*.

(7) S. 17—Presidency Small Cause Courts Act, S. 69—Proper mode of making reference to High Court—Judgment-debtor, adjudicated insolvent in High Court subsequent to decree of Presidency Small Cause Court—Application for execution by arrest in the Presidency Small Cause Court—Leave of the High Court, necessary—Security bond, validity of.

Where, under S. 69 of the Presidency Small Cause Court Act, the Judges of that Court make a reference to the High Court, such reference should clearly state the points on which there is a difference of opinion among the Judges. A reference which practically is of whole case to the High Court, saying that the Judges of the Presidency Small Cause Court are not agreed on the question whether "under the circumstances of the case, the bond should be enforced against the surety, the defendant" is not proper.

In this case a decree was passed by the Presidency Small Cause Court against a person who was afterwards adjudicated an insolvent by the High Court, in the exercise of its insolvency jurisdiction. *Held* (i) that the Presidency Small Cause Court was not competent, without the leave of the High Court, to entertain any application for the execution of the decree against the person adjudicated insolvent, *vide* S. 17 of the Insolvency Act III of 1909, (ii) and that a security bond, executed to the said Small Cause Court by a third party for the appearance of the judgment-debtor in the course of such execution proceedings which were carried on without the necessary leave of the High Court, was obtained without jurisdiction and that the same was void in law. **C. A. Easwara Iyer v. K. Govindarajulu Naidu**, 39 M. 689=31 Ind. Cas. 192.

SADASIVA AYYAR and NAPIER, JJ.

(8) S. 17—Pendency of insolvency proceedings.—Leave of Court for application to arrest insolvent—Effect of refusal of discharge on protection order.

The refusal of a discharge is a final disposal of a petition of insolvency and proceedings are no longer pending.

The protection order is *ipso facto* vacated by a refusal of discharge, and hence no leave under S. 17 of the Insolvency Act is necessary for an application to arrest the insolvent under a decree.

Quare.—Whether leave is necessary for an application to execute the decree by attachment

I.—Imperial Acts—(Continued).

Act III of 1909 (Presidency Towns Insolvency) —(Continued).

of the insolvent's property. *In the matter of Ko Shwe Gya*, 9 Bur. L.T. 252.
YOUNG, J.

(9) S. 17—Insolvency—Effect of order of adjudication—Suit against insolvent—Leave of Court—Leave to precede institution of suit. *In re Dwarkadas Tejbhandas*, 17 Bom. L.R. 925=40 B. 235=31 Ind. Cas. 948. See Final Part, 1915, Col. 96.

(10) S. 13 (3)—Insolvency—Stay of proceedings against insolvent.

S. 13 (3) of the Presidency Towns Insolvency Act permits a stay of proceedings in an action which was not pending at the time of order of adjudication. It is not limited to suits instituted before the adjudication order was made. **Mahomed Hajl Essack Elias v. Abdul Rahiman Shaik Abdul Aziz**, 18 Bom. L.R. 198=33 Ind. Cas. 634.

SCOTT, C.J., and HEATON, J.

(11) Ss. 28, 29 and 30—Composition of creditors.

Where an insolvent, after his adjudication on 4th March 1911, failed to file his schedule within 30 days from service of the order to do so, and presented a petition about a year later stating that the creditors who had obtained the adjudication were his only creditors and that they were willing to compound for 8 annas in the rupee and asking the Court to approve this arrangement and annul the adjudication, and where the Court acceded to the request and ordered the annulment.

Held that the order of annulment did not comply with the provisions of Ss. 29 and 30, as there was neither any public examination of the insolvent nor any leave obtained to dispense with such examination, and so was not binding on the insolvent's creditors. **A.K.A.M. Firm v. Ahmed Suleman Mapara**, 8 Bur. L.T. 259=8 L.B.R. 258=33 Ind. Cas. 559.

FOX, C.J., and PARLETT, J.

(12) S. 29. See No. 11, *supra*.

(13) S. 30. See No. 11, *supra*.

(14) S. 36 (5). See No. 2, *supra*.

(15) S. 36 (1), application under, if may be made *ex parte*—Calcutta High Court Insolvency Rules, 17, 18, 19 and 30.

Applications under S. 36 (1) of the Presidency Towns Insolvency Act for examination of persons thereunder are intended to be made *ex parte* under the Rules framed by the Calcutta High Court under S. 112 of the Act.

To such applications r. 30 applies and not rr. 17, 18 and 19, and this view is supported by the English Bankruptcy Act (1914), 4 and 5 George V, Ch. 59, and the rules thereunder. *In re Kissory Mohan Roy (Shaha)*, 20 C.W.N. 1155=36 Ind. Cas. 990.

GREAVES, J.

(15½) S. 39 (2) (a to f). See No. 4, *supra*.

1.—Imperial Acts—(Continued).

Act III of 1909 (Presidency Towns Insolvency) —(Continued).

(15-a) Ss. 46, 56—*Fraudulent preference—Insolvent's intention—Natural and probable consequences of payment—“Creditor and Debtor”—“Mourning—Payment” in ordinary course of business—Accommodation—Acceptor.*

A Court should find out whether the intention to give preference to any one of the creditors was the substantial or dominant intention acting on the insolvent's mind when he made the payment.

When the natural and probable consequences of a payment is the preference of a particular creditor among numerous creditors, and when the policy of the Act is that the debtor's assets should be equally distributed among all the creditors as much as possible, the payment by an insolvent debtor which has the natural effect of preferring a creditor must be deemed to have been made with the view and intention to prefer that creditor, whatever other views the insolvent may also have had in making that payment and whether those other views were more dominant or less dominant, more substantial or less substantial than the view to give a preference. If there was legal duress resulting in the payment made, the view to prefer may be negated. But a payment made in the ordinary course of business, though made to prefer a creditor, is a preferential payment (a).

In order to avoid a transaction as a fraudulent preference it is essential that the relation of debtor and creditor should exist between the parties to the transaction.

The word creditor is not defined by the Act. The word “creditor” means one that can compel the performance of an obligation by another person who is called the “debtor”, the person lying under the obligation. In Wharton's Law Lexicon “Creditor” is said to be correlative to “debtor” and “debtor” is defined as “he that owes something to another.” The person, who on the happening of certain contingencies, which may or may not happen, will become entitled to enforce an obligation then created against another person cannot be called a creditor.

A surety or an accommodation acceptor is no doubt a contingent creditor who is entitled to prove under S. 46 (1) of the Act; but he is not a creditor who can be fraudulently preferred under S. 56 (b). *Nalam Viswanathan v. Official Assignee of Madras*, 32 Ind. Cas. 795.

SADASIVA IYER and NAPIER, JJ.

References:—(a) (1874) 9 Ch. App. 301, *F.* (b) (1897) 1 Q.B. 122; (1901) 1 Ch. D. 77, *Diss.*; 58 L.T. 871, *F.*

(16) S. 57—*Transfer by insolvent prior to insolvency to wife—Benami transactions—Transfer by wife to another after husband's adjudication.*

A husband transferred his share in his family dwelling-house to his wife without consideration on the 11th November 1911. On the

1.—Imperial Acts—(Continued).

Act III of 1909 (Presidency Towns Insolvency) —(Continued).

27th of February 1912 he was adjudicated insolvent and his wife on the 12th of October 1912 transferred the property which had been so conveyed to her to the appellant.

Held—That, even assuming that the appellant had purchased the property for valuable consideration and without notice of the adjudication of the insolvent, the transfer to the appellant subsequent to adjudication was void under S. 57 of the Presidency Towns Insolvency Act, inasmuch as the transfer by the husband to the wife prior to his insolvency was found to be fictitious or *benami*, and the consequence was that the property had vested in the Official Assignee prior to the transfer to the appellant.

Per Mookerjee, J.—No title by estoppel accrued to the appellant as against the Official Assignee.

The Official Assignee to what extent representative of insolvent considered. *In re Gobordhan v. Sm. Rai Kessori Dasal*, 20 C.W. N. 554 = 23 C.L.J. 463 = 34 Ind. Cas. 435.

SANDERSON, C.J., WOODROFFE and MOOKERJEE, JJ.

References:—(1903) 2 K.B. 517, 524; (1912) 3 K.B. 6, R.

(17) S. 57—*What amounts to “acts of insolvency”—Transfer of goods to creditor after giving him notice that debtor is about to suspend payment—Whether bona fide transfer—Applicability of English decisions in interpreting Indian Act.*

A debtor's agent gave notice to a creditor that the debtor was about to suspend payment, and the creditor, after receiving the notice and on the day previous to the debtor filing his insolvency application, took possession of certain goods of the debtor by virtue of letters of lien given by the debtor. *Held*, per *White, C.J.* (affirming *Wallis, J.*):—that, though a mere intimation to a creditor that the debtor is insolvent is not an act of insolvency, the giving of notice to a creditor of an intention to suspend payment is an act of bankruptcy; and a creditor, who enters into a transaction with his debtor, with the knowledge that the debtor had committed an act of bankruptcy at the time the transaction was entered into, is not acting *bona fide* and cannot claim the benefit of S. 57 of the Indian Act, III of 1909.

Although the words “*bona fide*” do not appear either in S. 49 of the English Bankruptcy Act or in S. 57 of the Indian Act, yet it is only *bona fide* transactions that are protected. And a transaction which is not only designed to defeat the operation of the Bankruptcy Law, but also in itself amounts to an act of bankruptcy cannot be considered to be *bona fide*.

S. 57 of the Indian Act compared with S. 49 of the English Act.

When we are construing an Act which in many instances is taken, word for word, from an English Act, and when we are dealing with a branch of law which is essentially English

1.—Imperial Acts—(Continued).

Act III of 1909 (Presidency Towns Insolvency) —(Concluded).

law, though we may not be actually bound by, yet we ought certainly to pay the greatest respect to, the decisions of the English Court of appeal. **The Mercantile Bank of India, Ltd., Madras v. The Official Assignee of Madras**, 39 M. 250=35 Ind. Cas. 942.

WHITE, C.J., and SANKARAN NAIR, J.,

References:—(1891) A.C. 316 (322); (1876) 3 Ch. D. 70; (1880) 14 Ch. D. 693; (1905) A.C. 442 (446); (1896) 1 K.B. 406; (1902) 2 K.B. 58; (1903) 2 K.B. 517; (1876) 10 Morrell 252; (1905) 2 K.B. 683, R.

(18) S. 86. See No. 5, *supra*.

(19) S. 90. See No. 2, *supra*.

(20) Sch. II, cl. 18. See **INSOLVENCY**, No. 1, 24 C.L.J. 149.

Act II of 1910 (Paper Currency).

Ss. 26 and 27—*Promissory note payable on demand to person or bearer or order—If illegal and void—Right of creditor to get a decree apart from the note—Negotiable Instruments Act*, Ss. 1 and 19.

Under S. 26 of Paper Currency Act, II of 1910 a promissory note payable to bearer on demand is illegal and void, and no suit could be maintained upon the same.

The fact that the note is made payable to a person or bearer or order in the alternative does not affect its invalidity.

Whether the payee can get a decree for the money lent apart from the note would depend upon the existence of a separate obligation, and the fact that the loan and the note were contemporaneous is not decisive on the point (a).

Krishnan, J.—The provision of penalty in S. 27 for the transgression of the rule in S. 26 does not cure the invalidity as an instrument the creation of which is prohibited by law cannot be held to be valid because there are also specific penalties attached to its creation. **Chidambaram Chettiar v. Ayyasami Thevan**, (1916) 2 M.W.N. 210=4 L.W. 261=31 M.L.J. 401=20 M.L.T. 350=36 Ind. Cas. 741.

OLDFIELD and KRISHNAN, JJ.

Reference:—(a) (1916) 2 M.W.N. 14, R.

Act IV of 1912 (Lunacy).

(1) S. 56—*Guardian of lunatic obtaining District Judge's permission to take out compensation money in deposit with Land Acquisition Judge—Latter if may refuse to pay.*

Where the natural guardian of a lunatic, in whose name a sum of money representing his share of compensation money paid by the Land Acquisition Collector was in deposit in the Court of the Land Acquisition Judge, obtained an order from the District Judge under S. 56 of Act IV of 1912 for payment to him of a portion thereof for the maintenance of the lunatic, the Land Acquisition Judge has no jurisdiction to

1.—Imperial Acts—(Continued).

Act IV of 1912 (Lunacy)—(Continued).

refuse the guardian's application for withdrawing the money. **Satyendra Nath Dey v. The Secretary of State**, 20 C.W.N. 976.

HOLMWOOD and INAM, JJ.

(2) S. 71—*'Estate' of lunatic—Properties in which he has beneficial interest—Joint property—Whether included in the term 'estate.'*

In deciding what the estate of a lunatic is, under S. 71 of the Lunacy Act, 1912, even the properties in which the lunatic has only some beneficial interest (e. g., property which belong to him in common with his brothers and sisters), must be taken into account. **Sultan Ahmad Ali Rajah Avergal of Cannanore v. Arakkal Adi Rajah Cherla Ayissa Bibi**, 33 Ind. Cas. 106.

SADASIVA AIYAR and MOORE, JJ.

(3) Ss. 71, 72—*Appointment of guardian of lunatic—Whether wife may be appointed.*

S. 72 of the Lunacy Act is a kind of warning and prescribes that particular care should be exercised by the Court in the matter of appointing a guardian of the person of a lunatic in a case where the person to be appointed is entitled to inherit a part of the property of the lunatic, (and is, therefore, benefited by his death), and that the Court should see that the appointment is beneficial for the lunatic.

Held, in a controversy between the wife and the father-in-law of a lunatic on the one side and one N H on the other as to who should be appointed guardian of the person of the lunatic, that under the circumstances of the case the appointment of the wife and the father-in-law jointly so long as the wife resided with the latter was for the benefit of the lunatic and that they should be appointed under S. 71 of the Lunacy Act. **Amir Kazim v. Musi Imran**, 36 Ind. Cas. 983=39 A. 158=15 A.L.J. 10.

WALSH and STUART, JJ.

(3-a) S. 72. See No. 3, *supra*.

(4) S. 82—*Position of District Judge in proceeding under the Act, partly judicial and partly administrative—Inquiry under the Act, nature of—Relatives to whom notices are issued, position of—Right to adduce evidence in such proceedings.*

Held, that the position of a District Judge under the provisions of Indian Lunacy Act (IV of 1912) is partly judicial and partly administrative.

Held further, that the functions of the District Judge in making an inquiry under S. 82 of the Act are clearly to satisfy himself as to the state of mind of the person concerned. He issues notices to relatives likely to be interested in the result of his action, but those relatives are not treated in any way as parties to legal proceedings. They are treated rather as *amici curiae*. They are allowed to be heard and to make representation and suggestions both as to the calling of evidence and otherwise but they have no right to call evidence and

1.—Imperial Acts—(Concluded).

Act IV of 1912 (Lunacy)—(Concluded).

therefore cannot plead in appeal that the evidence which they wished to adduce was not heard (a). *Jadunath Singh v Pirthpal Singh*, 19 O.C. 353—36 Ind. Cas. 705.

STUART, J.C.

Reference :—(a) 8 A.L.J. 179, R.

Act VII of 1913.

See COMPANIES ACT, 1913.

Act III of 1914 (Copyright).

S. 24 (A)—*Copyright register book—Effect of entry on proprietorship—Evidence Act*, S. 114.

Under S. 3 of the Copyright Act of 1847 a certified copy of an entry in the copyright register book is *prima facie* evidence of the proprietorship of the person mentioned therein, to the copyright of the book in question. Such *prima facie* proof cannot be said to be rebutted by any statement made before a Magistrate. The above said provision was not repealed by the new Act of 1914, though the new Act granted, by S. 24, cl. (A) of the first schedule, to the owners of existing copyrights, rights at least as valuable as the rights given under the repealed Act. Even if a complainant was bound to prove his case, under the Copyright Act, S. 114 of the Evidence Act could be invoked in his favour. *Chellappaswamy v. Singaravelu Mudaliar*, 30 Ind. Cas. 721.

SADASIVA AIYAR and PHILLIPS, JJ.

Act VI of 1914 (Provincial Small Cause Court Amendment).

(1) See JURISDICTION OF SMALL CAUSE COURT, No. 1, 33 Ind. Cas. 738.

(2) See SMALL CAUSE COURT, No. 1, 19 O.C. 236.

2.—Bengal Acts.

Act X of 1859 (Bengal Rent).

(1) Suit for rent instituted under—Decree and purchase by landlord after Act VI of 1903 brought into force and land recorded as *mandari khunkati*—Right of landlord. See BEN. ACT VI of 1903 (CHOTA NAGPUR TENANCY), No. 8, 20 C.W.N. 582.

(3) See RES JUDICATA, No. 22, 33 Ind. Cas. 159.

(3) S. 82—*Status of under-raiyat where raiyat evicted from occupancy-holding for non payment of rent in Chota Nagpur—Interest of under-raiyat, void or voidable—Distinction between proceedings with respect to a tenure-holder and a raiyat—Right of under-raiyat to contest the validity of the decree against his lessor.*

Where a holding of an occupancy raiyat is sold, the interest of an under-raiyat is not void but voidable.

But when the occupancy holding has been destroyed by eviction of the raiyat for non-payment of rent, S. 82 of Act X of 1859 provides that the decree-holder shall be put in physical possession of the land.

2.—Bengal Acts—(Continued).

Act X of 1859 (Bengal Rent)—(Concluded).

There is a clear distinction between proceedings in regard to a tenure-holder and proceedings in regard to a raiyat. Where the proceeding has been with regard to a tenure-holder or under-tenant, the decree is to take the form of an order to all raiyats to pay rent to the decree-holder, and the decree-holder cannot be put into actual physical possession of the land.

An under-raiyat cannot contest the validity of the decree against his lessor as a defence to a suit in which it is sought to declare him a trespasser. *Bishun Narain Dass Poddar v. Chandra Kanta Naik*, 20 C.W.N. 1240—1 Pat. L.J. 543.

SHARFUDDIN and ROE, JJ.

Act XI of 1859 (Bengal Revenue Sale Law).

(1) See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 9, 33 Ind. Cas. 721.

(2) Ss. 13, 54—*Separate account—Share owned erroneously recorded in Collector's books as a larger share with proportionately larger revenue—Sale of separated share—Purchaser acquires what share.* *Khemesh Chandra Rakshit v. Abdool Hamid Sikdar*, 19 C.W.N. 782—29 Ind. Cas. 350—43 O. 46. See Final Part, 1915, Col. 108.

(3) S. 14—*Suit for annulment of sale for arrears of revenue not due—Collector, duty of.*

An estate consisting of several mouzaha, with revenue assessed proportionately on each payable by kists and with separate accounts cannot be sold for arrears for a certain kist which is not found to be in arrears. A Collector should close all the separate accounts before ordering sale of the entire estate under the circumstances. *Muhammad Idris v. Mota-saddi Mian*, 31 Ind. Cas. 743.

STEPHEN and CHATTERJEE, JJ.

Reference :—25 C. 833 (P.C.), R.

(4) S. 14—*Separate account—Separated share not in fact in arrear shown in Collector's books as in arrears—Consequential sale of whole estate, if valid—Failure of co-sharers to buy share—Sale of whole estate after closing separate accounts—Up to what date accounts to be closed.—Sale as for March kist without arrears after estate falls into arrears for June kist, if valid—Mahalwar Register, extract from, if evidence.* *Sheikh Haji Mutasaddi Mian v. Mahomed Idris*, 19 C.W.N. 764—34 Ind. Cas. 283 (P.C.). See Final Part, 1915, Col. 109.

(5) S. 33—*Revenue sale—Admissibility in evidence—Orim. Pro. Code, S. 145, order and finding under—Letters Patent, cl. (15)—'Judgment'—Civ. Pro. Code, 1908, S. 98, sub-S. (2)—No majority in favour of a reversal of a part of the decree—Procedure.* *Mohunt Krishen Doyal Gir v. Irshad Ali Khan*, 22 O.L.J. 525—31 Ind. Cas. 965. See Final Part, 1915, Col. 109.

(6) S. 37 (4)—*Thak maps of 1852, if to be presumed as unreliable—Value of thak*

2.—*Bengal Acts*—(Continued).Act XI of 1858 (Bengal Revenue Sale Law)
—(Continued).

maps as evidence—Land acquisition proceedings—Claim to compensation by semindar as against person holding under a lakhiraj title—Onus of proof—Purchaser at revenue sale, if may eject lakhirajdar from land which has been planted or built on—Encumbrance, how annulled—Assignee from auction-purchaser, position of—Land Acquisition Court if may determine conflict of title.

Thak maps have always been considered by Courts as good evidence, and although the value of a Thak map depends upon its accuracy, there is no presumption that Thak maps must be inaccurate.

Opinion of Captain Hirst in his "Notes on the old Revenue Surveys" referred to (a).

A purchaser of an entire estate sold for arrears of revenue suing to recover land claimed by the defendant as lakhiraj must prove a *prima facie* case that his mal land has, since 1790, been converted into lakhiraj. The fact that the lands are within the ambit of the estate is not sufficient to meet this burden.

Whether, in a particular case, the plaintiff has been able to prove such a *prima facie* case would depend upon its own circumstances.

Where the question of title to a plot of land arose between claimants to compensation money paid by Government on acquisition thereof under the Land Acquisition Act, one being the purchaser of the estate at a sale for arrears of land revenue, whilst the other was holding it as lakhiraj.

Held—That the former was in the position of the plaintiff and the burden of proof as stated above was on him (b).

S. 37 of the Revenue Sale Law does not protect land held without payment of rent upon which dwelling-houses, manufactories or other permanent buildings have been erected or whereon gardens, plantations, etc., have been made.

The assignee or transferee of the auction-purchaser at a revenue sale is entitled to exercise the rights of a purchaser.

It is not essential on the part of the auction-purchaser or his assignee, who seeks to annul an incumbrance, to give a formal written notice to avoid it.

All that is necessary is to notify to the incumbrancer by some unequivocal act the intention to annul.

A Land Acquisition Court has jurisdiction to determine a conflict of title between rival claimants. *Sm. Krishna Kalyani Das v. Mr. R. Braumfield*, 20 C.W.N. 1028 = 86 Ind. Cas. 184.

N. R. CHATTERJEE and ROE, JJ.

References:—(a) 30 C. 291 = 7 C.W.N. 193 = 30 I.A. 44, R. (b) 14 M.I.A. 152, Rel. on.

(7) S. 37, *Proviso*—Sale for arrears of revenue—Holding, annulment of—'Raiyat having a right of occupancy at a fixed rent,' meaning of—Occupancy raiyat, rights of—Occupancy raiyat, if loses his right by being a fixed raiyat

2.—*Bengal Acts*—(Continued).Act XI of 1859 (Bengal Revenue Sale Law)
—(Concluded).

—Rent of an occupancy raiyat if can be enhanced by a purchaser at a sale for arrears. *Abdul Gani Chowdhry v. Makbul Ali*, 22 C.L.J. 228 = 42 C. 745 = 20 C.W.N. 185 = 81 Ind. Cas. 19. See Final Part, 1915, Col. 111.

(8) S. 54. See No. 2, *supra*.

Act VII of 1868 (Bengal Land Revenue Sales).

S. 12—Noabad taluk—Non-permanent taluk—Sale for arrears of revenue—Purchaser's title. See CAUSE OF ACTION, No. 1, 20 C.W.N. 636.

Act VIII of 1869 (Landlord and Tenant Procedure).

(a) S. 27—Applicability—Tenant ousted by co-sharer landlord—Suit for possession—Limitation.

The special law of limitation provided in S. 27 of Act VIII of 1869 (B.C.) does not apply to a suit by a tenant for recovery of possession of lands from which he has been dispossessed by a co-sharer landlord (a). *Gande Patuni v. Sarat Patuni*, 32 Ind. Cas. 510.

WOODROFFEE and COXE, JJ.

Reference:—(a) 7 O.L.R. 141, F.

(1) S. 53. See LEASE, No. 4, 24 O.L.J. 30.

(2) S. 102—Appeal—Right to enhance or vary rent—Determination of amount of rent.

An appeal under S. 102 of the Act lies only in cases in which a question of right to enhance or vary the rent of a raiyat or tenant or any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto, has been determined by the judgment. No appeal lies under that section in cases in which merely a question as to the amount of rent payable is involved. *Dina Nath Sarma v. Saran Ram Deb*, 30 Ind. Cas. 277.

N. CHATTERJEE and ROE, JJ.

References:—20 W.R. 15; 20 W.R. 16; 24 W.R. 49; 15 C. 107, R.

(3) S. 153—Appeal—Decision on question of amount of rent payable.

S. 153 of the Act provides for an appeal in cases where there is a decision on a question of the amount of rent annually payable by a tenant. *Dina Nath Sarma v. Saran Ram Deb*, 30 Ind. Cas. 277.

N. CHATTERJEE and ROE, JJ.

Act VI of 1870 (Chowkidari).

(1) Patni lease—Chowkidari hakran lands resumed and settled with semindar—Suit by patnidar for possession of those lands—Cause of action—Ejectment of tenants settled by semindar—Specific Relief Act (I of 1877), S. 27 (b).

A clause in a patni lease provided that if any land or jama be excluded from the patni taluk under any law or order of the Court, the lessee should not on that account object to the payment of the jama agreed upon.

Held that the words could not apply to lands resumed by the Collector under the Chowkidari

2.—Bengal Acts—(Continued).

Act VI of 1870 (Chowkidari)—(Concluded).

Act VI (B.O.) of 1870, inasmuch as such lands were not really excluded from the *patni talug*, the Collector being bound under the Act to resettle them with the zemindar subject to all contracts there before made, i.e., subject to the *patnidar's* right.

Where lands in a *patni* which have been resumed under the Act, are settled with the zemindar, the cause of action for a suit by the *putnidar* to recover the lands does not arise on the date of resumption, but only on the zemindar showing by some act that he disputed the plaintiff's right; in any case it cannot possibly arise before the re-settlement. Tenant settled on such land by the zemindar do not acquire the status of ryots and are not protected from ejectment at the instance of the *patnidar* and S. 27 (b) of the Specific Relief Act is inapplicable to such a case. *Rani Debendra Bala Das v. Lalit Mohan Ghose*, 39 Ind. Cas. 593.

NEWBOULD, J.

References:—31 C. 703=8 C.W.N. 320; 9 C.W.N. 571=1 C.L.J. 303; 27 C. 814=4 C.W.N. 818; 42 C.L.J. 990=31 Ind. Cas. 249; 34 C. 109=11 C.W.N. 201=5 C.L.J. 33; 35 C. 964=12 C.W.N. 469=7 C.L.J. 439, F.; 20 C. 708; 27 C. 814=4 C.W.N. 818; 15 C.W.N. 976=13 C.L.J. 271=9 Ind. Cas. 374, R.

(3) S. 1—*Simanadari land, if chaukidari chakran land—Bengal District Gazetteer for Bankura, referred to, in the absence of findings by Courts.*

Where the question was whether certain lands in thana Indas in the District of Bankura and called "simanadari lands" were "chakran lands" within the meaning of S. 1 of Act VI B.C. of 1870, the High Court, in second appeal in the absence of any finding on the point by the lower appellate Court, held, on reference to the Bengal District Gazetteer of Bankura, that the *simanadars* performed the duties of *chaukidars* and so Act VI of 1870 applied to the case. *Lala Dome v. Bejoy Chand Mahatap*, 20 C.W.N. 404=43 C. 227=33 Ind. Cas. 553.

JENKINS, C.J., and HOLMWOOD, J.

(3) Ss. 60, 61. See CHOWKIDARI CHAKRAN LANDS, No. 1, 32 Ind. Cas. 545.

(4) S. 61. See No. 3, *supra*.

Act VI of 1876 (Chota Nagpur Encumbered Estates).

Ss. 3, 12-A — *Heir — Contract Act, 1872, Ss. 2 (D), 68—Money for sradh of mother—Promise to defer bringing suit on void contract, whether consideration.*

S. 3, Act VI of 1876, contemplates the existence of an heir of the holder of the property under management under the Act during his life-time. A contract made by such heir during the life-time of the holder which may involve them or either of them in pecuniary liability is void. A promise to defer bringing a suit upon void contract does not amount to a consideration.

2.—Bengal Acts—(Continued).

Act VI of 1876 (Chota Nagpur Encumbered Estates)—(Concluded).

Money borrowed by a person incapable of entering into contract during his father's life-time, for his mother's *Sradh* is not a necessary within S. 68, Contract Act, 1872. *Gopinath Bhagat v. Lakshminarayana Singh*, 32 Ind. Cas. 987.

CHAPMAN and MULLICK, JJ.

Act VIII of 1876 (Bengal Estates Partition).

(1) *Partition into separate tenancies without tenant's consent—Difference between partition under Act VIII of 1876 and partition made by Civil Court—Sale of entire separated holding by tenant—Abandonment.*

There is nothing in the Estates Partition Act of 1876 to prevent the partition of a tenancy into separate tenancies without the tenant's consent (a).

There is no difference (in the matter of the partition of a tenancy) between a partition under the Estates Partition Act and a partition made by a Civil Court.

The sale of an entire separated holding by a tenant constitutes abandonment. *Ram Lochan Koer v. Jagernath Misser*, 1 Pat. L.J. 270.

MULLICK, J.

Reference:—(a) 10 C.W.N. 818, R.

(2) *Bengal Act (V of 1897), Ss. 11 (c), 113 (c), 114 — Revisional jurisdiction of Board of Revenue—Reg. II of 1793 and Reg. III of 1893—Board of Revenue, powers of superintendence.*

S. 114 of the Estates Partition Act, 1897, did not empower the Board to exercise revisional powers against the order of the Officiating Commissioner, declining to affirm a partition or that of the Collector dismissing an application for partition under S. 11 (c) of the Act.

No appeal lies from an order of the Officiating Commissioner which is not in effect an order confirming or amending a partition within the meaning of S. 113 of the Estates Partition Act, 1897.

Per Mullick, J.—The powers of the superintendence conferred on the Board of Revenue by cl. (9) of S. 8 of Reg. II of 1793 are controlled by the Estates Partition Act, 1897, and the Board had no power to set aside the Collector's order dismissing an application for partition under S. 11 (c) of the Estates Partition Act, 1897.

Per Atkinson, J.—The power of revision conferred upon the Board of Revenue by Reg. II of 1793 does not operate to control the revisional jurisdiction given to the Board by the Estates Partition Act, 1897. *Birabhadra Ruth v. Janardan Proharaj Mohapatra*, 1 Pat. L.J. 491.

MULLICK and ATKINSON, JJ.

Act IX of 1879 (Bengal Court of Wards).

(1) Ss. 6 (a), 51—*Debtor's widow made Ward of Court—Suit to recover debt from widow without making Manager of Court party as her guardian, if maintainable, when whole estate not taken*

2.—Bengal Acts—(Continued).

Act IX of 1879 (Bengal Court of Wards) —(Concluded).

over. **Ananda Kumari Debi v. Durga Mohan Chuckerbutty**, 20 C.W.N. 31=22 O.L.J. 522 =32 Ind. Cas. 1. See Final Part, 1915, Col. 115.

- (2) Ss. 11, 13-A. 51, 55—*Estate retained by Court, after some co-sharers ceased to be disqualified, on account of unpaid debts—Sale of property in execution—Application to set aside sale by judgment-debtors, not acting through Court of Wards, is lies—Estate released pending appeal from order dismissing application—Effect—S. 7, Limitation Act (1908).*

Some properties of the judgment-debtors, whose estate was in charge of the Court of Wards, was sold in execution of a decree on 15th April 1912. As the Court of Wards would not apply to set aside the sale, the judgment-debtors themselves applied under S. 47 and O. XXI, r. 90 of the Civ. Pro. Code. The application was rejected on 11th January 1913 and the judgment-debtors appealed on 11th April 1913. The estate was released by the Court of Wards on the 18th June 1914, before the appeal was heard. One of the judgment-debtors, B, had ceased to be disqualified before the sale, but as there were unpaid debts of the estate, the Court of Wards, under S. 13-A of the Court of Wards Act, was authorised to retain possession of the estate.

Held—That, under S. 55 of the Court of Wards Act, the application to set aside the sale was incompetent.

That the release of the estate did not give a fresh start to limitation, as the judgment-debtor B, not being a minor at the time the right to apply accrued, was not entitled to claim the benefit of S. 7 of the Limitation Act. **Umakanta Sen Chowdhury v. Hira Lal Ray**, 20 C.W.N. 852=34 Ind. Cas. 86.

D. CHATTERJEE and BEACHROFT, JJ.

- (3) S. 13-A. See No. 2, *supra*.

- (4) S. 18—*Power of Court of Wards to execute promissory note—Power to acknowledge debt—S. 19, Limitation Act (1908).*

The Bengal Court of Wards Act does not contain any express power authorising the Court of Wards to execute promissory notes. But the Court of Wards has power to give an acknowledgment, so as to give a new period of limitation under S. 19, Limitation Act. **Rashbehary Lal Mandal v. Anand Ram**, 43 C. 211=34 Ind. Cas. 205.

FLETCHER and RICHARDSON, JJ.

References:—17 A. 198; (1889) A.W.N. 187; 30 A. 422 (437); 34 M. 221, *Appl.*

- (5) S. 51. See No. 1, *supra*.

- (6) S. 55. See No. 2, *supra*.

Act IX of 1880 (Bengal Cess).

- (1) S. 41—*Cesses—Liability—Contract—Lease, construction of. Gobinda Chandra Saha Bardar v. Lalit Mohan Roy, 23 O.L.J. 571=33 Ind. Cas. 352. See Final Part, 1915, Col. 117.*

2.—Bengal Acts—(Continued).

Act IX of 1880 (Bengal Cess)—(Concluded).

- (3) Ss. 42, cl. (8), 47, *construction of—Kabuliat—Special contract to pay rent—Cess, arrears of—Interest.*

Where, by a kabuliat executed before the passing of the Bengal Tenancy Act or the Cess Act, rent was payable by the tenure holder in three kists, and the latter undertook to pay any cesses which might be imposed by Government, and it was provided that no interest should be chargeable on arrears of rent until the end of the Bengali year:

Held that the landlord was entitled to recover interest upon cesses from the dates on which they fell due, i.e., that dates of the kists on which the rent was payable under the kabuliat, inasmuch as the provisions of S. 47 of the Cess Act cannot be subject to the special contract between the parties made in the kabuliat in the matter of rent. **Radhika Mohan Roy v. Manmatha Nath Mitter**, 23 O. L.J. 603=34 Ind. Cas. 111.

CHITTY and WALMSLEY, JJ.

- (3) S. 47. See No. 2, *supra*.

- (4) Ss. 47, 64 (A), 64 (B). See MORTGAGE (GENERAL), No. 20, 1 Pat. L.J. 161.

- (5) S. 64 (A). See No. 4, *supra*.

- (6) S. 64 (B). See No. 4, *supra*.

Act III of 1884 (Bengal Municipality).

- (1) Ss. 30, 31—*Private pathways—whether vest in Municipality—Right of control, by Municipality—Difference between roads vested in Municipalities and other roads.*

Under S. 30, Bengal Act III of 1884, as recently amended, a private pathway does not vest in the Municipality (a).

If the public have a right to go over the private pathway, then the Municipality, under certain later sections of the Act, have been given the power of control, the difference being that, in the case of roads vested in the Municipality, they are the body responsible for lighting, watering, sewerage and clearing the roads; and, in the other case, where the road is not so vested in the Municipality, they have only the power of control to prevent the road from becoming a nuisance or the rights of the public from being interfered with. **Chairman, Howrah Municipality v. Haridas Datta**, 43 C. 130=20 C.W.N. 613=33 Ind. Cas. 271.

FLETCHER and RICHARDSON, JJ.

Reference:—(a) 33 C. 1290 (1304), *F.*

- (2) S. 31. See No. 1, *supra*.

- (3) S. 155—*“Within a distance of two miles above or below the ferry”—Meaning—Act I of 1885 (Bengal Ferry)—“Ferry”—“Right of ferry”—“ferry boat”—Meaning—Statutes—Construction.*

The expression “within a distance of two miles above or below the ferry” in S. 155, Act III B.O. of 1884 mean within a distance of two miles above or below the banks of the river or stream and not within a radius of two miles of the Municipal ferry.

2.—Bengal Acts—(Continued).

Act III of 1884 (Bengal Municipal)—(Concl'd).

S. 155, Act III B.O. of 1884 cannot be construed in the light of the provision of Act I B.O. of 1885 since S. 4 of the later Act lays down that nothing in that Act contained shall apply to any ferry deemed or declared to be a Municipal Ferry under the provision of Act III B.O. of 1884 (a).

The words used in defining the limits of a public ferry under Act I of 1866 and the limits of a Municipal Ferry under Act III B.O. of 1884 are not used in the same sense as those in S. 16 of Act I, B.O. of 1885.

Chatterjee, J.—Where the words used in a section are plain and construed in their ordinary sense mean one thing, Courts cannot construe the section in a different way merely because the construction of words in their ordinary sense may, in some cases lead to results which might seem anomalous.

The banks referred to in the last clause of S. 155 of Act III B.O. of 1884 are banks of the same river and the clause applies only to cases where one of the two banks of the same river is within and the other without the limits of the Municipality.

Richardson, J.—The word "ferry" in the expression "Municipal Ferry" must denote a place. It is the place where passengers are conveyed by boat from one side of a river to the other. A right of ferry is the right so to convey passengers at such a place.

A ferry boat must mean any boat used for the purpose of carrying passengers across the river whether at that place or some other place. *Kasim Ali v. Chairman of Municipal Commissioners, Chittagong*, 35 Ind. Cas. 782.

CHATTERJEE and RICHARDSON, JJ.

References:—(a) 27 O. 317, *Expl.* (b) 11 C. B. 378, R.

(4) Ss. 321, 322 (4)—"Dwelling house," what is. *Radha Gobinda Mojumdar v. Kumar-khali Municipality*, 19 O.W.N. 1027—31 Ind. Cas. 10. See Final Part, 1915, Col. 117.

(5) S. 322 (4). See No. 4, *supra*.

Act I of 1885 (Bengal Ferries).

See BENGAL ACT III OF 1884 (BENGAL MUNICIPAL), No. 3, 35 Ind. Cas. 782.

Act III of 1885 (Bengal Local Self-Government).

S. 138 (b)—Rules 93 and 98 framed under—'Regulating the power' if includes regulating the mode of transfer—Immoveable property vested in District Board how to be transferred—Rule 98 mandatory—Corporate body—Title to land if passes by admission. See *CONTRACT*, No. 2, 23 C.L.J. 26.

Act VIII of 1885 (Bengal Tenancy).

(1) *Mitakeshara family*—Trespass on family waste lands—Power of manager to sue—Law governing suits under Bengal Tenancy Act. See *HINDU LAW (JOINT FAMILY)*, No. 5, 1 Pat. L.J. 164.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Cont'd).

(2) Occupancy holding, non-transferable—Sale by landlord in execution of rent-decree, under Civ. Pro. Code, prevented by deposit by purchaser from registered tenant—Withdrawal of deposit by landlord, if amounts to recognition of purchaser as tenant. See *LANDLORD AND TENANT*, No. 13, 20 O.W.N. 849.

(8) Ss. 1, 44 and *Sch.*, III. *Art.* 1 (a)—S. 1, as amended by S. 3 of Act I (B.O.) of 1907—Land in suburb of Calcutta let out in 1898 for 5 years—Lessee holding on till sued in ejectment in 1910—Status of lessee, non-occupancy raiyat—"Town of Calcutta," extension of, by Amending Act—Statute not declaratory but amending—No retrospective operation—Limitation—*Sch.*, III, *Art.* (1) (a)—Non-occupancy raiyat holding over after term, if holds on from year to year.

Defendant on 16th December 1898 took a five years' lease from plaintiff of an agricultural holding situated within the present Municipal limits of Calcutta but beyond the limits of the town of Calcutta as determined by the proclamation of the Governor-General in Council, dated the 10th September 1794, issued under S. 159 of Statute 33, Geo. III, c. 52. Plaintiff on 9th November 1910 having sued to eject the defendant:

Held—That, until the Bengal Tenancy Amendment Act of 1907 came into force, the Bengal Tenancy Act applied to the case and defendant had in consequence acquired the status of a non-occupancy raiyat when the Amendment Act came into force, and this status was not affected by the provisions of S. 3 of the Amendment Act which gave a new definition of the expression "Town of Calcutta" as used in S. 1 of the Bengal Tenancy Act, making it co-extensive in area with the present municipal limits of Calcutta,

The explanation added to sub-S. (3) of S. 1 of the Bengal Tenancy Act by S. 3 of Act I B. C. of 1907 is an amending statute and not merely one of a declaratory character and cannot therefore be given retrospective operation.

Statutes which are properly of a declaratory character have a retrospective effect.

But the nature of the statute must be determined from its provisions, and the mere fact that the expression "it is declared" has been used is by no means conclusive as to the true character of the Legislation.

Held—That the suit was barred by *Art.* (1) (a) to *Sch.*, III of the Bengal Tenancy Act.

Under the Bengal Tenancy Act, there is no raiyat who holds from year to year, and if the tenant is a non-occupancy raiyat who does not hold under a lease for term, he cannot be ejected under the provisions of cl. (c) of S. 44. *Jotiram Khan v. Jonaki Nath Ghose*, 20 O.W.N. 268—38 Ind. Cas. 54.

MOOKERJEE and BRACHROFT, JJ.

(3-a) S. 3—Status of tenant—Document—Construction.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

For determining a tenant's status under Act VIII of 1885 (Bengal Tenancy), if the inception of the tenancy is clear and the document creating the tenancy shows what it is, subsequent conduct or dealings need not be considered. It is only when no clear conclusion can be arrived at from the document that subsequent conduct or dealings are necessary to consider. *Protab Chandra v. Mahendra Lal*, 32 Ind. Cas. 717.

CHAUDHRI and NEWBOULD, JJ.

(3-b) S. 5—Transferee of non-transferable occupancy holding—Co-sharer landlord.

A settlement by a co-sharer landlord does confer a right with regard to the share of that landlord. *Umar Ali v. Jadu Ram Kapali*, 32 Ind. Cas. 855.

D. CHATTERJEE and BRACHROFT, JJ.

(4) S. 5—Tenancy—Lease deed—Character of tenancy as stated therein, if conclusive—Option to renew lease—Terms of renewal uncertain—Option unenforceable.

Although, where it is shown by a lease, unambiguous in its terms, that the land was originally required by the tenant for cultivating it by himself or by hired servants or by members of his family, the character of the tenancy is not altered by the mere fact that the land was subsequently let out to tenants, and, although in such a case the land may, as between the lessor and the lessee, be taken to have been acquired for the purpose as stated in the lease itself it is certainly open to a person who is no party to the contract (e.g., a sub-lessee) to show that the real purpose for which the land was acquired by the lessee was other than what was stated in the lease. (a) (*Per N.R. Chatterjee, J.*).

The term 'jote' does not necessarily mean the interest of a cultivator.

A non-occupancy *raiayat*, where he has been admitted to occupation of the land under a registered lease is liable to be ejected on the expiry of the lease.

Where in a *kabuliat* there is a clause that, on the expiry of the term, the tenant shall give up the land or take settlement of the land according to the terms on which the lessors wish to lease it out in future: Held that the terms being undefined and depending upon the will of the lessor cannot be enforced.

Quere :—Whether a mere statement in a lease that the land is let to the tenant for the purpose of being cultivated by himself or his servants is conclusive even as against the landlord to show that the tenant is a *raiayat*, whatever the area of the land may be or whatever may be done under the lease. (*Per Richardson, J.*). *Rajani Kanta Mukherjee v. Yusuf Ali*, 84 Ind. Cas. 92.

CHATTERJEE and RICHARDSON, JJ.

Reference :—(a) 15 C.W.N. 896, D.

(5) S. 5, cl. (5)—Applicability—Tenancy, if to be of 100 bighas at the date of suit—Presumption, if applicable to a tenancy existing before the coming into operation of

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

the Act—Sub-division of tenancy—Incidents of divided tenure—Tenancy, real nature of, how determined—Occupancy raiyat holding at a rent not changed for 40 years, if raiyat at fixed rate.

Cl. 5 of S. 5 of the Bengal Tenancy Act is not restricted in its application to suits or proceedings between landlords and tenants under the Act. Neither is it limited to cases of tenancy of more than 100 bighas in existence as such at the date of the institution of the suit wherein the question of the nature of such a tenancy arises for determination.

The clause is a provision, not of substantive but of adjective law; it lays down a presumption and changes the burden of evidence. The presumption is applicable to tenancy which existed before the commencement of the Act. The clause only codifies what had been a recognised doctrine under the old law.

The clause is applied to determine the character of the tenancy of 126 bighas, although that tenancy has been sub-divided into two tenancies before the Bengal Tenancy Act came into operation.

The tenure being divisible, the fact of sub-division does not create a breach of its continuity; and each fragment carved out of the original tenure retained its incidents (a).

The fact that some tenants of the land themselves carried on cultivation and did not collect rent from under-tenants, is not by any means decisive as to the character of the tenancy. The real nature of the tenancy is determined by proof of the purpose of the original grant (b).

The mere forbearance on the part of the landlord to claim enhancement of rent from an occupancy *raiayat* for 40 years, does not lead to an inference that the original contract was for payment of rent by the tenant at a fixed rate for ever. *Jagabandhu v. Magnamoyi*, 24 C. L.J. 363—36 Ind. Cas. 884.

MUKERJEE and CUMING, JJ.

References :—(a) 17 C.L.J. 435; 20 C.W.N. 1002, R. (b) 20 C.L.J. 140, R.

(6) Ss. 6, 7—Rent, enhancement of—Part of tenure created before Permanent Settlement but separated by assignment and held at proportional rent by assignee—Confirmatory sanad, if creates new tenure.

When a part of a tenure existing at the date of the Permanent Settlement was assigned subject to confirmation by the landlord, a *sanad* granted by the landlord in favour of the assignee confirming the transfer and allowing the assignee to hold his purchased share on payment of a proportionate share of the original rent, did not create a new tenure, and the rent payable was not liable to enhancement except in the circumstances specified in cls. (a) and (b) to S. 6 of the Bengal Tenancy Act.

Mookerjee, J.—It is well settled that the continuity of a transferable tenure is not affected by sub-division or by consolidation. *Chandra Kanta Chakrabarti v. Ram Krishna*

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Contd.).**

Mahalanabish, 30 O.W.N. 1002=24 C.L.J. 275=36 Ind. Cas. 707.

SANDERSON, C.J. and MOOKERJEE, J.
References:—36 C. 287=13 O.W.N. 410, Comm. on.

(6-a) S. 7. See No. 6, *supra*.

(7) Ss. 11, 18, 85, 170, cl. (3)—“Transfer,” whether includes lease—Sub-lessee under permanent tenure-holder or raiyat at fixed rate, whether may deposit money to prevent sale of holding in execution of rent decree. **Harl Mohan v. Atal Krishna Bose, 23 Ind. Cas. 925=19 C.W.N. 1127=32 Ind. Cas. 503. See Final Part, 1914, Col. 36.**

(8) S. 12—Amending Act I, (B.C.) of 1905—Portion of tenure, sale of, by registered instrument—Non-payment of landlord's fee—Title if passes—Purchaser allowing vendor to represent him to landlord—Effect on rent sale.

The transfer of a portion of a tenure was complete upon registration, although the landlord's fee was not paid and no notice of the transfer was given to him (a).

But where the purchaser subsequent to his purchase allowed his vendor to represent him before the landlord, paying rent in the latter's name, the landlord was entitled to frame his suit for rent without impleading the purchaser, and the sale in execution of the decree obtained therein passed the entire tenure. **Ali Mahamad v. Aftabdin Bhuya, 20 C.W.N. 355=34 Ind. Cas. 251.**

RICHARDSON and MULLICK, JJ.

References:—(a) 16 C. 642; 19 C. 17; 12 C. W.N. 478; 16 C.W.N. 64, Rel. on.

(8-a) S. 18. See No. 7, *supra*.

(9) S. 20 (7)—Raiyat—Occupancy rights—Possession as thekadar.

Under the Bengal Tenancy Act, 1885, a raiyat is a person who acquires land for cultivation purposes. Lease as thekadar does not confer occupancy rights. **Stonewigg v. Sheo Rachhaya Singh, 35 Ind. Cas. 622.**

CHAMIER, C.J. and SHARFUDDIN, J.

(10) S. 22. See **THEKADAR**, No. 1, 20 C.W.N. 800.

(11) S. 22 (as amended by Bengal Act I of 1907)—Co-sharer landlord—Purchase of occupancy holding—Non-occupancy right when preserved. See **LANDLORD AND TENANT**, No. 60, 34 Ind. Cas. 75.

(12) S. 23—Injunction—“Rendering land unfit for the purpose of the tenancy”—Temporarily unfit—Release of a portion of the holding by a raiyat in favour of some of the landlords—Possession relinquished—Portion acquired for the purpose of holding market.

S. 23 of the Bengal Tenancy Act is applicable not only to cases where the land is made permanently unfit, but also to cases where the land is made temporarily unfit for the purposes of the tenancy.

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Contd.).**

Defendants Nos. 1 to 3 held a certain non-transferable occupancy holding under the plaintiffs respondents and the other defendants appellants, as their landlords. The tenant defendants executed a deed of release in favour of the landlords defendants, to whom they also relinquished possession of one-tenth of the area of the entire holding (i.e., 2 bighas). The object of this release was to enable the landlords defendants to erect structures thereon and to hold a market on the site:

Held, that the plaintiffs were entitled to obtain an injunction to restrain the defendants from altering the character of the land.

That the defendants landlords, if they were permitted to execute their design, would render the holding unfit, within the meaning of S. 23 of the Bengal Tenancy Act, for agriculture, for which purpose alone the land was let out to the tenants defendants. **Rajkishore Mondal v. Rajani Kant Chuckerbutty, 24 C.L.J. 85.**

MOOKERJEE and ROE, JJ.

References:—34 C. 718=34 I.A. 138=6 C.L.J. 19, D.

(13) S. 29—Money rent—Kabuliat—Rent in kind—Stipulation to pay fixed sum in case of default—Enhancement.

Where an occupancy raiyat held lands at a money rent of Rs. 3-4 as per annum, and then executed a *kabuliat* by which he agreed to hold the same lands at a fixed produce rent of 12 Batuas of paddy or, in lieu thereof, 12 rupees:

Held, that the *kabuliat* could not be enforced inasmuch as it violated the provisions of S. 29 of the Bengal Tenancy Act. **Sheikh Tarap Ali v. Kalipada Bandopadhyaya, 23 C.L.J. 635=34 Ind. Cas. 97.**

D. CHATTERJEE and BEACHCROFT, JJ.

References:—33 C. 200; 18 O.L.J. 74; 37 C. 610; 10 C.L.J. 144; 15 C.W.N. 249, R.

(14) S. 29—Enhancement—Rent, assessment of—Excess land and new land taken—Consolidated rent—New holding. **Raj Kumar Sarkar v. Falsuddi Tarafdar, 22 O.L.J. 81=30 Ind. Cas. 283. See Final Part 1915, Col. 121.**

(15) S. 29—Enhancement—Kabuliat—Separate tenancy. **Raj Kumar Sarkar v. Falsuddi Tarafdar, 22 C.L.J. 86=30 Ind. Cas. 891. See Final Part 1915, Col. 121.**

(16) S. 29—Enhancement—Original holding split up into several new tenancies. **Nasir Payada v. Jyatendra Narain Acharyee Chowdhry, 22 C.L.J. 88=30 Ind. Cas. 320. See Final Part, 1915, Col. 121.**

(17) S. 29, cl. (b) proviso 1—Rent—Contract to pay more than 2 annas in the rupee—Void in toto—Division of tenancy between brothers—Effect—Pre-existing rights not taken away.

It is now settled law that proviso (1) to S. 29 of the Bengal Tenancy Act does not control cl. (b) of the section and that continuous realisation of rent at an illegal rate is of no avail to the landlord when he seeks the assistance of the Court.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

A contract which provides for an enhancement exceeding 2 annas in the rupee is wholly void (a).

It cannot be stated that a division of a pre-existing holding between two brothers being a contract between the landlord and tenant has the effect of creating new tenancies and therefore of taking away the pre-existing occupancy rights, unless it was intended by the parties that it should have such effect (b). *Nafar Chandra Pal Chowdhry v. Rahaman Sheikh*, 34 Ind. Cas. 48.

TEUNON and CHOWDHRY, JJ.

References:—(a) 24 C. 896, R. (b) 14 C.W. N. 385 = 11 C.L.J. 56 = 3 Ind. Cas. 306 and 6 Ind. Cas. 601 = 14 C.L.J. 110, R.

(18) Ss. 23, 33, 179—*Patta and kabuliati enhancing rent and creating permanent mukarrari interest—Plea of undue influence—Effect of ratifying kabuliati—Claim for enhancement for improvements when to be made.*

The patta and the kabuliati in this case recited that the tenants were to have their perpetual status at a fixed rate of rent of Rs. 5 per bigha and that the landlord was not to have any power of enhancement. In a suit by the landlord for rent at the rate mentioned in the kabuliati, the tenants pleaded that the kabuliati was obtained by undue influence and that the real rent was at a lower rate.

Held that, as the defendants subsequently ratified the kabuliati, it was not open to them to plead undue influence; and that, though the document did not say that any heritable and transmissible status was given to the tenants, the intention of the landlord was to create a permanent mukarrari interest within the meaning of S. 179, Bengal Tenancy Act, and S. 29 of that Act cannot therefore apply to such a lease.

Held also that, in order to make out a claim for enhancement for improvements, it is necessary to comply strictly with the provisions of S. 33 of the Bengal Tenancy Act. *Gur Sahai Mahto v. Keshwar Sahu*, 1 Pat. L.J. 76 = 35 Ind. Cas. 137.

MULLICK J.

(19) S. 29. Provisos (1), (2), and S. 30 (c)—Enhancement of rent—Improvement by landlord—Sum in addition of interest—Claim for damages. See LANDLORD AND TENANT, No. 6, 23 C.L.J. 209.

(20) Ss. 29 (b), proviso (1) and 178 (1) (b)—Occupancy holding—Continuous realisation of rent at an illegal rate—Contract, enhancing rent at more than 2 as. in the rupee, if void—Holding, division of—New tenancy.

Proviso (1) to S. 29 of the Bengal Tenancy Act does not control (a), (b) of the section and continuous realisation of rent at an illegal rate is of no avail to the landlord when he seeks the assistance of the Court.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

The tenants entered into a contract with the landlord by signing the rent roll, for payment of enhanced rent exceeding 2 as. in the rupee.

The contract was not registered.

Held, that the contract was wholly void (a).

Where it was found as a fact, that the pre-existing holding was divided between two brothers of the tenant:

Held, that, in the absence of an intention of the parties to that effect, the division had not the effect of creating new tenancies and thus of taking away the pre-existing occupancy rights (b).

That under S. 178, cl. (1) (b), the occupancy right in existence could not be taken away by the contract. *Nafar v. Rahaman*, 23 C.L.J. 580.

TEUNON and CHAUDHURI, JJ.

References:—(a) 24 C. 896, R. (b) 11 C.L.J. 56; 14 C.L.J. 110, F.

(21) S. 30—Applicability of. See RENT, No. 1, 24 C.L.J. 373.

(21-a) S. 30. See No. 19, *supra*.

(22) Ss. 30, 39, 50 (2), 52, 105 (4) and 109-A—Basis of enhancement of rent discussed—Decree of special Judge determining amount of enhancement—Appeal.

Where a Special Judge determines the amount of enhancement under S. 30 of the Bengal Tenancy Act it is a "decision settling a rent" and as such appealable.

Principles of enhancement discussed.

In the matter of determining the amount of enhancement of rent under S. 30 of the Bengal Tenancy Act (VIII of 1885) regard must be had to the nature of the land on which rent is to be assessed. If it is upland the prices of the upland staple crop must be considered, while if it is lowland the prices of the lowland staple crop must be ascertained. *Sajwan Mahto v. Gulab Chand Lal*, 1 Pat. L.J. 409 = 35 Ind. Cas. 678.

CHAMIER, C.J. and SHARFUDDIN, J.

(22-a) Ss. 30, 113, Ch. X—Prevailing rate—Enhancement of rent—Entry of certain sum as rent at settlement—Civ. Pro. Code, 1908, O.I. r. 4.

A settlement of rent with reference to the prevailing rate is not illegal merely for the reason that it involves an enhancement of more than two annas in the rupee. There is no limit to the amount of enhancement which can be effected on the ground of prevailing rate.

If the entry of a certain sum as rent at a settlement is merely an entry of the existing rate, then there is no bar to a proceeding for settlement within 15 years. It is only if the entry resulted from an actual settlement of rent that the bar of 15 years under S. 113 of the Bengal Tenancy Act would be applicable.

Under the new Civ. Pro. Code an appeal cannot be defeated merely upon the ground of non-joinder of parties. *Bhagaban Mahapatra v. Palturam Singh*, 32 Ind. Cas. 749.

CHAPMAN and MULLICK, JJ.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

(23) *Ss. 30-A, 31—Seven different rates in one village—S. 31 not extended thereto—'Prevailing rate' within the meaning of S. 30-A—If exists.*

Where, in a village situate in a district to which S. 31-A of the Bengal Tenancy had not been extended, it was found that there were in fact seven different rates of rent paid by seven different tenants, the rates varying from Rs. 2-5-5 to Rs. 7-9-5 per bigha.

Held that there was no 'one prevailing rate' within the meaning of S. 30-A of the Bengal Tenancy Act to which the rent can be enhanced (a). *Aghore Nath Mukhopadhyaya v. Abhoy Charan Nath*, 33 Ind. Cas. 85.

TRUNON and NEWBOULD, JJ.

(23-a) S. 31. See No. 23, *supra*.

(23-b) S. 33. See No. 18, *supra*.

(24) S. 38—*Rent, abatement of—'Permanent deterioration'—Land covered with sand—Existing condition.* *Krishna Sahay v. Palakdhari Rout*, 22 O.L.J. 42—39 Ind. Cas. 236—20 C.W.N. 1157. See Final Part, 1915, Col. 123.

(24-a) S. 39. See No. 22, *supra*.

(25) S. 40—*Competence of Revenue Court where tenant not occupancy raiyat and rent not produce rent—Civil Court if may question its competence on such ground.* *Durga Mohan Gangopadhyaya v. Sukumar Das*, 19 C.W.N. 825—21 O.L.J. 590—30 Ind. Cas. 412. See Final Part, 1915, Col. 123.

(25-a) S. 44. See No. 3, *supra*.

(26) *Ss. 45, 116, 120, Sch. III, Art. (1) (a)—Zeraiat, land let to tenant claimed as—Tenant's admission in kabuliya executed after 2nd March 1883, if admissible—Lease of Zeraiat land for a term—Suit to eject brought more than 6 months after the expiry of term—Limitation.* *Ganpat Mahon v. Rishai Singh*, 20 C.W.N. 14—33 Ind. Cas. 978. See Final Part, 1915, Col. 124.

(27) S. 49, cl. (b)—*Raiyat, transfer of holding by, to under-raiyat—Ejectment of under-raiyat by tenure-holder—Notice if necessary.*

A raiyat whose holding was not transferable transferred his interest to the under-raiyat under him and disappeared from the land. The tenure-holder subsequently granted an under-tenure to the plaintiff who sued to eject the under-raiyat:

Held—That the under-raiyat was not entitled to the notice prescribed by S. 49, cl. (b) of the Bengal Tenancy Act. To entitle him to claim the protection of S. 49 he had to establish that the suit was one for ejectment by his landlord, and, under S. 4, cl. (c), the landlord of an under-raiyat being a raiyat he must establish that he holds under a raiyat, but in the present case the holding being under a tenure-holder, S. 49 was of no avail (a). *Jadob Sardar v. Gobinda Chandra Mondal*, 34 Ind. Cas. 912—21 C.W.N. 863.

SANDERSON, C.J. and MOOKERJEE, J.

References:—(a) 2 O.L.J. 570; 4 C.W.N. 667, B.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

(28) S. 49 (b)—*Under-raiyat holding—Tenancy for a term—Heritability—Notice to quit—Term, expiry of—Heirs of an under-raiyat, if can be ejected without such notice.* *Alejan Bibi v. Raham Ali*, 22 O.L.J. 232—20 C.W.N. 756—31 Ind. Cas. 26. See Final Part, 1915, Col. 125.

(28-a) S. 50. See No. 22, *supra*.

(28-b) S. 49, cl. (6)—*Non-transferable under-raiyat holding—Exchange—Acceptance—Ejectment—Notice.*

Where an under-raiyat whose sub-raiyat holding is not transferable without the consent of the raiyat landlord exchanges the land of his holding and puts the transferee in possession and the raiyat landlord who is aware of this nevertheless continued receiving rent of this holding in the name of the under-raiyat and the conduct of the parties shows that the raiyat landlord did not treat the exchange as working forfeiture of the rights of the under-raiyat, the former cannot treat the transferee as trespasser and eject him without notice under cl. (6). S. 49 of the Bengal Tenancy Act. *Abdul Hamid v. Uday Chandra Acharyee*, 32 Ind. Cas. 614.

CHATTERJEE and BEACHCROFT, JJ.

(28-c) *Ss. 50, 105—Fixity of rent, Presumption re—Enhancement—Jama wasil baki papers more than 70 years old genuineness of—Evidence Act, 1872, Ss. 3, 490.*

In a proceeding under S. 105 of the Bengal Tenancy Act for settlement of fair and equitable rent the tenant relied on receipts for 20 years to show uniform rent as a basis for the presumption under S. 50 of that Act. The landlord adduced evidence of *Jama wasil baki* papers more than 70 years old. *Held* that the *Jama wasil baki* papers were admissible in evidence and their genuineness could be presumed under S. 90 of the Evidence Act. *Held* further that the liability to enhancement was imposed not by these papers but by the law which, in the absence of the presumption under S. 50 or upon rebuttal of that presumption imposed a liability to enhancement upon tenants. *Nirod Krishna Ghose v. Prodht Kumar Tagore*, 32 Ind. Cas. 794.

D. CHATTERJEE and BEACHCROFT, JJ.
Reference:—16 O.L.J. 24, F.

(29) *Ss. 50, 105.* See LANDLORD AND TENANT, No. 50, 33 Ind. Cas. 415.

(30) *Ss. 50, 115—Wrong entry in Record-of-Rights—Suit for declaration—Whether governed by Bengal Tenancy Act—Holding at fixed rates—Evidence of long payment at unchanged rate—Admissibility—Presumption.*

A suit by a tenant for a mere declaration that an entry in the Record-of-Rights showing his holding to be a *kaimi jama* is wrong and that his correct status is that of a raiyat at fixed rates is not one under the Bengal Tenancy Act.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

Even though a suit is not under the Bengal Tenancy Act, a Court is competent to take into consideration the evidence of long payment of rent at an unchanged rate as showing that the plaintiff had a holding at fixed rates (a).

Under S. 115, Bengal Tenancy Act, evidence of payment anterior to the publication of the Record of Rights is admissible (b). *Pirihl Chandra Lal Chowdhury v. Shelkh Moham-mad Tahir*, 1 Pat. L.J. 67 = 35 Ind. Cas. 427.

MULLICK, J.

References:—(a) 12 O.L.J. 108; 12 O.W.N. 482, F. (b) 12 O.W.N. 904, F.

(80-a) S. 52—*Eviction by landlord of portion of holding—Right of landlord to recover proportionate rent.*

If a landlord chooses to evict his tenant from a portion of his holding, he shall recover no rent from the holding until he has restored to the tenant the land which he has forcibly taken. There cannot be any apportionment of rent, if the diminution of the holding has been due to dispossession by the landlord. This rule applies equally to all classes of tenancies. *Sham Narain Singh v. Babu Chandra Shek-har Prasad Singh*, 36 Ind. Cas. 528.

ROE and PRASAD, JJ.

References:—24 C. 396; 5 Ind. Cas. 105 = 11 C.L.J. 601; 9 Ind. Cas. 508 = 13 C.L.J. 119; 5 Ind. Cas. 352 = 14 C.W.N. 446 = 11 C.L.J. 606; 18 Ind. Cas. 621 = 17 C.L.J. 50; 21 Ind. Cas. 957 = 18 C.L.J. 509, R.

(31) S. 52. See *KABULIAT*, No. 1, 33 Ind. Cas. 211.

(31-a) S. 52. See No. 22, *supra*.

(32) S. 58.—Omission to give rent receipt—Whether an 'offence'—Proceeding under that section upon tenant's complaint—Whether amounts to a criminal prosecution. See *MAL-LICIOUS PROSECUTION*, No. 2, 1 Pat. L.J. 149.

(33) S. 65—*Sale of ryot's holding in execu-tion of decree for arrears of rent—Further arrears, decree for—Effect of.*

Where the lessees of the proprietary rights of a landholder instituted a suit against the tenants in occupation for arrears of rent and in execution of their decree purchased the land themselves and took possession thereof.

Held that the tenant's interest in the holding had thereby become extinguished and eliminat-ed and that a subsequent purchaser in execution of another decree for arrears of rent cannot get any interest in the holding. *Nag Narain v. Jung Bahadur Sahai*, 34 Ind. Cas. 905.

ATKINSON, J.

(34) S. 65. See *HINDU LAW (WIDOW)*, No. 29, 34 Ind. Cas. 681.

(35) S. 65—*Decree for road-cess—Purchase in execution—Title of purchaser whether para-mount to that of mortgagee over same property*, See *MORTGAGE (GENERAL)*, No. 20, 1 Pat. L. J. 161.

(35-a) S. 67—*Kabuliyat prior to Act fixing rate of interest varied by solenamah after the*

2.—Bengal Acts—(Continued):

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

Act—Contract of tenancy newly created—Document—Construction.

The original *Kabuliyat* by which the tenancy was created was of the year 1879 and it provided for interest at the rate of 6½ per cent. per mensem on overdue instalments. This was varied in its terms by a *Solenamah* after the passing of the Act. *Held* that the *Solenamah* was only a vari-ation of some of the terms of the old *Kabuliyat* but that no new contract of tenancy was created; and that therefore the tenants remained liable to pay interest at the rate stipulated in this *Kabuliyat*. *Held* also that if the *Solenamah* had created any new contract of tenancy, the tenants would not have been liable to pay inter-est at more than the rate mentioned in S. 67 of the Bengal Tenancy Act. *Abdul Hamid v. Abdul Miji*, 32 Ind. Cas. 710.

N.R. CHATTERJEE and RICHARDSON, JJ.

(35-b) Ss. 67 and 68—*Award of interest or damages on arrears of rent—Mandatory provision.*

Under S. 67 of Act VIII of 1885 (Bengal) it is the duty of the Court to award interest and under S. 68, sub-cl. 2, the Court should award damages if it is a fit and proper case. The Court must do one or the other. The obligation is mandatory under the statute. *Kandheo Narain Singh v. Dewa Singh*, 36 Ind. Cas. 955.

MULLICK and ATKINSON, JJ.

(36) Ss. 67, 179—*Permanent mokurari lease—Stipulation to pay interest on arrears of rent "at 75 per cent. with full damages," if by way of penalty—Contract Act (IX of 1872), S. 74—Mere high rate if sufficient to demand interference—Facts and circum-stances to be proved—Position of tenant under permanent lease and debtor compared—Onus of proof.*

Per N. R. Chatterjee, J.—S. 179 of the Bengal Tenancy Act does not exclud-e the con-sideration of the question whether a stipulation in a permanent *mokurari* lease to pay interest at a higher rate than that provided by S. 67, is affected by provisions of law other than the Bengal Tenancy Act. And although Courts should not lightly interfere with contracts between landlords and tenants in cases of per-manent *mokurari* leases, a stipulation for pay-ment of interest on arrears of rent at a rate which is unconscionable should not be allowed to be enforced even in such cases.

No hard and fast rule can be laid down as to what is unconscionable and exorbitant, which must be determined with regard to the facts of each case.

Interest represents compensation for the detention of the rent and a stipulation in a *mokurari* lease to pay "75 per cent. interest plus full damages" appears rather to have been intended as an effective means of securing punctual performance of the contract than to represent the damages which the landlord was to suffer by reason of non-payment of the rent.

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Contd.).**

Per Richardson, J.—The lessee of a permanent lease at an invariable rent is not *prima facie* entitled to the indulgent consideration which might be extended to a needy and improvident debtor in the clutches of a grasping money-lender, and though it may be that the provisions of S. 179 of the Bengal Tenancy Act must be read subject to the power of the Court to intervene under the Contract Act, they cannot be overlooked or left out of account.

Stipulation to pay interest at a high rate may be proved to be one by way of penalty, but to justify an inference that it is so, it is not enough to show that it was a hard bargain. In general, evidence of facts and circumstances outside the contract is necessary to justify the Court's interference.

The *onus* to prove such circumstances is on the lessee. **Nabo Kumar Chuckerbutty v. Syed Abdul Jubbur Mlyan**, 21 C.W.N. 112 = 36 Ind. Cas. 721.

N. R. CHATTERJEE and RICHARDSON, JJ.
(36-a) S. 69. See No. 35-a, *supra*.

(37) *Ss. 74, 179—Written lease—A definite amount over and above amount stated as rent, but forming part of consideration, if abwab—High rate of interest and damages in Mokurari lease, if penalty—Contract Act (IX of 1872), S. 74.*

The question whether any particular item is or is not an *abwab* must depend upon the construction of the contract of lease in each case, and the question in each case is whether the sum claimed is really part of the rent agreed upon to be paid as consideration for the lease.

The question whether in a case where there is a written engagement, a specified sum which is neither indefinite nor arbitrary and which is agreed upon to be paid as part of the rent in the lease creating the tenancy can be recovered, was not referred to the Full Bench in **Radha Prosad Singh v. Bal Kowar Koori**, 17 C. 726.

A stipulation in a *kabulyat* creating a *mokurari* lease to pay interest at 75 per cent. on arrears of rent and damages at 300 per cent. is intended to secure punctual payment of rent rather than represent the loss to which the landlord is put for the non-payment of the rent. Being by way of penalty such a stipulation comes under S. 74 of the Contract Act, and is also unconscionable. **Upendra Lal Gupta v. Meheraj Bibi**, 21 C.W.N. 108.

CHATTERJEE and SHEEPHANKS, JJ.

(38) *S. 85—Under-raiyati lease for 9 years . with covenant of renewal if valid—Ejection, suit for, at termination of term.*

Notwithstanding the provisions of S. 85 of the Bengal Tenancy Act, a stipulation in a lease granted by a raiyat to an under-raiyat that, after the expiry of the nine years for which the lease was granted, the raiyat would grant the under-raiyat a fresh lease of the land is valid (a).

2.—Bengal Acts—(Continued).**Act VIII of 1885 (Bengal Tenancy)—(Contd.).**

When there is a covenant for renewal, if the option does not state the terms of the renewal, the new lease would be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof except as to the covenant for renewal itself.

If it is possible to interpret an agreement between the parties so as to make it operative, effect should be given to it and the contract should not be pronounced unenforceable.

Held—that the only reasonable interpretation of the covenant in this case was that the parties agreed that the lease would be renewed on the same terms and for the same period as the original lease. **Lal Mia v. Muhammad Easli Msa**, 20 C.W.N. 948 = 33 Ind. Cas. 448.

MOOKERJEE and N. R. CHATTERJEE, JJ.

References :—(a) 15 C.L.J. 122, F.; 15 C.L.J. 672 = 16 C.W.N. 618, R.

(39) S. 85. See SUB-LEASE, No. 2, 24 C.L.J. 538.

(40) S. 85. See SUB-LEASE, No. 1, 24 C.L.J. 539.

(40-a) S. 85. See No. 7, *supra*.

(41) *S. 85 (2)—Lessee induced on land by a void lease if may plead lease void and created no rights—Lease registered in contravention of the law—Suit for damages for breach of covenant—Estoppel—Scope of the Bengal Tenancy Act, whether it excludes operation of rules of equity in the relation of landlord and tenant.*

In a suit for damages by a lessor against a lessee for breach of a covenant contained in a registered lease purporting to have been granted by the lessor as tenure-holder to the lessee as under-tenure-holder, it was found that in fact the lessor was an occupancy raiyat, and the lessee urged that the lease, having been granted and registered in contravention of S. 85 of the Bengal Tenancy Act, was void and inoperative. *Held*—that the lessee was estopped from showing that the lease was void and that no interest passed to him (a).

That the Court was not precluded from so holding by the previous decisions of the High Court.

The Bengal Tenancy Act is not a complete Code even in respect of the law of landlord and tenant; much less does it profess to incorporate the general principles of the law of contract and the doctrines of equity jurisprudence in so far as they may have to be applied in the determination of disputes between landlords and tenants. **Bamandas Bhattacharyya v. Nilmadhab Saha**, 20 C.W.N. 1340 = 24 C.L.J. 541 = 35 Ind. Cas. 754.

MOOKERJEE and CUMING, JJ.

Reference :—(a) 20 C.W.N. 1335, F.

(42) *S. 86 (6) Encumbrance by tenant—Surrender of holding to landlord—Settlement by landlord with third person—Right of encumbrancer.*

A transfer of a portion of non-transferable holding of an occupancy raiyat is so far valid

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

against the landlord as not to entitle him to enter upon the portion transferred. A surrender of the holding by the tenant made without the consent of an encumbrancer is not valid and has not the effect of entitling the landlord to *khās* possession in regard to his rights. So where a *raiyat* with a non-transferable right of occupancy, executed a *Kat Kabala* in respect of a part of his holding and thereafter a tenant surrendered his holding through the landlord, who had obtained a decree for arrears of rent, on the understanding that the tenant was not to be liable for the arrears due, the person with whom the landlord entered into a settlement subsequently cannot oust the encumbrancer from the possession of the property. *Hasuni Bibi v. Sadir Mamud Sankar*, 30 Ind. Cas. 252.

D. CHATTERJEE and N. CHATTERJEE, JJ.

References:—27 Ind. Cas. 61=20 C.L.J. 52 = 18 C.W.N. 971 (F.B.)=42 C. 172, F.

(43) S. 87—*Abandonment—Whether sufficient to extinguish rights of lessee's transferee—Surrender and abandonment—Difference between—Transfer of Property Act, Ss. 3, 117.*

Abandonment and surrender are quite distinct, as surrender, express or implied, must be mutual between the parties.

Though abandonment may terminate a tenancy under the Bengal Tenancy Act, it is not by itself sufficient to extinguish the rights of a transferee of a lessee under the Transfer of Property Act. *Sakayat Mollah v. Alam Mollah*, 33 Ind. Cas. 98.

NEWBOULD, J.

(44) S. 87—*No splitting up of tenancy of several tenants—One of original tenants remaining in possession—No abandonment of tenancy.*

Where it was not shown that a tenancy in favour of several persons was split up, and one of the original tenants still continued in possession of the land, though the others dropped away, there could be no abandonment of the tenancy within the meaning of S. 87 of the Act, and, therefore, a landlord could not eject the remaining tenant in possession. *Gopi Sundari Das v. Haladhar Mazumdar*, 30 Ind. Cas. 583.

MULLICK, J.

Reference:—7 C.W.N. 670, D.

(44-a) S. 87—*Occupancy tenants—Transfer of non-occupancy holding—Abandonment—Right of re-entry—Finding as to abandonment—Second appeal.*

Where occupancy tenants whose rights are not transferable by custom sell their holding and abandon it, the landlord has a right of re-entry and if the landlord transfers this right to any person by a *miras-ijara* the transferee is entitled to a decree for ejectment as against the purchaser of the holding from the occupancy tenants, even though the purchaser of the holding executes a release deed in favour of the original tenants and puts them in possession.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

A finding of the lower appellate Court on the question of abandonment, arrived at on evidence on the record, is one that cannot be assailed in second appeal. *Kallas Chandra Aich v. Romesh Chandra Sen*, 32 Ind. Cas. 355.

D. CHATTERJEE and BEACHOROFF, JJ.

(44-b) S. 93—*Co-sharer with separate account in Collectorate—Continuance as "co-owner"—Appointment of common manager.*

An estate is still a single estate for Revenue purposes, though separate accounts have been opened in respect of it. A co-sharer continues to be a "co-owner" though there is a separate entry in respect of the share in the Collectorate.

The dispute as to the management of an estate within the meaning of S. 93 of the Act need not be between all the co-owners of the estate. Nor the dispute need be as to the management of all and every part of the estate. What is required is a dispute between co-owners "as to" the management of the estate, that is, a dispute relating to or affecting the management of the estate. A dispute between the opposite parties, who own the greater part of the estate, even if the dispute be only as to the management of their share, is sufficient. Similarly a dispute as to the terms on which or the person with whom a particular holding or a number of holdings should be settled, is a dispute as to the management of the estate, though only a part of the estate is involved.

A manager of part of an estate is not a manager of the estate, because the part does not include the whole. A dispute as to the management of part of an estate is a dispute as to or relating to the management of the estate, because the whole includes the part (a).

The District Judge has power to appoint a common manager under the section though there may be disputes between the co-owners as to management of the estate involving a dispute as to boundaries between that common estate and another estate separately owned by one of the co-owners. *Kumar Soradindu Roy v. Girish Mohini Devi Chowdhurani*, 36 Ind. Cas. 448.

CHATTERJEE and RICHARDSON, JJ.

References:—(a) 6 C.L.J. 216; 11 C.W.N. 1143, R.

(45) S. 93—*Receiver if may be appointed in proceedings to appoint a common manager. See CIV. PRO. CODE (1908), No. 636, 20 C.W.N. 1009.*

(46) Ss. 93, 94, 95—*Common manager—Pendency of proceedings for appointment of—Interim receiver—Court's power to appoint—Necessity for proper evidence—Ex parte statement in verified petition—Insufficiency—Civ. Pro. Code, 1908, O. XL, r. 1.*

Where upon an *ex parte* statement contained in a verified petition of the applicants who stated that the contents of their petition were true to the best of their information and belief, a receiver was appointed to take possession of

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

the properties until the Judge passed his final order for the appointment of a common manager under the Bengal Tenancy Act :

Held that the order was wrong and must be set aside.

In a proceeding under the Bengal Tenancy Act for the appointment of a common manager it is competent to a Court to appoint a receiver under circumstances under which it can rightly make the appointment. In order that an order of Court of this kind should appear to the Court just and convenient, there must be evidence upon which the Court can come to a conclusion that it is just and convenient. *Asad Ali Chowdhury v. Syed Mohamed Husain Chowdhury*, 34 Ind. Cas. 83.

CHATTERJEE and BEAUCHROFT, JJ.

(46-a) S. 94. See No. 46, *supra*.

(46-b) S. 95. See No. 46, *supra*.

(47) S. 103—Record of rights—Evidentiary value.

The record of rights is a document prepared by a state official for State purposes in an open and public manner and the law requires that it should be presumed to be accurate until it be proved to be incorrect; and the person who appears recorded in the Record of Rights is not to have his rights lightly flattered away in the absence of legal proof. It is not proper to say that the Record of Rights is only evidence between landlord and tenant. It is evidence in all cases where the subject-matter with which it deals is in dispute. *Muhammad Farid v. Abdul Wahab*, 35 Ind. Cas. 424.

ATKINSON, J.

(47-a) S. 103. See No. 60, *infra*.

(48) Oh. X, Ss. 103-B, 104—104-J, 105, 112, 113—Agreement between landlord and tenant prior to date of entry in record-of-rights—Rate of rent entered in the Record—If liable to enhancement—Applicability and scope of S. 113—S. 113 not affected by S. 103-B—Nature of the two sections.

If the rent entered in the Record-of-Rights was the rent settled under Chap. X of the Bengal Tenancy Act, then S. 113 of the Act precludes the landlords from obtaining on the strength of a provision for such enhancement contained in a contract entered into with the tenants prior to the date of the entry in the Record-of-Rights, a decree for rent at a higher rate than that entered in the Record-of-Rights.

S. 113 applies to rents settled under Chap. X. Under that chapter rent may be settled in accordance with the provisions contained in Ss. 104—104-J, or rent may be settled under S. 105 or S. 112. S. 113 does not apply to cases of rent otherwise settled.

There is really no inconsistency between S. 103-B and S. 113 and if there were any inconsistency between them, the general provisions of S. 103-B would have to give way to the particular provisions contained in S. 113.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

S. 103-B applies to all entries in the Record-of-Rights and creates a presumption of correctness with regard to them. S. 113 applies in those cases where the rent of a tenure or holding has been actually settled under the chapter.

A consideration of Oh. X as a whole shows that the effect of the plain language of S. 113 is not in any way controlled or cut down by anything in S. 103-B (a). *Meyajan Bisan v. Srimati Joyimala*, 34 Ind. Cas. 82.

CHATTERJEE and RICHARDS, JJ.

References:—(a) 13 C.W.N. 210—4 Ind. Cas. 470, R.

(48-a) S. 104. See Nos. 48, *supra*, and 60, *infra*.

(49) Ss. 104, 105—Lakheraj title—Settlement Officer, decision of—Bengal Tenancy Act, as amended by S. 9 of Act III (B.C.) of 1898—Res judicata—Competent Court. *Maharaja Birendra Kisor Manikya Bahadur v. Kallitara Debi*?, 22 C.L.J. 155—30 Ind. Cas. 953—43 C. 547. See Final Part, 1915, Col. 132.

(50) Part II, Oh. X, Ss. 104-G, 191, 192. See LANDLORD AND TENANT, No. 53, 33 Ind. Cas. 420.

(51) S. 105—Enhancement of rent—Second appeal if lies against decision of Special Judge. *Akbar Ali Khan v. Syed Abbas*, 19 C.W.N. 1328—32 Ind. Cas. 164. See Final Part, 1915, Col. 183.

(51-a) S. 105. See Nos. 22, 29 and 48, *supra*, and 58, *infra*.

(51-b) Ss. 105 and 105-A—Suit for settlement of rent—Determination of status of tenant—Under tenant proper party to suit.

In a suit by a landlord for settlement of fair and equitable rent the under-tenants of the tenants are proper parties though not necessary parties to the suit.

In settling a fair rent under S. 105 of the Act there is nothing to prevent the Revenue Officer and the Court from taking into consideration the terms and conditions embodied in the lease or other written document by which the rights of the parties are regulated (a).

A landlord applied under S. 105 of the Act for settlement of fair and equitable rents in respect of lands held by his tenants. The tenants were entered in the Record of Rights as tenure holders. The landlord disputed the correctness of these entries and asserted that the tenants were rayats and liable to pay rent as such. Upon this question an issue was raised which the Revenue Officer refused to try on the ground that for that purpose the under-tenants or the sub-tenants of the tenants were necessary parties. The same view was held by the District Judge also. Held that the under-tenants could not be denied to have been the proper parties, if they had been joined as parties to the proceedings, but they were not necessary parties in the sense that the proceedings must fail in their absence. *Held* also that the Revenue Officer should not have refused to try the

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

question whether the tenant was a raiyat or a tenure holder, as the question was *prima facie* triable in such proceedings under S. 105-A, cl. (e) of the Act, though the under tenants or sub-tenants were not made parties to the proceedings. *Jogendra Mohan Das v. Janaki Nath Saha*, 86 Ind. Cas. 795.

RICHARDSON and SMITHER, JJ.

References :—(a) 17 Ind. Cas. 917 = 16 C.L.J. 381; 17 Ind. Cas. 919 = 16 C.L.J. 383, R.

(51-c) Ss. 105, cl. (4), 109-A.—“Settling rent” includes enhancement—Civ. Pro. Code, 1908, S. 115—Appeal (second appeal)—Erroneous decision on limitation—Revision.

It is clear from the terms of sub-S. (4) of S. 105 of the Bengal Tenancy Act that the expression “settling rent” includes enhancement. If such “settling rent” by a Settlement Officer results in enhancement, his decision cannot be the subject of a second appeal. An erroneous decision on a question of limitation cannot be a ground for interference in revision by the High Court under S. 115, Civ. Pro. Code, 1908. *Rampat Mohato v. Ram Golam Singh*, 32 Ind. Cas. 982.

CHAPMAN and MULLICK, JJ.

(52) Ss. 105, 105-A, 109, 111-A—Scope of Ss. 109 and 111-A—Assessment of fair rent under S. 105, a declaratory suit by tenant barred when—Res judicata.

The proviso to S. 111-A applies only to a case where the record of rights has been framed in pursuance of an order made under S. 101, sub-S. (2) cl. (d), that is, to a case where a settlement of land revenue is being or is about to be made but not to a case where the Record of rights was prepared at the instance of the landlord under the provisions of S. 101, sub-S. (2), cl. (4).

Where after the assessment of a fair rent under S. 105, a subsequent suit for a two-fold declaration was brought by the tenants. Held that in so far as the tenants sought for a declaration that they were *maurasi mokarari raiyats* and not tenure holders and that the lands held by them constituted not one tenure but distinct raiyati holdings, the suit was maintainable, but that in so far as the tenants sought for a declaration that the landlord was not entitled to realise the rent assessed under S. 105, the suit was clearly barred by S. 109.

As the introduction of S. 105-A has not altered the scope of S. 109, S. 109 must be construed on the same lines as before the introduction of S. 105-A. To attract the operation of S. 109, it is essential to establish that the Civil suit has for its subject-matter what has already formed the subject of an application under S. 105 (a).

It cannot be held, on the analogy of the doctrine of constructive *res judicata* that the jurisdiction of the Civil Court has been constructively excluded even when a point has been neither raised nor decided under S. 105

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

read with S. 105-A. *Nawab Bahadur of Murshidabad v. Ahmad Hussain*, 85 Ind. Cas. 695.

MOOKERJEE and CUMING, JJ.

References :—(a) 12 C.L.J. 195 : 19 C.W.N. 886 ; 19 C.W.N. 637 N., R.

(53) Ss. 105 and 109—Scope and effect of—Discretion of Revenue Court—Effect.

The meaning and intention of the Legislature in enacting S. 109 was to avoid conflicts arising between the Revenue Courts on the one side and the Civil Courts on the other ; and, under that section, when an issue is decided by a Revenue Court having jurisdiction, under S. 105, the decree having the force and effect of a decree of a Civil Court, no action is capable of being entertained by a Civil Court in connection with any matter decided in the proceeding under S. 105 (a). *Ramdayal Pandey v. Genda Tewari*, 1 Pat. L.J. 479.

ATKINSON and KINGSFORD, JJ.

Reference :—(a) 16 C.L.J. 67, F.

(54) Ss. 105, 188—Separate tenancy—Tenant executing *kabuliat* in favour of co-sharer-landlord—Bengal Tenancy Act Ss. 105, 188—‘Land.’ *Safaruddi v. A. K. Fazal Huq*, 21 C. L.J. 592 = 30 Ind. Cas. 414. See Final Part, 1915, Col. 134.

(55) S. 106—Res judicata—Order of Settlement Officer under S. 106—Decree—Suit in Civil Court, maintainability of—Act III (B.C.) of 1898, S. 9—Jurisdiction—Rent-free title if can be investigated. *Nikunja Behari Chunda v. Maharaja Radha Kishore Manikya Bahadur*, 22 C.L.J. 148 = 30 C.W.N. 275 = 30 Ind. Cas. 944. See Final Part, 1915, Col. 134.

(55-a) S. 106. See No. 49, *supra*.

(56) Ss. 106, 108—Record of rights, entry in, correction of—Declaratory suit—Produce rent, variation of, according to caste and occupation—One suit against all the tenants in the village, if maintainable—Civ. Pro. Code (1908), O. I, r. 3—Defendants, joinder of—Court-fee, amount of—Court Fees Act, S. 28—Revenue-officer, revisional powers of—Powers, if restricted to the merits of the case—Revenue-officer, if can on revision direct payment of additional Court-fee. *Dhakeshwar Prosad Narain Singh v. Iwar-dhar Singh*, 22 C.L.J. 57 = 30 Ind. Cas. 862. See Final Part, 1915, Col. 135.

(57) Ss. 106, 109—Scope. See CIV. PRO. CODE (1908), No. 562, 24 C.L.J. 79.

(57-a) S. 108. See No. 56, *supra*.

(57-b) S. 109. See Nos. 22, 52, 53, 57, *supra*.

(58) Ss. 109-A, 105—Decision of Special Judge in appeal from order of Settlement Officer in proceeding under S. 105 allowing enhanced rent on basis of excess area, if open to second appeal to High Court—Finding of fact based on erroneous interpretation of contract.

In a proceeding under S. 105 of the Bengal Tenancy Act, the landlord's case was that the

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

area in the occupation of the tenant as found on measurement in the settlement proceedings under Chap. X of the Bengal Tenancy Act by the Revenue authorities exceeded the area mentioned in the *kabuliyat*, wherein it was stipulated that the landlord could have the land measured within the term and if the area or the classification was found to be wrong the tenant would be bound to pay additional rent or be entitled to a reduction as the case might be. The landlord claimed assessment of rent on the difference between these two areas and prayed for a fair and equitable rent being settled for all the lands in the holding. The tenant denied that he was in possession of excess lands. The Settlement Officer found that the tenant was in occupation of excess area and he assessed fair rent on this basis. In appeal the Special Judge held in substance that the tenant was not in occupation of excess lands because he must be deemed under his contract to be in occupation of the area mentioned therein. Against this decision of the Special Judge the landlord preferred an appeal to the High Court.

Held—That, when in a proceeding under S. 105 of the Bengal Tenancy Act, the Settlement Officer is asked to increase the rent under sub-S. (4) in accordance with the rules laid down in S. 52, and the claim is refused on appeal to the Special Judge on the ground that the land of the tenant is not proved to be in excess of the area for which rent had been previously paid, a second appeal to the High Court is not barred by S. 109-A of the Bengal Tenancy Act.

That in the present case a second appeal lay to the High Court and should also succeed on the merits, inasmuch as the finding of the Special Judge involved an error of law. *Jnanada Sundarl Chowdhraui v. Adu Sheikh*, 20 C. W. N. 428 = 23 C.L.J. 281 = 48 C. 603 (F.B.) = 39 Ind. Cas. 148.

SANDERSON, C.J., WOODROFFE,
MOOKERJEE, HOLMWOOD and
D. CHATTERJEE, JJ.

(58-a) S. 111. See No. 52, *supra*.

(59) S. 111-A — Plaintiff shown as tenant liable to pay rent in record-of-rights—Suit for declaration that he was a *lakhiraj* tenant not liable to pay rent—Nature of suit—Limitation.

In this case the Record-of-Rights which was finally published on 14-11-1905 showed the plaintiff to be liable to pay rent to the landlord at a certain rate. The landlord sued for rent and got a decree against the plaintiff on 1-8-1912. Plaintiff now sued on 7-10-1912 for a declaration that he was a *lakhiraj* raiyat on the land and was not liable to pay rent to the defendant landlord.

Held, that the suit was one substantially under S. 111-A of the Bengal Tenancy Act, and although no reference was made to the record-of-rights in the plaint, the effect of

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

the declaration sought for, if granted, would be to correct the record-of-rights, and the cause of action accrued, not on the date of the rent decree passed against plaintiff, but on the date of the publication of the Record, and as that took place more than 6 years before this suit, the suit was barred. *Sheikh Amiruddin alias Tincowrie v. Sheikh Saldur Rahman*, 1 Pat. L.J. 73 = 35 Ind. Cas. 433.

MULLICK, J.

Reference :—11 C.W.N. 48, F.

(60) Ss. 111-A, 104-H, 109-B — Occupancy right, suit for declaration of, after final publication of record-of-rights—Limitation—Presumption as to correctness of record, rebutting of. *Kumeda Prosunna Bhuya v. The Secretary of State*, 19 C.W.N. 1017 = 30 Ind. Cas. 255. See Final Part, 1916, Col. 136.

(61) S. 111-B—Suit brought within the prohibited period—Proper procedure—Rejection or return of plaint at once—Civ. Pro. Code (Act V of 1908), O. VII, rr. 10 and 11—Plaint kept in the file until expiry of three months—Suit if may be dismissed later on—Jurisdiction of the Court, to proceed to try suit on the merits.

In view of the provision of S. 111-B of the Bengal Tenancy Act that a suit shall not be instituted in any Civil Court for the decision of certain issues within three months from date of the certificate of final publication of the record-of-rights, the proper course for the Court, when such a suit is brought within that period, is to reject the plaint under O. VII, r. 11, cl. (d) of the Civ. Pro. Code.

If, the defect being overlooked, the plaint is registered, the Court on subsequently discovering it when the three months have expired, would not be justified in dismissing the suit.

As the section does not take away the Civil Court's jurisdiction altogether it should, in such a case, proceed to try the suit on the merits.

Per *Richardson, J.*—If a plaint presented during the prohibited period be not at once returned or rejected under O. VII, r. 10 or r. 11 of the Civ. Pro. Code (as the legislature undoubtedly contemplates) and remains on the file of the Court, the suit may be treated, subject always to any question arising under S. 109, as though the plaint had been received and the suit instituted on the day following the expiration of such period (a). *Fran Krishna Saha v. Kripa Nath Chowdhry*, 35 Ind. Cas. 76 = 21 C.W.N. 209.

N.R. CHATTERJEE and RICHARDSON, JJ.

References :—(a) 17 C.W.N. 403 = 17 C.L.J. 239 ; 19 C.W.N. 1141 ; 34 C. 20 = 11 C.W.N. 88 (F.B.), R.

(61-a) S. 112. See No. 48, *supra*.

(61-b) S. 113. See No. 48, *supra*.

(62) S. 115—Tenancy continues how long—Time, extension of. See EXECUTION OF DECREE, No. 18, 24 C.L.J. 523

(62-a) S. 116. See No. 30, *supra*.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

(62-b) S. 116. See No. 26, *supra*.

(63) S. 116 and Sch. 3, cl. 1 (a)—Khas Khamar land held by tenant under lease for term—Suit for Khas possession brought more than six months after expiration of lease—Limitation—Heading of Chapter if may be looked at for construing sections.

The plaintiffs sued for Khas possession of land held by the defendants under a lease for five years on the ground that they were entitled to re-entry at the expiration of the agreement. It was found that the defendants were not in possession of the land before they entered it under their lease and that the land in suit was *khas khamar*. The suit was brought more than six months after the expiration of the lease:

Held—That the defendants were not included in the term "non-occupancy raiyat" within cl. 1 (a), Sch. 3 of the Bengal Tenancy Act and the suit was not barred.

That the Court could look at the heading of Chap. XI of the Bengal Tenancy Act for the purpose of construing the sections. *Dwarka Nath Chowdhuri v. Tafazar Rahman Sarkar*, 20 C.W.N. 1097.

WOODROFFE and CHAUDHURI, JJ.

(63-a) S. 120. See No. 26, *supra*.

(63-b) S. 133—Suit for rent for less than Rs. 50—Interest in land having conflicting claims thereto—Appeal.

A suit for rent for less than Rs. 50 was dismissed by the first Court and an appeal preferred to the District Judge was dismissed by him as incompetent under the provision of S. 153 of the Bengal Tenancy Act. **Held** that the appeal lies to the District Judge since the decree decided a question relating to some interest in land as between parties having conflicting claims thereto. *Satish Chandra v. Amlridin Khadim*, 32 Ind. Cas. 784.

RICHARDSON and IMAM, JJ.

References:—8 C.W.N. 434, F.; 8 C.W.N. 437, 438, R.

(64) S. 147 (a)—Compromise in contravention of, effect of.

A compromise decree passed in contravention of the provisions of S. 147 (a) of the Bengal Tenancy Act is a nullity. *Chand Gorain v. Khub Lal Mahton*, 35 Ind. Cas. 445.

KINGSFORD, J.

References:—17 C.W.N. 496, F.

(65) S. 153—Second appeal—Maintainability of—"The amount claimed in the suit"—'Rent'—Suit claiming rent and damages for breach of contract—Civ. Pro. Code (1908), Ss. 102, 115—Error of law.

The bar provided in S. 153 of the Bengal Tenancy Act cannot be evaded by the joinder of a claim for money with a claim for rent.

The expression 'the amount claimed in the suit' in cl. (a) of S. 153 of the Bengal Tenancy Act has reference to the rent for the recovery whereof the suit has been instituted. The term

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

'rent' may possibly include whatever is recoverable as rent under the provisions of the Bengal Tenancy Act as also sums ancillary to rent, such as interest on rent in arrears, or statutory damages for non-payment of rent.

A suit was brought for recovery of Rs. 82-8 as arrears of rent and damages and of Rs. 50 as damages for breach of contract, i.e., for recovery of the sum of Rs. 132-8. A decree was passed in favour of the plaintiff, which was confirmed on appeal:

Held, that a second appeal was barred under S. 153 of the Bengal Tenancy Act, in so far as the claim for rent was concerned, and in respect of the claim for damages for breach of contract, a second appeal was equally barred under S. 102 of the Code of Civil Procedure.

The High Court cannot interfere under S. 115 of the Code of Civil Procedure on the ground that the lower Court has committed an error of law. *Jamadar v. Jagat Kishore*, 23 C.L.J. 557—34 Ind. Cas. 697.

MOOKERJEE and BEACHOROFF, JJ.

(66) S. 153—Second appeal, whether lies—Tenant claiming *mafi*, as *jeth raiyat*—Meanings of *jeth raiyat* and *mafi*.

Where, in a rent suit valued at less than Rs. 100, the tenant claimed Rs. 3-5 as *mafi* on the whole rent, on the ground that he was a *jeth raiyat*, and the District Judge allowed the *mafi* and the landlord preferred a second appeal:

Held, that no second appeal lies under S. 153 of the Bengal Tenancy Act, as it does not involve a question of the amount of rent annually payable by the tenant.

Jeth raiyats have to perform certain duties under the landlord, as for example, calling tenants for the collection of rent and such similar duties and for that they are allowed by the landlord, by way of wages and instead of payment in cash, a *mafi* from the total rent instead of payment in cash. *Mafi* is not rent because it is a sum of money payable by the landlord to the tenant, whereas rent is money payable by the tenant to the landlord and *mafi* is a set-off against the rent. *Shalikh Safait Hossain v. Shalikh Walzuddin*, 20 C.W.N. 1207 = 1 Pat. L.J. 504.

SEARFUDDIN and ROE, JJ.

(67) S. 153—Rent suit, valued below Rs. 100—Whether second appeal lies—Setting up title by the defendant in himself, whether involves a question of title in land between parties having conflicting claims thereto—Concurrent findings of fact of Courts below, dismissal of appeal for.

Where the plaintiff brings a suit for rent the value of which is less than Rs. 100 against the defendants claiming that she is a *raiya* of the land and that the defendants are her under-*raiya*s and liable to pay rent to her and the defendants deny that they are under-*raiya*s under the plaintiff but plead that their father had purchased the land from the heir of the

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

admitted previous raiyat of the land and that they had been holding the land as the raiyat of the landlord, and both the Courts below found that the plaintiff was in possession for a large number of years and that the defendants failed to prove that they ever held the land as raiyat of the landlord:

Held, that a second appeal was not barred under S. 153 of the Bengal Tenancy Act, as the Courts below decided a question of title to land between the parties having conflicting claims thereto.

The appeal was dismissed, there being concurrent findings of fact of the Courts below. *Babua v. Mussammat Sarli*, 20 C.W.N. 1352. CHAMBER, C.J. and SHARFUDDIN, J.

(68) S. 153—*Appeal—Question of abatement of rent, decision regarding—If appealable—Lease—Lessee's possession disturbed by persons with paramount rights of pasturage over premises demised—Lessee's right to abatement of rent.*

Where the question was whether the defendants were entitled to an abatement of rent or were bound to pay the full rent and the lower appellate Court decreed the plaintiff's claim in full:

Held that the decree decided the amount of rent annually payable by the defendants and as such an appeal against the said decree was not barred by S. 153 of the Bengal Tenancy Act.

Where certain lands were let out at a certain rent and it was subsequently found that some other persons had some rights of pasturage, etc., in a portion of the lands demised:

Held that the lessees were entitled to get an abatement of rent in respect of the lands in which such other persons were found to have rights of pasturage, etc. *Dina Nath Das v. Sarat Chandra Chuckerbutty*, 34 Ind. Cas. 851.

CHATTERJEE and RICHARDSON, JJ.

(69) S. 153—'Order'—*Interlocutory orders covered by the term—Order of remand—Appeal—Whether maintainable.*

The term 'order' as used in S. 153 is not limited to final orders but includes interlocutory orders, such as orders of remand.

Where a Subordinate Judge has not only not decided any of the questions mentioned in S. 153 but has left open all the questions in controversy between the parties and remanded the case for re-trial, as, in his opinion, material evidence had been erroneously excluded by the Trial Court, *held* that an appeal from the order of remand by the Subordinate Judge was not maintainable. *Sashi Bhushan Hazrah v. Srimati Dano Moyee Das*, 34 Ind. Cas. 301.

LANCELLOT SANDERSON, C. J. and MOOKERJEE, J.

(69-a) S. 153—*Suit for rent—Conflicting claims to landlord's right—Second appeal.*

Where in a suit for rent the plaintiff who had acquired the landlord's right by purchase at a sale in execution of a mortgage-decree,

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

made the successors of the previous holder of the landlord's right, parties to the suit and the main question determined by the lower Courts was the question whether the plaintiff had obtained possession of the landlord's right or not:

Held that as the plaintiff's title was assailed by the successors of the previous owner and as there were conflicting claims which were decided by the Courts below, a second appeal lay to the High Court. *Peary Mander v. Anand Ram*, 32 Ind. Cas. 695.

SHARFUDDIN and CHAPMAN, JJ.

(70) S. 153—*Question of title raised but not decided by Munsif exercising final jurisdiction—Appeal to District Judge if lies—District Judge deciding question of title in appeal—Second appeal if lies.* See REVIEW, No. 3, 20 C.W.N. 967.

(71) S. 153. See APPEAL (GENERAL), No. 11, 24 C.L.J. 331.

(72) S. 153 (b)—*Appeal—Suit for rent—Relationship of landlord and tenant—Second appeal—No appeal from primary Court maintainable.*

No appeal lies from a decision of a Court specially empowered to exercise final jurisdiction under S. 153 (b) of the Bengal Tenancy Act, in a suit for rent valued less than Rs. 50 deciding a question of whether or not the relationship of landlord and tenant existed (a).

Where no appeal lies from a primary Court to the first appellate Court, no second appeal lies from the latter Court to the High Court (b). *Kalipada Karmakar v. Shekhar Basini Dasya*, 23 C.L.J. 235—31 Ind. Cas. 812.

HOLMWOOD and MULLICK, JJ.

References:—(a) 35 C. 547, F. (b) 12 C.W.N. 895, F.

(73) S. 155—*Suit to eject tenant under—Limitation—Limitation Act (1908), Sch. I, Arts. 32, 143.*

Art. 32 and not 143, Limitation Act, governed a suit by a landlord brought under S. 155 of the Bengal Tenancy Act to eject a tenant who had allowed a portion of his holding to be encroached upon by a stranger and had exchanged another plot of land of the tenancy with the stranger in contravention of the terms of his *kabuliat*. *Taher Mondal v. Tarafdi Gharami*, 20 C.W.N. 661—33 Ind. Cas. 923.

SHARFUDDIN and NEWBOULD, JJ.

References:—26 C. 564—3 C.W.N. 464, Rel.

(74) S. 155—*Landlord and Tenant—Breach of covenant—Notice—Notice requiring surrender—Invalid notice—Ejectment, suit for.*

The object of a notice to quit given under S. 155 is to give the tenant an opportunity of remedying the breach (if it is capable of being remedied), so that on remedying the breach and on payment of a reasonable compensation he may avoid ejectment. Where under the notice given, the tenant was required to quit the land even if he remedied the breach,

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

such a notice is not a proper notice under S. 155 of the Bengal Tenancy Act and no suit for ejectment can be sustained on such notice. **Kali Chandra Chakravarty v. Kali Kumar Majumdar**, 34 Ind. Cas. 587.

CHATTERJEE and RICHARDSON, JJ.

References:—22 O. 77; (1893) 2 Ch. 271; (1900) 1 Ch. 496, R.

(75) Ss. 155 (b), 178, 179. See **LANDLORD AND TENANT**, No. 63, 34 Ind. Cas. 497.

(76) Ss. 155, 188. See **LANDLORD AND TENANT**, No. 22, 24 O.L.J. 40.

(77) S. 157—*Trespass, suit on—Claim in the alternative for rent.* **Maharaja Birendra Kishore Mankiya Bahadur v. Girls Chandra Nag Banikya**, 22 O.L.J. 154=30 Ind. Cas. 949. See Final Part, 1915, Col. 139.

(78) S. 160, cl. (g)—“*Protected interest*”—“*Express permission*”—*Permission at the time of creation of each sub-tenancy, if necessary—General permission, if sufficient.*

S. 160, cl. (g) of the Bengal Tenancy Act does not contemplate that the tenant should come each time to his landlord and ask him for express authority in writing, authorising the specific interest which the tenant intends to create. A permission to create an interest of a particular description given in the lease granted by the landlord is sufficient for the purposes of S. 160, cl. (g) of the Act.

A deed by which a *daryutni* was created contained the following words:—“I give you a right to alienate the land at pleasure by gift and sale, and to grant *sepatni* by settlements of your own interest:”

Held, that the words were sufficient to authorise the creation of a sub-tenancy within the meaning of S. 160, cl. (g) of the Bengal Tenancy Act, and as such a *sepatni* created by the *daryutnidar* was a “protected interest” not liable to be annulled under the Act (a). **Bidhumukhi Chowdhurani v. Asmatulla**, 24 C.L.J. 180=36 Ind. Cas. 669.

SANDERSON, C.J. and MOOKERJEE, J.

References:—(a) 39 C. 138; 16 C.W.N. 561, D.

(79) Ss. 160, 161, 165, 167—*Possession, suit for—Osut taluk—Sale for arrears of rent—Protected interest—Incumbrance—Burden of proof—Notice of annulment—Certified purchaser to apply—Certified purchaser benamidar—Declaration in the application for execution of rent decree, if admissible in favour of declarant—Evidence Act, S. 13.* **Jogesh Chunder Patitunda v. Rohini Kumar Roy Chowdhry**, 21 O.L.J. 66=34 Ind. Cas. 215. See Final Part, 1915, Col. 140.

(79-a) S. 161. See No. 79, *supra*.

(80) Ss. 161, 167—“*Incumbrance*,” *portion of putni tenure purchased from tenant, if—Sale of tenure in execution of rent-decree against registered tenant—Purchaser if must annul*

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

transferee's interest. **Abdul Rahman Chowdhuri v. Ahmadar Rahman**, 19 O.W.N. 1217 =22 C.L.J. 356=48 C. 558=31 Ind. Cas. 554. See Final Part, 1915, Col. 141.

(81) Ss. 161, 170 (3)—*Occupancy holding—Unregistered transfer of whole holding—Whether transferee has an interest “voidable by the sale.”*

When the occupancy right of a judgment-debtor has been advertised for sale in execution of a decree for rent, the transferee of the occupancy holding, whose name has not been registered in the books of the landlord and who has in no way been recognized by the landlord, is not a person who, within the meaning of S. 170, sub-S. (3) of the Bengal Tenancy Act, has in the tenure or holding an interest “voidable on the sale.”

Such an unregistered transferee of an occupancy holding is not entitled to make a deposit under S. 170 (3) of the Bengal Tenancy Act, 1885.

The interests voidable on the sale referred to in S. 170 are those interests which are incumbrances within the meaning of S. 161 (a).

An unregistered purchaser of a portion of a holding, does not hold an incumbrance within the meaning of S. 161 inasmuch as an absolute sale of a portion of the holding is not in limitation but in destruction of the interest to which it related. *A fortiori* the sale of an entire holding is not in limitation of the interest of the tenant. **Maharaja Sir Rameshwar Singh Bahadur v. Raghunandan Khasas**, 1 Pat. L.J. 403.

CHAMIER, C.J. and SHARFUDDIN, J.

Reference:—(a) 19 C.W.N. 1217, F.

(82) Ss. 164 (1), 165, 167—*Tenure, sale of—Bid insufficient to pay off decree and costs—Sale concluded—Sale, effect of.* **Nawab Sir Sallimullah Bahadur v. Rahuuddi**, 21 C.L.J. 659=20 C.W.N. 156=30 Ind. Cas. 68=43 C. 263. See Final Part, 1915, Col. 141.

(82-a) S. 165. See Nos. 79 and 82, *supra*.

(83) S. 167—*Ejectment—Purchaser seeking to annul the sub-tenancy—Sale of superior tenure for arrears of rent—Adverse possession against sub-tenant—Incumbrance—Notice.*

When a person has, by adverse possession against a sub-tenant, acquired a statutory title to a portion of the lands comprised in the sub-tenancy, he has an interest in the sub-tenancy, so that when, on a sale of the superior tenancy for arrears of rent, the purchaser seeks to annul the sub-tenancy as an “incumbrance,” such person stands in the position of an “incumbrancer” and is entitled to notice under S. 167 of the Bengal Tenancy Act. **Bhushan Chandra Ghose v. Srikantha Banerjee**, 23 C. L.J. 485=21 C.W.N. 155=33 Ind. Cas. 957.

SANDERSON, C.J. and MOOKERJEE, J.

References:—14 O.L.J. 136; 16 C.L.J. 839, D.

(83-a) S. 167. See Nos. 79, 80 and 82, *supra*.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

(83-b) S. 170. See Nos. 7 and 81, *supra*.

(84) S. 170 (3)—*Transfer of non-transferable holding—Deposit under S. 170 (3) by transferee on behalf of tenant—Acceptance of deposit by landlord, whether amounts to recognition of transfer.*

Where a transferee of a non-transferable holding deposits rent under S. 170 (3) of the Bengal Tenancy Act on behalf of the recognized tenant, the landlord shall not by accepting the deposit be deemed to have recognized the transferee as his tenant merely because in making the deposit the transferee described himself by the words "the man in possession by virtue of purchase." *Jagendra Nath Haldar v. Joggeswar Mondal*, 33 Ind. Cas. 718.

HOLMWOOD and IMAM, JJ.

References:—10 O.W.N. 438; 17 O.W.N. 156 = 15 Ind. Cas. 166; 34 C. 902 (P.C.); 17 C.W.N. 163 = 20 C.W.N. 39 = 20 C.L.J. 106 = 5 Ind. Cas. 176; 18 O.W.N. 971 = 20 C.L.J. 52 = 42 C. 172 = 27 Ind. Cas. 61, R.

(85) Ss. 170, 171. See CONTRACT ACT, No. 73, 34 Ind. Cas. 341.

(86) S. 171—*Benefits of, whether unregistered co-sharer in occupancy holding entitled to.*

A person cannot obtain the benefit of S. 171, Bengal Tenancy Act, 1885, on the ground of being an unregistered co-sharer in the occupancy holding against the registered holder of which the decree for rent was obtained. *Hareesh Chandra Bose v. Ram Govinda Nandy*, 35 Ind. Cas. 584.

WOODBROFFE and CHOWDHURI, JJ.

References:—10 C.L.J. 473; 12 C.L.J. 609, D.; 9 C.W.N. 843; 12 C.W.N. cxxxii, R.

(86-a) S. 171. See No. 85, *supra*.

(87) S. 173 (3). See SETTING ASIDE SALE, No. 2, 33 Ind. Cas. 574.

(87-a) S. 174, *appealability of order under.*

An appeal does not lie from an order passed on an application under S. 174 of the Act. *Moulvi Salyid Razl-ud-din Hossain v. Bende-shri Prasad Singh*, 36 Ind. Cas. 769.

MULLICK, J.

(88) S. 174—*Deposit to be made by judgment-debtor himself—Transferee, whether can make a valid deposit.* *Surendra Narayan Singh v. Latchmi Koer*, 29 Ind. Cas. 840 = 43 O. 100. See Final Part, 1915, Col. 142.

(88-a) S. 174. See CIV. PRO. CODE (1908), No. 507, 36 Ind. Cas. 769.

(88-b) S. 178. See Nos. 20 and 75, *supra*.

(88-c) S. 179. See Nos. 18, 36, 37 and 75, *supra*.

(89) S. 182—*Tenant having occupancy right in certain Jamas in one village—Another tenancy under the same landlord in different village—Applicability of S. 182.*

For the application of S. 182, Bengal Tenancy Act, it is not necessary that the homestead and the raiyat should be either in the same village or under the same landlord.

So where a tenant had occupancy right in certain Jams under a landlord in one village

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Contd.).

and subsequently acquired a tenancy for building a shop under the same landlord in a different village in which he afterwards came to reside, held, the provisions of the Bengal Tenancy Act applied to the latter tenancy. *Bhikariram Bhagat v. Maharaj Bahadur Singh*, 43 C. 195 = 34 Ind. Cas. 152 = 25 C.L.J. 195.

D. CHATTERJEE and CHAPMAN, JJ.

References:—13 C.L.J. 255; 9 O.W.N. 416; 10 O.W.N. 944; 14 C.L.J. 170, R.

(90) S. 184, Sch. III, Art. 3—*Legitimate purpose and scope of—Governs relations of landlord and tenant only—Special limitation—Dispossession sufficient to deprive tenant of right of suit.*

In determining what Art. 3 of Sch. III of the Bengal Tenancy Act means, the purpose and scope of the Act, which governs the relations of landlord and tenant only, must not be left out of sight. It was not the design of the Act to deprive a tenant of the rights that he otherwise possesses against a third person between whom and himself there was no relationship of landlord and tenant. It was only intended to deal with such rights as existed between landlord and tenant.

To deprive a tenant of his right of suit, there must be a plain dispossession within the meaning of Art. 3 of the schedule. *Krishna Chandra Bagdi v. Satish Chandra Banerji*, 20 C.W.N. 872 = 35 Ind. Cas. 365.

JENKINS, C.J. and N.R. CHATTERJEE, J.

(91) S. 185—*Homestead land—Land taken to gather and store crops—Person if raiyat—Homestead—S. 182, applicability of.* *Dina Nath Nag v. Sashi Mohan Dey Tarafdar*, 22 C.L.J. 219 = 31 Ind. Cas. 16 = 20 O.W.N. 550. See Final Part, 1915, Col. 143.

(91-a) S. 188. See Nos. 54 and 76, *supra*.

(91-b) S. 191. See No. 50, *supra*.

(91-c) S. 192. See No. 50, *supra*.

(91-d) Chap. 13—*Suit to recover katiari dues—Jurisdiction of Small Cause Court.*

A claim to katiari, being for a professional tax, a suit to recover such dues is cognisable by Court of Small Causes and should not be confounded with a suit for agricultural rent governed by the Bengal Tenancy Act. *Maharaja Sir Rameshwar Singh Bahadur v. Bikan Mamin*, 36 Ind. Cas. 600.

ROE, J.

(92) Sch. III, Part I. cl. (3). See LIMITATION ACT (1908), No. 180, 1 Pat. L.J. 506.

(92-a) Sch. III, Art. 1. See No. 26, *supra*.

(93) Sch. III, Art. 2—*Limitation Act (1908), S. 29, Sch. I, Art. 116—Arrears of rent, suit to recover—Agricultural land, lease of, for agricultural purposes—Transfer of Property Act, S. 107.* *Rash Behari Lal Mandal v. Tiluckdhari Lal*, 29 Ind. Cas. 797 = 23 C.L.J. 111 = 20 O.W.N. 485. See Final Part, 1915, Col. 144.

2.—Bengal Acts—(Continued).

Act VIII of 1885 (Bengal Tenancy)—(Concl'd.).

(94) *Sch. III, Art. 2, cl. (b)—Suit for rent of jalkar—Limitation.*

A suit for rent of a *jalkar* (fishery right) is governed by the rule of limitation (three years) prescribed by Art. 2, cl. (b) in Sch. III of the Bengal Tenancy Act (a). *Raja Shashi Shek-harwar Roy v. Nanda Lal Mandal*, 39 Ind. Cas. 110.

N.R. CHATTERJEE and RICHARDSON, JJ.
Reference:—(a) 19 C.W.N. 514, F.

(95) *Sch. III, Art. 3—Dispossession of tenant by one holding dual capacity of landlord and auction-purchaser—Limitation.*

A person who holds the dual capacity of the landlord and also of the purchaser of the holding, when he disposes the tenant, such a case comes within the meaning of Art. 3 of Sch. III of the Bengal Tenancy Act (a).

The dispossession referred to in Art. 3 of Sch. III, Bengal Tenancy Act, need not be a dispossession by the landlord as such. *Faul Bhuan Sarkar v. Pulla Chandra Mandal*, 35 Ind. Cas. 838.

FLETCHER and TEUNON, JJ.

References:—(a) 41 O. 52; 13 O.W.N. 108; 24 Ind. Cas. 860, F.; 17 C.W.N. 817, Not F.

(96) *Sch. III, Art. 6—Landlord parting with his interest as such—Suit for arrears of rent thereafter—Decree—Application for execution—Art. 6 inapplicable—Applicability of general Law of Limitation.*

A decree-holder who has parted with his interest as landlord before he brought his suit for arrears of rent, cannot be held to have been suing as a landlord in respect of arrears of rent from his tenant and the special law of limitation contained in Art. 6, Sch. III of the Bengal Tenancy Act, 1885, does not therefore apply and the decree-holder was entitled to execute his decree under the general law of limitation (a). *Satis Ranjan Das v. Nasaraddi Patwari*, 34 Ind. Cas. 145.

D. CHATTERJEE and BEAHCROFT, JJ.

Reference:—(a) 41 O. 926, F.

(97) *Sch. III, Art. 6—Rent-decree, obtained by co-sharer landlord—Limitation for execution. Byomkesh Chakrabarty v. Haladhar Mandal*, 19 O.W.N. 1271=31 Ind. Cas. 700. See Final Part, 1915, Col. 145.

Act XII of 1887 (Bengal and Assam Civil Courts).

(1) See CENTRAL PROVINCES ACT XVIII OF 1881 (LAND REVENUE), No. 4, 1 Pat. L.J. 290.

(2) Execution of decrees in suit valued at over Rs. 5,000 but decreed for less—Appeal. See EXECUTION OF DECREE, No. 24, 31 Ind. Cas. 496.

(3) S. 37—Effect of the section—Right of persons to adopt law other than their own personal law—Proof of custom. See MAHOMEDAN LAW—CUSTOM, No. 1, 33 Ind. Cas. 114.

(4) S. 87. See PRE-EMPTION, No. 10, 20 O.W.N. 1048.

2.—Bengal Acts—(Continued).

Act I of 1895 (Public Demands Recovery).

(1) S. 9 (9), (8)—*Certificate of sale, when is vitiated by irregularities—Nullity and irregularity, distinction between—Requisition not signed—Certificate not in due form—Certificate signed mechanically—Certificate Officer to exercise discretion in issuing certificate—Proof of service of notice—Entry in order sheet if sufficient—Presumption in favour of regularity of official acts if arises when proceedings shown to have been carried on carelessly and in slovenly manner—Issues, not expressly framed, when may and when should not be determined—Attachment if creates lien or confers title. Syed Mohiuddin v. Pirthichand Lal Choudhury*, 19 O.W.N. 1159=31 Ind. Cas. 664. See Final Part, 1915, Col. 146.

(2) S. 109. See FRAUD, No. 2, 20 C.W.N. 819.

Act V of 1897 (Estates Partition).

(1) Ss. 10, 95. See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 9, 33 Ind. Cas. 721.

(2) Ss. 11 (c), 113 (c), 114. See BENGAL ACT VIII OF 1876 (ESTATES PARTITION), No. 2, 1 Pat. L.J. 491.

(2-a) S. 46 (c)—*Khasra—Absence of preparation according to Batwara Act—Evidentiary value of Khasra.*

Where a *Khasra* is not prepared in accordance with the *Batwara Act*, it is absolutely valueless in evidence, if not inadmissible. Therefore such *Khasra* cannot form the basis for the settlement of rent. *Rai Babu Gulab Chand Saheb v. Syed Salek Hussain*, 35 Ind. Cas. 513.

SHARFUDDIN and ROE, JJ.

References:—4 Ind. Cas. 316=13 C.W.N. 93, R.

(2-b) S. 88. See No. 4, *infra*.

(2-c) S. 95. See No. 1, *supra*.

(3) S. 99—*Lands held severally in pursuance of a private arrangement—Tenure, creation of, by one co-sharer—Tenure, if binding on other co-sharers—Co-sharers getting lands with-in tenure, on partition—Defendant's allegation untrue—Defendant, if can succeed—Legislature—Presumption. Nogendra Mohan Ray v. Pyari Mohan Saha*, 21 O.L.J. 605=20 C.W.N. 319=43 O. 103=30 Ind. Cas. 420. See Final Part, 1915, Col. 147.

(3-a) S. 113. See No. 2, *supra*.

(3-b) S. 114. See No. 2, *supra*.

(4) Ss. 119, 88—*Suit against order of Revenue Court, when lies. Gurbuksh Prasad Tewari v. Kall Prosad Narain Singh*, 19 O.W.N. 1322=32 Ind. Cas. 167. See Final Part, 1915, Col. 148.

Act III of 1898 (Bengal Tenancy Amendment).

See LANDLORD AND TENANT, No. 50, 33 Ind. Cas. 415.

2.—Bengal Acts—(Continued).**Act III of 1899 (Calcutta Municipal).**

(1) S. 3 (37). See BENGAL ACT V OF 1911 (CALCUTTA IMPROVEMENT), No. 1, 24 C.L.J. 246.

(2) S. 286—*House drain, property in—Drain vesting in the Corporation, effect of.*

The fact that the drain is a house drain, made by the owner of the adjoining premises for the outlet of water therefrom, does not exclude it from the operation of S. 286 of the Calcutta Municipal Act.

When a road or a drain vests in a Municipality, the effect is not to confer the full proprietary right in the soil itself covered by the road or the drain on the Commissioners (a).

The property of the local authority concerned does not extend further than is necessary for the maintenance and user of the highway as a highway; subject to this qualification, the original owner's rights and property remain, and, if the highway ceases to be a highway, the owner becomes entitled to full and unabridged rights of ownership in the property. *Gunendra v. Corporation of Calcutta*, 24 C. L.J. 358 = 21 C.W.N. 234.

MUKERJEE and CUMING, JJ.

References:—(a) 13 C. 38 and other cases referred to.

(3) Ss. 341, 617, 618, 619—*Compensation for removal of fixtures by Calcutta Municipal authority—Whether payment of compensation is a condition precedent to such removal—Court by which claim to such compensation is cognizable—Whether before removal a suit will lie to declare right to compensation in case of removal.*

The Calcutta Municipal Act, 1899, provides that the Corporation shall compensate every person who suffers damage by the removal of fixtures erected before June 1, 1863.

The Corporation served J with notices under S. 341 to remove certain structures and thereafter obtained orders from the Magistrate for their demolition; but took no steps to enforce these orders. J brought a regular suit in the Court of Subordinate Judge against the Corporation claiming (1) declaration that the fixtures were erected before June 1, 1863; (2) declaration that she was entitled to compensation for loss she would suffer by their removal; (3) declaration that the Corporation could not remove them till compensation was paid; (4) that the Court should fix the amount of the compensation; and (5) an injunction restraining removal till the compensation was paid.

Held, (1) that on the true construction of S. 341 (3), the assessment of compensation was not a condition precedent to the demolition of the structures, (2) that Courts other than the Small Causes Court were, by S. 617, debarred from fixing the compensation, and therefore as the suit sought relief under any but the first two heads, it was misconceived, but that J was entitled under S. 42 of the Specific Relief Act I of 1877, to a declaratory decree for the first two claims, the Corporation having denied her right to compensation until the hearing of

2.—Bengal Acts—(Continued).**Act III of 1899 (Calcutta Municipal)—(Concl'd.).**

the appeal against the decree of the Subordinate Judge. *Joseph v. Corporation of Calcutta*, 18 Bom. L.R. 878 = 20 M.L.T. 383 = 24 C.L.J. 493 = (1916) 2 M.W.N. 544 (P.C.) = 5 L.W. 199 = 21 C.W.N. 194 = 36 Ind. Cas. 912.

LORD BUCKMASTER, LORD ATKINSON and SIR JOHN EDGE.

(4) S. 617. See No. 3, *supra*.

(5) S. 618. See No. 3, *supra*.

(6) S. 619. See No. 3, *supra*.

Act I of 1903 (Bengal Tenancy Validation and Amendment).

See LANDLORD AND TENANT, No. 50, 33 Ind. Cas. 415.

Act IV of 1906 (Sambalpur Civil Courts).

(1) See CENTRAL PROVINCES ACT XVIII OF 1881 (LAND REVENUE), No. 4, 1 Pat. L. J. 290.

Act I of 1907 (Bengal Tenancy Amendment).

S. 22—Act VIII of 1885 (Bengal Tenancy), as amended by. See LANDLORD AND TENANT, No. 60, 34 Ind. Cas. 75.

Act VI of 1908 (Chota Nagpur Tenancy).

(1) S. 47—*Execution of mortgage decree—Sale of right of a raiyat—Validity—Duty of Court—Objection to sale when may be taken.*

S. 47, Chota Nagpur Tenancy Act, provides that no decree or order shall be passed by any Court for the sale of the right of a raiyat in his holding, nor shall any such right be sold in execution of any decree or order. It is the duty of the Court executing the decree to consider whether the sale of the property is forbidden by the section.

An objection to the sale might be taken after the passing of the decree for sale. *Jadhu Mahto v. Kall Prasanno Bhattacharjee*, 1 Pat. L.J. 33 = 34 Ind. Cas. 733.

CHAMIER, C.J. and JWALA PRASAD, J.

Reference:—40 O. 534, F.

(2) Ss. 77, 208. See GHATWALI TENURE, No. 2, 1 Pat. L.J. 601.

(3) Ss. 81, 83, 87, 256—*Dispute under S. 83, jurisdiction of Settlement Officer, upon such disputes, to record entry that tenure mundari khuntkati—Suit for rent instituted under Act X of 1859—Decree and purchase by landlord in execution after Chota Nagpur Tenancy Act brought into force and land recorded as above at Settlement—Title to tenure.*

Under S. 83 of the Chota Nagpur Tenancy Act, the Settlement Officer has jurisdiction to decide a dispute between landlord and tenant as to whether the latter was a *mundar khuntkatar* and to record an entry to the effect in the record-of-rights.

Where, pending a suit for rent brought under Act X of 1859, the Chota Nagpur Tenancy Act (VI of 1908 B.O.) came into operation, and the landlord in execution of the decree obtained

2.—Bengal Acts—(Continued).

Act VI of 1908 (Chota Nagpur Tenancy) —(Continued).

in the suit put up the holding to sale and purchased it, but meanwhile, in the course of settlement proceedings, the land was recorded as the *mundari khuntkati* of the defendant.

Held that, although the new Act did not apply to the suit, it governed proceedings in execution instituted after the suit had terminated in a decree; and the entry that the land was the *mundari khuntkati* of the tenants being conclusive evidence under S. 256 of the Act, the landlord acquired no title in the land. *Jogendra Nath Dey v. Gour Singh Mura*, 20 C.W.N. 582=34 Ind. Cas. 385.

D. CHATTERJEE and MULLICK, JJ.

(3-a) S. 83. See No. 3, *supra*.

(3-b) S. 87. See No. 3, *supra*.

(4) Ss. 87, 258, 265 (viii)—*Judicial Commissioners hearing appeals in cases under S. 87 if Revenue Officer—Order not modifiable by suit in Civil Code—Order to what extent res judicata—Civ. Pro. Code (1908), S. 11. Tekati Ganesh Narain Sahi Deo v. Maharaja Pratap Udai Nath Sahi Deo*, 19 C.W.N. 998=23 C.L.J. 118=43 C. 136=31 Ind. Cas. 691. See Final Part, 1915, Col. 150.

(5) Ss. 184, 191 (2), 208 (2), 210—*Rent decree—Execution by arrest of judgment-debtor in the first instance, if legal—Effect. Thakur Madan Mohan Nath Sahi Deo v. Maharaja Pratap Udai Nath Sahi Deo*, 20 C.W.N. 111=34 Ind. Cas. 22. See Final Part, 1915, Col. 150.

(5-a) S. 191. See No. 5, *supra*.

(5-b) S. 208. See No. 5, *supra*.

(5-c) S. 210. See No. 5, *supra*.

(5-d) Ss. 212 and 215 (1) (c)—*Setting aside sale—Nature of interest entitling exercise of right—Proof of title—“Relating to execution,” meaning of.*

The expression “relating to the execution” includes an order passed in respect of a payment for the purpose of getting a sale set aside.

An applicant under S. 212 need not prove that the interests have been lawfully acquired. If he is able to satisfy the Court that he claims an interest and alleges lawful title, the mere fact of the claim will be sufficient to bring him under S. 212. It will not be necessary for him to prove his title. The section clearly means that parties who desire to have a sale set aside should not be held down to strict proof, which may require elaborate evidence for the purpose of showing that the origin of the title was lawful. The proceeding contemplated by the section is a summary proceeding in which the mere claim to a lawful title will be sufficient. *Panchanon Mahata v. Kanai Mahata*, 36 Ind. Cas. 829.

MULLICK, J.

(5-e) S. 215. See No. 5d, *supra*.

(6) S. 231—*Mortgage-decree—Execution-sale—Purchase by decree-holder—Application by*

2.—Bengal Acts—(Continued).

Act VI of 1908 (Chota Nagpur Tenancy) —(Concluded).

judgment-debtor to set aside sale—Limitation. See MORTGAGE (GENERAL), No. 19, 20 C.W. N. 1243.

(7) S. 266. See No. 3, *supra*.

(8) S. 258. See No. 4, *supra*.

(9) S. 265. See No. 4, *supra*.

Act V of 1911 (Calcutta Improvement).

(1) *Preamble*, Ss. 2, 36, 39, 40, 41, 42, 43, 44, 47, 48, 49, 50, 52, 68, 69, 78, 81, 82, 83, 84, 88, 89, 122, 123, 124, 125, 155, 156 and 160 and *Schedule—Calcutta Municipal Act (III of 1899, B.C.)*, S. 3 (37)—*Land Acquisition Act (I of 1894)*, Ss. 6 (3) and 23—*Indian Councils Act, 1861 (24 and 25 Vict., Chap. 67)*, S. 43—*Recoupment—Taxation—Finance—Acquisition, by agreement—Acquisition, compulsory—Acquisition, abandonment of—Surplus land, disposal of—“Affected”—“Lay out”—“Re-lay out”—“Providing building sites,” meaning of these terms—Jurisdiction—Sanction, notification of—Duly framed and sanctioned—“Street”—Area—Suit, bar of—Civil Court, Jurisdiction of—Trustees, powers of—Ultra vires—Statutes, construction of—Executive authorities—Legislature, delegation by, to executive—Improvement scheme.*

The Calcutta Improvement Act does not authorize the trustees to acquire land compulsorily for the purpose of recoupment. S. 69 is the only provision in the Act for compulsory acquisition and under that section land can be compulsorily acquired only for carrying out any of the purposes of the Act. Recoupment is not one of the purposes of the Act which are enumerated in the Preamble and are formulated in detail in Ss. 36, 39 and 52.

Ss. 41, 42, 78, 81, 122 and 123 do not by necessary implication authorize the compulsory acquisition of land for recoupment.

Ss. 41 and 42 specify matters which must or may be provided for, in an improvement scheme; they do not confer a right to acquire land compulsorily.

Ss. 78 and 81 treat of the abandonment of acquisition of unnecessary land and disposal of superfluous land respectively; neither section creates a right to acquire land compulsorily.

Ss. 122 and 123 relate to methods of account and do not touch the question of right of compulsory acquisition for recoupment.

The trustees are not competent to initiate a street scheme for one of the purposes mentioned in S. 39 and specified in their resolution, and then proceed with the scheme as if they had assumed jurisdiction for a different purpose.

The area which is intended to be benefited by a street-scheme must be first determined under S. 39, and then the scheme has to be drawn up with reference to the elements mentioned in S. 40. The area so determined is larger than the land to be acquired for the execution of the improvement works.

2.—Bengal Acts—(Continued).**Act V of 1911 (Calcutta Improvement)—(Ctd.).**

The expression "providing building sites" in S. 89 means making it possible to use as building site land which cannot be now used as building site; it does not mean buying up land already fit for building site, pulling down houses existing thereon and selling the land at a profit for erection of buildings.

The expression "laying out or re-laying out" in S. 41 (b) cannot apply to the entire land comprised in the area intended to be benefited by a street-scheme.

The expression "street" does not include the abutting lands on both sides and the houses thereon, as it does in the English Local Government Act, 1858; it has the same meaning as in S. 3 (37) of the Calcutta Municipal Act.

The term 'affected' in S. 42 (a) means neither 'beneficially affected or improved in value' nor 'prejudicially affected or impaired in value,' but signifies 'acted upon physically or materially.' Land is affected by the execution of an improvement scheme within the meaning of S. 42 (a) when by the construction of the improvement works, there is a physical interference, with any right, public or private, which the owner is entitled to exercise in connection with that property.

S. 49 (2) does not bar the jurisdiction of the Civil Court to determine whether the trustees have or have not acted in violation or excess of statutory authority. As Ss. 155 and 160 show, S. 49 does not bar suits of all descriptions; it merely shows that after the publication of the notification of sanction by the Local Government, it must be assumed that the scheme has been framed and sanctioned duly, that is, in conformity with the procedure prescribed by the Act.

S. 156 does not apply to a suit brought not because of an act done but for the purpose of an injunction to restrain an act threatened to be done.

The term 'acquisition' does not necessarily mean compulsory acquisition under the provisions of the Land Acquisition Act; Ss. 68 and 69 indicate the distinction between acquisition by agreement and compulsory acquisition.

In any concrete case, if the competence of the Board to compulsorily acquire land, is called in question, the test to be applied is, whether the land is proposed to be acquired for carrying out one or other of the purposes of the Act as indicated in the Preamble and developed in Ss. 36, 39 and 62.

Mode of construction of Statutes which confer on a corporation extensive powers of interference with private rights explained. Where the objects of the Statute do not obviously imply such an intention, it must be presumed that the Legislature does not desire to confiscate private property or to encroach upon private rights; it is expected that if the Legislature intended to confer on the executive authorities unlimited powers of interference

2.—Bengal Acts—(Concluded).**Act V of 1911 (Calcutta Improvement)—(Ctd.).**

with private rights, it would manifest its intention plainly in express words, at any rate by clear and necessary implication.

Distinction between acquisition for recoupment and taxation for purpose of recoupment explained. When a proposed acquisition is abandoned on condition of periodical payment by the owner of a sum fixed in perpetuity or the payment in lump of the capitalised value thereof, a tax is in essence imposed on the land; such a tax can be validly imposed only with the sanction of the proper authorities duly obtained under S. 43 of the Indian Councils Act, 1861, and the Statute imposing the burden must do so in clear and unambiguous language.

Proper use of judicial precedents explained; they are of value only in so far as they enunciate principles. No useful purpose is served, when a question arises as to the construction of an Act, by reference to judicial decisions on the meaning of other Acts which, though similar in scope and purpose, are couched in different terms and provide machinery of a different type to carry out their objects. *Trustees for the Improvement of Calcutta v. Chandra Kanta Ghosh*, 24 O.L.J. 246—21 O.W.N. 8=36 Ind. Cas. 749.

MOOKERJEE and CUMING, JJ.

(2) S. 71—*Special Tribunal, if Court, and may call for records of other Courts—Land Acquisition Act (I of 1894), S. 53.*

The Special Tribunal constituted to hear reference against orders passed by the Calcutta Improvement Trust has been constituted a Court under the Land Acquisition Act of 1894 and, under S. 53 of that Act, is governed by the provisions of the Code of Civil Procedure and has the powers of a Judge under that Code.

The power to call for the records of other Courts is a power which is inherent in the Judge of a Land Acquisition Court and consequently in the Special Tribunal. *Nareesh Chandra Bose v. Hira Lal Bose*, 20 C.W.N. 360=43 C. 239=34 Ind. Cas. 268.

HOLMWOOD and MULLICK, JJ.

Act VI of 1914 (Bengal Medical).

(1) Ss. 27, 33—*Rules framed under the Act by Local Government if ultra vires—Specific Relief Act, S. 45—Mandamus—Omission of qualified candidate's name from Election Roll—Mistake of returning officer—Jurisdiction of High Court to interfere* *Narendra Nath Basu v. Mr. H. L. Stephenson*, 19 O.W.N. 129=31 Ind. Cas. 618. See Final Part, 1914, Col. 125.

(2) S. 33. See No. 1, *supra*.

3.—Bombay Acts.**Act V of 1862 (Bombay Bhagdari).**

(1) S. 3—*Alienation—Transfer by testamentary devise is alienation.* *Jawar Jijibhai v. Haribhai Hanaji*, 17 Bom. L.R. 1181=40 B. 207=33 Ind. Cas. 426. See Final Part, 1915, Col. 161.

3.—Bombay Acts—(Continued).

Act III of 1874 (Bombay Hereditary Offices).

As amended by Bom. Act III of 1910, S. 36—*Vatandar—Question as to heirship—Civil Court—Jurisdiction.* *Shankar Babaji Kulkarni v. Dattatraya Bhiwaji*, 17 Bom. L.R. 725=40 B. 55=30 Ind. Cas. 925. See Final Part, 1915, Col. 152.

Act II of 1876 (Bombay City Land Revenue).

Estoppel—Negligence of Collector in breach of statutory duty when makes Government liable—*Bombay City Land Revenue Act, II of 1876, scope and object of—Person misled by entry in registers kept under the Act as to the nature of title under which land is held by lessees under Government if may sue Government—Misrepresentation which did not affect decision of person misled.* *Merwanji Muncherji Cama v. The Secretary of State*, 19 O.W.N. 1056= (1915) M.W.N. 596=2 L.W. 701=29 M.L.J. 999=13 A.L.J. 1026=39 B. 664=30 Ind. Cas. 599 (P.C.). See Final Part, 1915, Col. 153.

Act III of 1876 (Mamlatdars' Courts).

(1) Ss. 25, 36, 64. See JURISDICTION OF CIVIL COURTS, No. 4, 18 Bom. L.R. 779.

(2) S. 36. See No. 1, *supra*.

(3) S. 64. See No. 1, *supra*.

Act X of 1876 (Bombay Revenue Jurisdiction).

(1) Ss. 3, 11—*Manager, Encumbered Estates, Sind—Whether a 'Revenue' Officer—Order passed by him—Suit against him without filing an appeal—Not barred by S. 11—Former suit against him without notice under S. 80, Civ. Pro. Code—Later suit after withdrawal—Time spent in former suit—Exclusion—Limitation Act, S. 14.*

The Manager, Encumbered Estates, Sind, is not a Revenue Officer as that term is defined in S. 3 of the Revenue Jurisdiction Act, and S. 11 of that Act is no bar to the institution of a suit against him without first preferring an appeal against his order.

Where the appellant filed a suit on the same cause of action which failed because he had not given the manager the notice required by S. 80, Civ. Pro. Code, and the failure to give notice was evidently in deference to a ruling which was subsequently overruled; *held*, that the former suit was prosecuted with due diligence and in good faith, and that the appellant was entitled, under S. 14 of the Limitation Act, to the exclusion of the time which was spent in the former suit. *Gehimal v. The Manager, Encumbered Estates in Sind*, 9 S.L.R. 167=32 Ind. Cas. 616.

PRATT, J.C. and CROUCH, A.J.C.

*References:—*5 S.L.R. 181; 3 S.L.R. 175; 6 S.L.R. 260, R.

(3) S. 4, cl. (a). See JURISDICTION OF CIVIL COURTS, No. 4, 18 Bom. L.R. 779.

(3) S. 6. See BOM. ACT V OF 1879 (BOMBAY LAND REVENUE CODE), No. 5, 18 Bom. L.R. 929.

(4) S. 11. See No. 1, *supra*.

3.—Bombay Acts—(Continued).

Act V of 1879 (Bombay Land Revenue Code).

(1) Ss. 56, 153. See TRUSTS ACT, No. 13, 18 Bom. L.R. 438.

(2) S. 74. See RAZINAMA, No. 1, 18 Bom. L.R. 976.

(3) S. 111. See No. 5, *infra*.

(4) S. 153. See No. 1, *supra*.

(5) Ss. 154, 111—*Gujarat Talukdars' Act (Bom. Act VI of 1888), S. 33—Recovery of arrears of assessment—Attachment of ornaments of a Khatedar of the Talukdar village—Revenue administration of the village carried on by Talukdari Settlement Officer under a guardianship order during the minority of the Talukdar—Income-Tax Act (II of 1886)—Seizure of account-books for ascertaining liability to pay income-tax—Damages for the wrongful seizure—Revenue Jurisdiction Act (X of 1876), S. 6.*

Owing to the minority of a Talukdar, the revenue administration of his village was entrusted to the Talukdari Settlement Officer and under him to the Mamlatdar of Prantij, under a guardianship order passed by the District Court. To recover the arrears of assessment for past years from one of the Khatedars of the village, the Mamlatdar attached ornaments belonging to the Khatedar (plaintiff). The plaintiff having sued the Mamlatdar to recover damages for the wrongful attachment:

Held, that the Mamlatdar was authorised to distrain moveable property of the plaintiff, both under S. 154 of the Land Revenue Code, because he was invested with the power of making attachment of moveables by delegation from the Collector of Ahmedabad, and under S. 111 of the Land Revenue Code, as modified by S. 33 of the Gujarat Talukdars' Act.

To ascertain the liability of the plaintiff to pay income-tax, a Mamlatdar removed the account-books belonging to the plaintiff from his house, against his will and in spite of his protests. The plaintiff having sued to recover damages for the wrongful seizure of his account-books by the Mamlatdar:

Held, that the seizure having been unauthorised and wrongful, the Mamlatdar was liable in damages. *Daluchand Fulchand Gandhi v. Gulabhai Kanthadji*, 18 Bom. L.R. 323=34 Ind. Cas. 198.

SCOTT, C.J. and HEATON, J.

Act XVII of 1879 (Dekkhan Agriculturists' Relief).

(1) S. 3. See Nos. 4 and 10, *infra*.

(2) Ss. 3, 12 and 13—*Suit for redemption of mortgage—Relief sought being setting aside of a consent decree between the parties and a prior sale-deed as fraudulent—Suit outside the scope of the Act.*

In a suit to redeem a mortgage under the provisions of the Dekkhan Agriculturists' Relief Act, the plaintiff prayed that a consent decree between the parties whereby the mortgaged

3.—Bombay Acts—(Continued).

Act XVII of 1879 (Dekkhan Agriculturists' Relief)—(Continued).

properties were freshly mortgaged and a sale-deed of a part of the mortgaged property to the mortgagee be set aside as fraudulent:—

Held, that the suit having been brought to set aside a sale-deed and a Court's decree was outside the Dekkhan Agriculturists' Relief Act. **Yluayakrao Balasaheb Inamdar v. Shamrao Yithal Kalkundri**, 18 Bom. L.R. 708=40 B. 655=36 Ind. Cas. 72.

BATCHELOR, AG. C.J. and SHAH, J.

- (3) Ss. (3) (a), 12, 13—*Suit for redemption—Prayer to set aside a sale-deed as fraudulent—Suit outside the scope of the Act.*

The plaintiffs filed a suit to redeem a mortgage under the provisions of the Dekkhan Agriculturists' Relief Act, 1879, praying that a sale-deed subsequently executed by their mother of some of the mortgaged lands to defendants be cancelled as fraudulent:

Held, that the suit was outside the scope of S. 3, cl. (a) of the Act, because the suit was not a mere suit to redeem, but was a suit primarily for the setting aside of a fraudulent deed of sale. **Chandabhai v. Ganpati**, 18 Bom. L.R. 763=36 Ind. Cas. 517.

BATCHELOR, A.G., C.J. and SHAH, J.

- (4) Ss. 10-A, 9 (y)—*Suit by money-lender to enforce a lease—Oral evidence to show that the purchase relied on by the plaintiff was really a mortgage—Benami transaction.*

In enacting S. 10-A of the Dekkhan Agriculturists' Relief Act, the intention of the Legislature was to apply its provisions to suits by a money-lender suing to enforce either a lease or a sale-deed against an agriculturist, though the instrument sued on was really according to the intention of the parties in the nature of a mortgage.

Reading cl. (y) of S. 3 by the light of S. 10-A of the Act, it appears that the nature of the suit under cl. (y) should not be determined by the frame of the plaint, but by the allegations of the parties which raised the question of mortgage or no mortgage. **Gautam Jayachand Gujar v. Malhari Bapu Bhong**, 18 Bom. L.R. 247=40 B. 397=34 Ind. Cas. 406.

SCOTT, C.J., and HEATON, J.

- (5) S. 12. See Nos. 2 and 3, *supra*.

(6) S. 13—*Hereditary Offices Act (Bom. Act III of 1874), S. 6—Mortgage by Valandar—Possessory mortgage—Mortgagee's possession of the property after mortgagor's death not adverse to mortgagor—Redemption suit—Mesne profits from the date of suit.* **Ramchandra Venkaji Nalk v. Kallu Devji Deshpande**, 17 Bom. L.R. 630=39 B. 587=30 Ind. Cas. 396. See Final Part, 1915, Col. 28.

- (7) S. 13. See Nos. 2 and 3, *supra*.

(8) S. 15-B—*Payment of instalments—Default in payment—Sale of portion of the mortgaged property—Decree final need not be made—Civ. Pro. Code (1908), O. XXXIV, r. 5 (2).*

3.—Bombay Acts—(Continued).

Act XVII of 1879 (Dekkhan Agriculturists' Relief)—(Concluded).

A holder of a decree for sale upon a mortgage, in default of payment of instalments ordered under S. 15 (b) (1) of the Dekkhan Agriculturists' Relief Act, need not apply under O. XXXIV, r. 5 (2) of the Civ. Pro. Code to make the decree final, before he can apply for sale of the necessary portion of the property under S. 15 (b) (2) of the Act. **Kashinath Vinayak Bave v. Rama Daji Kale**, 18 Bom. L.R. 475=40 B. 492.

BATCHELOR and SHAH, JJ.

(9) S. 23—*Agriculturist's house—Exemption from sale—Exemption not confined to contractual debts—Civ. Pro. Code (1908), S. 144.* **Mahadev Raghunath Godbole v. Rama Tukaram Devkote**, 17 Bom. L.R. 962=40 B. 191=31 Ind. Cas. 305. See Final Part, 1915, Col. 29.

(10) Ss. 72 and 3 (w)—*Limitation—Agriculturist—Status at the date the cause of action arose—"Person," meaning of.* **Pirappa Malkappa v. Annaji Appaji Maholkar**, 17 Bom. L.R. 974=40 B. 189=32 Ind. Cas. 495. See Final Part, 1915, Col. 29.

Act I of 1880 (Khoti) Settlement.

S. 9—*Sale of lands in execution of a decree—Subsequent suit by a party for setting aside the sale as illegal the lands being occupancy lands.* See RES JUDICATA, No. 18, 18 Bom. L.R. 786.

Act VI of 1888 (Guzerat Talukdars).

S. 33—*Recovery of arrears of assessment—Mamlatdar's powers of attachment.* See BOM. ACT V OF 1879 (BOMBAY LAND REVENUE CODE), No. 5, 18 Bom. L.R. 323.

Act IV of 1890 (Bombay District Police).

(1) Ss. 42, 44—*Powers and duties of Magistrate.* See PROCEEDINGS, No. 1, 18 Bom. L.R. 460.

(2) S. 44. See No. 1, *supra*.

Act IV of 1898 (Bombay Improvement Trusts).

S. 48 (11). See LAND ACQUISITION ACT (I OF 1894), No. 10, 18 Bom. L.R. 826.

Act III of 1901 (Bombay District Municipalities).

(1) S. 42—*Embezzlement of municipal money by the Secretary and accounts clerk—Liability of Councillors for the money—Suit by Government—'Misapplication,' interpretation of.* **Manilal Gangadas Desai v. The Secretary of State**, 17 Bom. L.R. 1115=40 B. 166=33 Ind. Cas. 428. See Final Part, 1915, Col. 157.

(2) S. 46. See No. 5, *infra*.

(3) S. 96—*Building license—Condition prohibiting construction of windows and doors so as to overhang or project on public street—Legality—Power of Municipality as regards buildings—Compensation for set back when payable—Interpretation of Statute.*

Where a Municipality gave permission to build a house and attached to the permission a condition, *viz.*, windows and doors of the

3.—Bombay Acts—(Continued).

Act III of 1901 (Bombay District Municipalities)—(Concluded).

building will not be permitted to project on or overhanging any public street or Municipal land, and where a person constructed a door each leaf of which was in two folding sections and the door opened outwards, and where each leaf, if opened with the sections folded, would not project into the street, but if opened with the sections extended would project beyond the line of the street.

Held, that the door, when opened with the sections extended, projected into the street, and it therefore infringed the directions given by the Municipality (a).

The Municipality has, under S. 96 (2) of Bombay Act III of 1901, power to impose a condition as to the location of doors in reference to a street, and therefore a condition that a door shall be so made that it cannot swing over the street is such a condition; for a door that swings outwards has a different location to a door that swings inwards.

S. 96 of the Bombay District Municipal Act gives the Municipality a very wide power of regulating buildings.

The general power is to pass such orders with reference to the building as the Municipality thinks proper. The power is one within the discretion of the Municipality and it is subject to two restrictions, viz., (1) the general limitation as to all statutory powers of public functionaries that the orders issued under it are reasonable; and (2) the particular limitation expressed in the section that the orders are not inconsistent with the Act (b).

Compensation is not payable unless the land left vacant is included in a public street (c).

If, by giving the words of an Act the meaning which they naturally and ordinarily import and bear, a result is obtained which is consistent with the Act, it matters not that it may be in excess of what the Legislature had in view (d). *The Municipality of Karachi v. Mahomed Ali Essaji*, 9 S.L.R. 126=33 Ind. Cas. 675.

PRATT, J.C., and BOYD, A.J.C.

References:—(a) 7 S.L.R. 31, *overruled*. (b) 12 B. 490; 27 B. 221, R. (c) 3 Bom. L.R. 842, R. (d) 21 B. 528, R.

(4) S. 160 (3)—Decision of District Court—Revision. See CIV. PRO. CODE (1908), No. 230, 18 Bom. L.R. 340.

(5) Ss. 167, 46—*District Municipality—Dismissal of servant—Suit for damages for wrongful dismissal—Act purporting to have been done in pursuance of the Act. Municipality of Ratnagiri v. Vasudev Balkrishna Lotlikar*, 17 Bom. L.R. 652=29 B. 600=30 Ind. Cas. 390. See Final Part, 1915, Col. 158.

Act I of 1905 (Bombay Court of Wards).

(1) Ss. 31, 32—*Suit against a Government ward as trustee of a public Trust—Trustee found liable in a sum of money—"Suit relating to the property of the ward"—Notice of suit to guardian of the ward—*

3.—Bombay Acts—(Concluded).

Act I of 1905 (Bombay Court of Wards)—(Concluded).

Guardian not named in the suit—Irrregularity of procedure.

A suit was brought under the provisions of S. 92 of the Civ. Pro. Code, against the defendants as trustees of a Mahomedan religious institution, to recover trust-moneys from them. Defendant No. 1 was a Government ward and his estate was in charge of the Talukdari Settlement Officer, under the Bombay Court of Wards Act. No notice, as required by S. 31 of the Act, was given; nor was the Talukdari Settlement Officer named as a guardian of defendant No. 1. A decree was passed in the suit against defendant No. 1 for Rs. 6,000. On appeal it was contended that the suit was bad for want of notice under S. 31, and for omission to name the guardian under S. 32:

Held, (1) that S. 31 had no application, for the suit was merely one relating to the property of a religious institution, and not to the property of defendant No. 1;

(2) that S. 32 did not provide that if the Court of Wards was not named as guardian from the commencement of the suit, the suit was bad;

(3) that the omission to name the guardian in no way affected the merits of the case, and might be treated as a mere defect or irregularity in procedure. *Sayad Amin Saheb v. Sheikh Masleudin*, 18 Bom. L.R. 563=40 B. 541.

SCOTT, C.J. and HEATON, J.

(2) S. 32. See No. 1, *supra*.

4.—Burma Acts.

Act II of 1876 (Lower Burma Land and Revenue).

(1) See PAUPER APPEAL, No. 1, 9 Bur. L.T. 69.

(2) Ss. 4 and 5—*Pagoda land—Jurisdiction of Civil Courts.*

Where the Pagoda Trustees of a Pagoda sued the defendant (appellant) for possession of some land which they claimed as belonging to the Pagoda site, but the boundaries of which land were not defined by the Revenue Officer as provided in S. 5 of the Lower Burma Land and Revenue Act.

Held that the Civil Courts are precluded from deciding whether the land in dispute forms part of the Pagoda site or not, and that, until the trustees have obtained a decision in their favour from the Revenue authorities, they cannot make out a title to possession against the defendant. *Annamalai Chetty v. Ma Shwe May*, 8 Bur. L.T. 264=8 L.B.R. 260=33 Ind. Cas. 580.

ORMOND, J.

(2-a) S. 5. See No. 2, *supra*.

(3) Ss. 19, 55 (b), 56 (a)—*Jurisdiction of Civil Courts—Distinction between 'claims' and 'disputes.'* *In re Maung Naw v. Ma Shwe Hmut*, 8 Bur. L.T. 191=30 Ind. Cas. 772=8 L.B.R. 227 (F.B.). See Final Part, 1915, Col. 159.

4.—Burma Acts—(Concluded).

Act II of 1876 (Lower Burma Land and Revenue)—(Concluded).

(3-a) S. 55. See No. 3, *supra*.

(4) Ss. 55-B, 56—"Claims", "disputes", meaning of—Cultivators, disputes re-land occupied by, for cultivation, among themselves—Jurisdiction.

The word "claims" in S. 55-B relates only to claims against Government and the word "disputes" in S. 55-B does not include disputes between one cultivator and another in regard to land occupied for purposes of cultivation. The jurisdiction of the Civil Courts is not ousted by S. 56 of the Act in respect of such suits. *Maung Po Kyang v. Maung Pyl*, 35 Ind. Cas. 277=10 Bur. L.T. 5.

TWOMEY, J.

Reference:—(a) 8 Bur. L.T. 191, *F.*

(4-a) S. 56. See Nos. 3 and 4, *supra*.

Act IV of 1898 (Lower Burma Towns and Village Lands).

(1) Ss. 24, 25, 26. See PAUPER APPEAL, No. 1, 9 Bur. L.T. 69.

(3) S. 25. See No. 1, *supra*.

(3) S. 26. See No. 1, *supra*.

Act VI of 1900 (Lower Burma Courts).

S. 27 (2)—Appeal against decree not substantially altered by amendment—Limitation.

The time for an appeal directed against a decree not substantially altered by an amendment made in it at the appellant's instance and wholly in the appellant's favour cannot be computed from the date of the amendment. *Wor Lon v. Rainey*, 35 Ind. Cas. 347.

PARLETT, J.

Reference:—22 M. 364, R.

5.—C.P. Acts.

Act X of 1859 (C.P. Tenancy).

S. 2 (5)—Village tank—Grant by landlord of right to fish and to grow water nuts—Whether tank bed is 'land let for agricultural purposes.' *Harl v. Wana*, 11 N.L.R. 122=31 Ind. Cas. 294. See Final Part, 1915, Col. 161.

Act XVIII of 1881 (C.P. Land Revenue).

(1) Ss. 4-A, 69 (4)—Applicability to Bhogra land—Classification of land—Assignee of proprietary right in Bhogra land if "proprietor".

Ss. 69 (4), Central Provinces Land Revenue Act, would be applicable to *bhogra* land; but that section merely deals with the classification of land, and does not in any way touch the question of proprietary rights therein.

An assignee of proprietary rights in *bhogra* land is a 'proprietor' as defined in S. 4-A of the Act. *Dinanath v. Manbodhi*, 12 N.L.R. 189=36 Ind. Cas. 547.

STANYON, A.J.C.

Reference:—12 N.L.R. 3, *F.*

(2) S. 69 (4). See No. 1, *supra*.

5.—C.P. Acts—(Continued).

Act XVIII of 1881 (C.P. Land Revenue)—(Concluded).

(3) S. 82—*Wajib-ul-ars*—Presumption as to its correctness. See ACT IX OF 1887 (PROVINCIAL SMALL CAUSES COURTS), No. 24, 12 N.L.R. 47.

(4) Ss. 136-D, 136-G—Order passed by Deputy Commissioner of Sambalpur under S. 136-G—No appeal to District Judge—Appeal to High Court—'District Judge'—Deputy Commissioner, Sambalpur, Civil Courts Act (B.C. IV of 1906)—Bengal, N. W.P. and Assam Civil Courts Act (XII of 1887), S. 12.

No appeal lies to the District Judge against an order of the Deputy Commissioner of Sambalpur declining to grant an application made to him, under S. 136-D of the Central Provinces Land Revenue Act (XVIII of 1881) for partition of some *bhogra* lands in a village, but such an appeal lies to the High Court.

The Court of the District Judge of Sambalpur has taken the place of the Deputy Commissioner as the Principal Civil Court of original jurisdiction under the Act of 1885. Therefore the decision of the Deputy Commissioner must be deemed to have been a decision of the District Judge and consequently an appeal lay to the High Court and not to the District Court. *Padman Lochan Misra v. Krishna Chandra Misra*, 1 Pat. L.J. 290.

CHAMIER, C.J. and SHARFUDDIN, J.

(5) S. 138—Lambardar Gaontia, settlement by—*Raiyati* land, lease of—Lease, if valid.

A *lambardar Gaontia* can grant a lease of *raiayati* land without the approval of co-sharer *Gaontias*. *Sidheswar Panda v. Pitbas Gaontia*, 24 C.L.J. 83.

WALMSLEY and NEWBOULD, JJ.

Act IX of 1883 (C.P. Tenancy).

(1) S. 38 (2)—The words 'and previous sums if any secured by mortgage of it'—Meaning—Sums due to other creditors included—Interpretation of statutes—Liberal construction—Grammatical meaning—'Ejusdem generis'—*Noscitur a sociis*—Maxims if applicable to this section—Central Provinces Act XI of 1898 (Tenancy), S. 41 (2).

The words 'and the previous sums (if any) secured by mortgage of it' in S. 38 (2) of the Tenancy Act of 1883, which corresponds word for word with S. 41 (4) of Act XI of 1898, should be construed as including not only sums due to the person who is taking the contemplated mortgage but also the sums due to him and to another creditor.

There seems to be strong reason in the object of the Legislature which was mainly to protect the interests of the landlord, for placing on the expression 'and the previous sums secured by the mortgage of the holding' the unrestricted meaning to which the words used are *prima facie* open and which from their generality they should receive (a).

The rule of *ejusdem generis* or *noscitur a sociis* does not apply to the three items under

5.—C.P. Acts—(Continued).**Act IX of 1883 (C.P. Tenancy)—(Concluded).**

S. 38 (2), *i.e.*, principal, interest and previous sums secured by mortgage.

Rules of construction of statutes considered (b). *Balaji v. Gopalrao*, 12 N.L.R. 51—33 Ind. Cas. 489.

DRAKE-BROCKMAN, J.C., and STANYON, A.J.C.

References:—(a) 16 C.P.L.R. 70; 6 N.L.R. 69, R. (b) 11 E.R. 639 (641), R.

(2) S. 38 (5). See LIMITATION ACT (1908), No. 232, 12 N.L.R. 90.

Act XI of 1883 (C.P. Tenancy).

(1) 'Agriculturist'—*Pan* or betel plant cultivator—Whether included in the term. See PLEADINGS, No. 4, 12 N.L.R. 57.

(2) S. 41 (2)—Meaning of 'give'—Object of prescribing notice to landlord—Notice sent by post—Effect—S. 27, General Clauses Act (1897)—S. 26, C.P. General Clauses Act (1914).

The word 'give' in connection with notices in S. 41 (2), C.P. Tenancy Act, is equivalent to 'serve' (*vide* S. 27, General Clauses Act, 1897), and S. 26, C.P. General Clauses Act, (1914) (a).

To put a notice into the post is hardly to 'give' it to the addressee, and the month's time allowed to the landlord under sub-S. (2) of S. 41 begins from the date of the receipt of the notice.

The object of the Legislature in prescribing a notice to the landlord as a condition precedent to certain alienations was to place him in a position to keep out undesirable strangers. Incidentally the interests of tenants are also served, inasmuch as they have to think twice before determining to make an out and out transfer or to take a considerable loan on the security of their holdings. But the tenor of S. 41 throughout its considerable length is to vest the landlord with a power of acquiring the land himself to the exclusion of tenant and transferee alike. *Dina v. Parasram*, 12 N.L.R. 42—32 Ind. Cas. 991.

DRAKE-BROCKMAN, J.C.

References:—(a) 14 C.P.L.R. 162 (165); 15 C.P.L.R. 173 (174), R.

(3) S. 41 (2)—Words 'and previous sums if any secured by mortgage'—Construction. See C. P. ACT IX OF 1883 (TENANCY), No. 1, 12 N.L.R. 51.

(4) S. 41 (3)—Scope—Transfer by absolute occupancy tenant in contravention of S. 41—Suit by landlord to avoid the transfer and evict the transferee—Question of abandonment by tenant whether arises.

Where an absolute occupancy tenant makes a transfer in contravention of S. 41, Central Provinces Tenancy Act, and the landlord brings a suit for avoiding the transfer and for possession on the ground that the transfer was without his (landlord's) consent, the question of abandonment by the tenant does not arise, whether the tenant be made a party or not.

5.—C.P. Acts—(Continued).**Act XI of 1883 (C.P. Tenancy)—(Continued).**

Sub-S. 8 of S. 41 of the present Act presupposes the right of a landlord to bring a suit for ejectment against the transferee and makes a special provision for the protection of the tenant whose interests therefore need not be considered by the Court.

The principles embodied in *Bhola v. Fathu* (a) relate to a condition of affairs which is now obsolete and do not apply to the conditions existing under the present law. *Nakulao v. Ramadhlaseao*, 12 N.L.R. 86—84 Ind. Cas. 698.

BATTEN, A.J.C.

References:—(a) 15 C.P.L.R. 17, D.; 9 C.P. L.R. 101, R.

(5) S. 45—Contract to sell land together with cultivating rights in *sir*—Sanction to sell without reservation of occupancy rights in *sir* refused—Contingent contract—Right to specific performance or damages. See CONTRACT ACT, No. 37, 12 N.L.R. 69.

(6) Ss. 45 (5), 69 (c)—*Sir land*—Acquisition of occupancy rights by proprietor—Ordinary tenant not affected—Liability to eviction—Not taken away. *Gopikisan v. Kulpat*, 11 N.L.R. 170—31 Ind. Cas. 470. See Final Part, 1915, Col. 163.

(7) Ss. 46, 47 and 95—Trespass, suit for, whether cognisable by Civil Court—Mortgage—Foreclosure.

Where the claim is based on trespass, and the defendants are proved to be in occupation of the lands without colour of title and are thus trespassers the provisions of the Central Provinces Tenancy Act do not apply.

Consequently the Civil Court is not deprived of jurisdiction to hear and dispose of such a claim.

It is an elementary principle when statutory right and liabilities are being created and jurisdiction has been conferred upon a special Court for the investigation of matters which may possibly be in controversy, such jurisdiction is exclusive and cannot concurrently be exercised by the ordinary Courts. (a)

Quære:—Whether in the case where a mortgagee forecloses and goes into possession of a tenancy within the provisions and terms of the Central Provinces Tenancy Act under a decree in a foreclosure mortgage suit, the provisions of Ss. 46 and 47 of that Act would apply to any such case. We are rather inclined to think that they would not, because the mortgagee is in possession, not by virtue of the mortgage, but by virtue of a decree of the Civil Court founded upon the mortgage; and that consequently his possession is not attributable to the mortgage but to the decree in which the mortgage itself has become merged. (*Per Atkinson, J.*) *Chamru Satpasi v. Dirba Babu*, 1 Pat. L.J. 525.

MULLICK and ATKINSON, JJ.

References:—(a) 85 C. 470; 2 C.L.J. 359; 16 C.P.L.R. 136, F.

5.—C.P. Acts—(Concluded).**Act XI of 1898 (C.P. Tenancy)—(Concluded).**(8) S. 47. See No. 7, *supra*.(9) S. 69. See No. 6, *supra*.(10) S. 95. See No. 7, *supra*.**Act I of 1914 (C.P. General Clauses).**

S. 26. See C.P. ACT XI OF 1898 (TENANCY), No. 2, 12 N.L.R. 42.

6.—Madras Acts.**Act XXVIII of 1880 (Madras Surveys and Boundaries).**

S. 25—*Boundaries — Settlement Officer — His decision that certain lands do not form part of Zemindari—Failure to contest by suit under S. 25—Res judicata—Civ. Pro. Code, S. 11—Matters substantially though not formally in issue—Applicability of principle to—Madras Act II of 1864 (Revenue Recovery), S. 58—Claim for refund of proportionate peishkush—Courts whether precluded from deciding it. Muthammal v. The Secretary of State for India in Council, 27 M.L.J. 529=16 M.L.T. 432=26 Ind. Cas. 817=39 M. 1202. See Final Part, 1914, Col. 138.*

Act IV of 1862 (Madras Enfranchised Inams).

See CROWN GRANTS, No. 1, 31 M.L.J. 489.

Act II of 1864 (Madras Revenue Recovery).

Government revenue, Government's right for, nature of—Jodi—Assignment—Assignees, if entitled to a first charge.

Per Wallis, C.J.—The right of the Government as regards Government revenue is only a right to a charge on the land and a right to forfeit, by due course of law, the title of the person holding the land who does not pay the charge (a).

The statutory charge for rent now possessed by landholders and certain Inamdars is a creation of the Madras Estates Land Act (I of 1909). Prior to that, it was well settled that, where the Government assigned its right to revenue to the Inamdar, subject to the payment of a Jodi, the Inamdar did not acquire a charge upon the land but was left to recover his rent from his occupiers under the provisions of the Madras Rent Recovery Act (VII of 1865).

Where the Jodi payable by an Inamdar to the Government has not been assigned, it is recoverable by the Government, like peishkush, by sale of the Inamdar's interest under the Revenue Recovery Act, 1864. Where the right to collect the Jodi has been transferred to a Zemindar or Mittahdar, in consideration of his undertaking to pay a fixed peishkush, the Zemindar or Mittahdar has no charge upon the lands therefor and he can only recover arrears of Jodi in a suit for rent.

Per Seshagiri Aiyar, J.—The Government has a first charge for Jodi which is directly payable to it, as by the Common Law of this country as well as the Revenue Recovery Act, 1864, a debt due to the King takes priority over other debts except possibly those due to Brahmins (b).

6.—Madras Acts—(Continued).**Act II of 1864 (Madras Revenue Recovery)—(Concluded).**

The term Jodi or quit-rent is applied indiscriminately in several decisions to what is recoverable by a proprietor from his under-tenure holders as well as to payments due to Government by way of assessment.

According to the principle enunciated in S. 141, Contract Act, an assignee of Government revenue is entitled to the security which the Government had, although he may not be entitled to all the statutory remedies of his assignor and consequently an assignee of Jodi as such will have a first charge therefor (c). Subbaraya Goundan v. Ranganadha Mudallar, 3 L.W. 273=(1916) M.W.N. 216=30 M.L.J. 397=19 M.L.T. 231=32 Ind. Cas. 971=40 M. 99.

WALLIS, C.J. and SESHAGIRI AİYAR, J.

References:—(a) 6 M. 303, 310; 13 M. 89, 123, F. (b) 12 O. 445, 454; 5 Bom. H.C.R. 23, R. (c) 39 Ch. D. 174, F.

Act VII of 1865 (Madras Irrigation Cess).

(1) Water Cess Act VII of 1865—Engagement—Meaning of—Forfeiture of Zemindari to Government—Obligations of the Zemindar how far binding—Onus to prove that land was included in permanent settlement—Act III of 1905 declaratory of the law—How far affects substantive rights—Ownership of beds and ownership of water. Secretary of State v. Maharajah of Bobbili, (1915) M.W.N. 1025=3 L.W. 119=19 M.L.T. 6=30 M.L.J. 163=32 Ind. Cas. 279. See Final Part, 1915, Col. 167.

(2) Engagement—Inam title deed—Preparation by Revenue officials. Secretary of State v. Ramanuja Jeer Swamikal, (1915) M.W.N. 636=30 Ind. Cas. 605. See Final Part, 1915, Col. 167.

(3) S. 1—Proof of immemorial enjoyment of water—Presumption of grant.—Absolute grant—Liability to pay water-cess. Kessari Yenka-subbiah v. The Secretary of State for India in Council, 14 M.L.T. 131=20 Ind. Cas. 804=38 M. 424=30 Ind. Cas. 425. See Final Part, 1913, Col. 165.

(4) S. 1—'Engagement' meaning of—Madras Revenue Recovery Act (II of 1864). S. 59—Madras Land Encroachment Act (III of 1905), S. 1. Secretary of State v. Srimadri Jaghathiraju, 28 M.L.J. 51=26 Ind. Cas. 692=17 M.L.T. 29=2 L.W. 31=39 M. 67. See Final Part, 1915, Col. 169.

(5) S. 1—Madras Act III of 1905—Inam village—Irrigation from Government source—River flowing through a Zemindari—Water taken off in a channel belonging to Zemindar and used by Inamdar for irrigating second crop and dry crop—Water-cess, if can be charged by Government—Madras Act III of 1905, if retrospective in effect—Crown grant—Construction—Madras Act VII of 1865, whether applies to Zemindaries and Inam villages—Grant—Construction—Presumption—Statute, construction of—Flowing water, whether can be owned

6.—Madras Acts—(Continued).

Act VII of 1885 (Madras Irrigation Cess)—(Concluded).

—*Riparian owner—Presumption of ownership of half the bed, whether applicable to Zemindars—Applicability of new rules of evidence to pending suits.* Secretary of State v. Janakiramayya, 2 L.W. 763=29 M.L.J. 389=(1915) M.W.N. 671=18 M.L.T. 277=30 Ind. Cas. 609. See Final Part, 1915, Col. 171.

Act VIII of 1885 (Madras Rent Recovery).

(1) Samudayam lands—Tenants whether bound to pay for Kanganam and Kulivettu—Payments whether voluntary. C.Y.G.T. Ohldambaram Chetty v. Ayyavu alias Muthukaruppan Thevan, 29 M.L.J. 746=32 Ind. Cas. 919. See Final Part, 1915, Col. 172.

(2) Ss. 1 and 79—Landholder, meaning of—Transfer of Registry, effect of proprietary right, if conveyed by such transfer—Transferee, if can be regarded as agent under S. 79—Tender of patta, when valid—Manager of joint Hindu family, if competent to tender patta.

A more transfer of Revenue registry cannot confer proprietary right on the transferee so as to make him a 'landholder' within the meaning of S. 1 of the Rent Recovery Act, and he cannot therefore take any proceedings under the Act such as tendering pattas and suing for rents due, etc. (a).

Nor does such a transfer of registry constitute the transferee the agent of the transferor under S. 79 of the said Act since it would have the effect of defeating the provisions of the Act.

In the case of an undivided Hindu family all the members need not join in tendering pattas and the manager of the family is competent to grant pattas and sue for rents on behalf of the family (b). Parthasarathi Aiyangar v. Rangasamy Aiyangar, 4 L.W. 654.

SESHAGIRI IYER and SRINIVASA AIYANGAR, JJ.

References:—(a) 26 M. 589; 10 M.L.T. 450, F. (b) 15 M. 484, F.

(3) S. 79. See No. 2, *supra*.

Act VIII of 1869 (Madras Inams).

See CROWN GRANTS, No. 1, 31 M.L.J. 483.

Act III of 1873 (Madras Civil Courts).

S. 17—Munsiff handing over charge to successor without completing trial of a suit—Munsiff promoted as Sub-Judge—Successor completing trial and delivering judgment—Appeal—Appeal heard by the Sub-Judge—Legality—Objection when to be taken—Effect of not objecting—Disqualifications under common law and statutory law—Appropriate remedy. Venkatapathi Nayanivaru v. Mahomed Sahib, 38 M. 531=30 Ind. Cas. 430. See Final Part, 1915, Col. 175.

Act V of 1882 (Madras Forest).

(1) Afforestation, notification of, objection to—Trial before Forest Officer—Appeal to District Court—Decision of District Court, if final—Limitation of ordinary incidents of litigation

6.—Madras Acts—(Continued).

Act V of 1882 (Madras Forest)—(Concluded).

to be express. See LIMITATION ACT, 1908, No. 14, 31 M.L.J. 324.

(2) Ss. 6, 16 and 17—Reserved forest—Proclamation by Forest Settlement Officer—No notice served on the owner of the land proposed to be constituted a reserved forest—Notification declaring forest reserved, effect of, upon the rights of the owner—Provision regarding service of notice on owner, whether directory or mandatory—Knowledge, actual, of owner, regarding proceedings, whether cures irregularity—Right of owner, if extinguished—Inamdar's right to unassessed waste lands. Balakrishna Rao v. Secretary of State for India in Council, 2 L.W. 695=29 M.L.J. 276=18 M.L.T. 151=30 Ind. Cas. 355=32 M. 494. See Final Part, 1915, Col. 176.

(3) S. 16. See No. 2, *supra*.

(4) S. 17. See No. 2, *supra*.

Act IV of 1884 (Madras District Municipalities).

S. 250 (1) (a), r. 4, Note 1—Nomination of representative to a firm—Not amendment—Chairman's decision to be arrived at bona fide—No express malice necessary—Damages for failure to register, nominal. Draviam Phila v. Cruz Fernandez, 29 M.L.J. 704=18 M.L.T. 518=31 Ind. Cas. 322. See Final Part, 1915, Col. 177.

Act V of 1884 (Madras Local Boards).

(1) S. 73—Mortgagee with possession—Intermediate landholder—Tenant's right to pay him. Jagannalkulu v. The Manager of Nandigam, (1914) M.W.N. 939=28 M.L.J. 154=27 Ind. Cas. 122=39 M. 269. See Final Part, 1914, Col. 145.

(2) S. 73—Local cess—Nature of—Interest whether recoverable upon such cess. See MADRAS ACT I OF 1908. (ESTATES LAND), No. 16, 3 L.W. 32.

(3) S. 117, cl. (e)—Market established after the Act—License granted—Renewal after one year—If levy of fee for renewal, proper.

Plaintiff sued the Taluq Board for recovery of fee levied for granting license for continuance of his market. He had already paid a fee under the Act when the market was opened and the Board demanded a fresh fee for a fresh license.

The lower Court granted plaintiff a decree holding that S. 117 (e) contemplates levy of a fee only for opening a new market and not for its continuance.

On revision, held, that under S. 117, cl. (b) (3), there is no option to the Board to refuse a license for old markets established before the Act but it can refuse to grant license for other markets. That cl. (5) makes it clear that the grant endures for one year only and that cl. (1) says that the fee levied is per annum. The Board was therefore entitled to impose a fresh levy and plaintiff cannot recover. The Taluq Board, Bowlipatti v. Janakiammal, (1916) 2 M.W.N. 253=4 L.W. 336=36 Ind. Cas. 384. SESHAGIRI IYER, J.

6.—Madras Acts—(Continued).**Act I of 1886 (Abkari).**

S. 8—“Abkari”, meaning of—If includes ganja—Contract in violation of the conditions of an abkari license—Illegal—Contract Act, S. 23.

Reading S. 8, cls. 1 and 19 together it is clear that Abkari includes ganja also and therefore all the conditions of an abkari license apply also to a ganja license. An agreement in violation of the conditions of the license is illegal and unenforceable. *Namasivaya Gurukkal v. Subramanya Ayyan*, 34 Ind. Cas. 927.

SADASIVA IYER, J.

Act III of 1888 (Madras City Police).

S. 41—Bona fide exercise of discretion—Specific Relief Act, S. 45—Mandamus—Commissioner of Police—Refusal to issue license to conduct procession, though right established by Civil Court—Apprehension of breach of the peace.

Under S. 41 of the Madras City Police Act (III of 1888) the Commissioner of Police can, in the exercise of his discretion, refuse to issue a license to conduct a procession through a particular street, although the right of the applicant to use that street for the procession has been declared by a decree of a competent Civil Court. Such refusal may be justified if, owing to the short time that elapsed between the judgment and the proposed procession, it may not be possible to take sufficient precautions to regulate the procession without any likelihood of the breach of the peace, or any other special circumstances of strain and difficulty of any particular year renders such refusal necessary for the preservation of the public peace and public safety.

In cases of such justifiable refusal of license by the Commissioner, the High Court will not order the Commissioner of Police to issue a license.

But if the Commissioner goes on continuing such refusal year after year so that it would really be an attempt to evade the judgment of the Civil Court, the High Court will interfere for giving effect to the decree of the Civil Court. *In re T. Nagalinga Mudaliar*, 31 M.L.J. 426.

COUTTS-TROTTER, J.

Act I of 1889 (Madras Village Courts).

(1) Village Munsif's Court—Suit for one item in an account—Subsequent suit in the District Munsif's Court for the other items—Civ. Pro. Code (1908), O. II, r. 2, whether a bar. Messrs. Augustus Brothers v. M. A. Fernandez, 2 L.W. 890—29 M.L.J. 474=(1915) M.W.N. 765=18 M.L.T. 877=31 Ind. Cas. 69. See Final Part, 1915, Col. 178.

(2) S. 24—Order of Deputy Collector debarbing one from appearing as vakil for parties in Village Courts, ultra vires—Specific Relief Act (I of 1877), S. 42—Suit for declaration of invalidity of order, maintainability of.

Under S. 24 of the Madras Village Courts Act, any person holding a vakalatnama from a

6.—Madras Acts—(Continued).**Act I of 1889 (Madras Village Courts)—(Old).**

party may appear and plead in a Village Court and there is no provision in the Act for debarring any one from this privilege.

Whatever general powers of supervision can be inferred from the power of appointment, suspension and removal of Village Munsifs conferred by Ss. 7 and 8 of the Madras Village Courts Act, it cannot be held to extend to the passing of an order debarring a person from acting as a vakil for a party in Village Courts. It is no doubt desirable that bad characters should be prevented from practising in Village Courts and the Act may need amendment, but, as it stands, such an order is illegal.

A suit for a declaration that such an order is void is maintainable, though it may not be covered by S. 42 of the Specific Relief Act (a). *Ramachandra Rao v. Secretary of State for India*, 39 M. 808=31 Ind. Cas. 310.

AYLING and TYABJI, JJ.

References:—(a) 22 M. 220 and 27 M.L.J. 634, R.

(2-a) S. 73. See REVIEW, No. 5, 32 Ind. Cas. 527.

(3) S. 73. See REVISION, No. 4, 34 Ind. Cas. 503.

Act II of 1894 (Madras Proprietary Estates Village Service).

(1) Ss. 4, 15—Effect—Powers of Receiver—General powers of management of an estate whether includes power to appoint Karnam—Receiver of Court whether ‘proprietor.’ See CIV. PRO. CODE (1908), No. 631, 30 M.L.J. 456.

(2) S. 15. See No. 1, *supra*.

Act III of 1895 (Madras Hereditary Village Officers).

Trespass alleged in plaint—Jurisdiction of Civil Courts. See JURISDICTION OF CIVIL COURTS, No. 1, (1916) M.W.N. 278.

Act I of 1900 (Malabar Compensation for Tenants' Improvements).

(1) Landlord and Tenant—Tender of value of improvements in Court—Defendant liable for mesne profits—S. 83—Transfer of Property Act.

Trotter, J.—Whether a landlord is entitled to take the procedure of paying into Court the sum which the tenant is entitled to for his improvements?

When the landlord has tendered that which the Court has subsequently found to be the true amount due and owing in respect of the improvements, if the tenant chooses to hold over, he can do so only at his peril and on condition of paying the mesne profits on the land.

Whether the compensation under the Malabar Compensation for Tenants' Improvements Act can be treated as part of the mortgage-money within the Transfer of Property Act.

Seshagiri Aiyar, J.—The value of improvements cannot be brought under the expression

6.—Madras Acts—(Continued).

Act I of 1900 (Malabar Compensation for Tenants' Improvements)—(Concluded).

'amount due on the mortgage' in S. 83 of the Transfer of Property Act. The tenant is liable to pay mesne profits after the period of tender by the landlord. *Chami v. Anu Pattar*, (1916) M.W.N. 160=3 L.W. 246=32 Ind. Cas. 861.

COUTTS-TROTTER and SESHAGIRI AIYAR, JJ.

(3) Ss. 5 and 6. See LIMITATION ACT (1908), No. 243, (1916) 2 M.W.N. 324.

(3) S. 6. See No. 2, *supra*.

(4) Ss. 15, 6 (3), 20—*Re-valuation of improvements when allowable—Government notification allowing new rates—No ground for re-valuation.*

Neither S. 15 nor S. 6 (3) of the Improvements Act allows a re-valuation of improvements unless there have been additional improvements effected after the first valuation or there has been a change in the condition of the improvements. *Kunhammad Kuttli v. Panchara Alleema*, 30 M.L.J. 203=33 Ind. Cas. 746.

SADASIVA AIYAR and NAPIER, JJ.

Reference:—17 Ind. Cas. 131, *F*.

(5) S. 20. See No. 4, *supra*.

Act I of 1902 (Madras Court of Wards).

R. 58—*Manager's power to remit interest on arrears of rent.*

Of the rules relating to the Court of Wards, r. 58 specifically limits the instances where Collectors are empowered to remit debts due to the estates. They include matters erroneously included in rent accounts and also irrecoverable rents and debts due either in cash or in grain for the recovery of which all possible processes have been exhausted; and in any case the limit is to a sum under Rs. 100. The manager has not greater authority in those matters than the Collector.

It is on the party relying upon remission of interest on arrears of rent made by the Manager under the Court of Wards to show that that remission was authorised by the Court of Wards. *Madhava Bhumj Santo v. Ramachandra Mardaraj*, 31 Ind. Cas. 468.

COUTTS-TROTTER and SRINIVASA AIYANGAR, JJ.

Act III of 1904 (Madras City Municipal).

(1) S. 8, cl. 27 and S. 248, cl. 1—*Drain part of public street—Power of President to remove sun shade overhanging such drain.*

Under the definition of "public street" in S. 8, cl. 27 of the Madras City Municipality's Act, the space covered by the drains is included in the public streets vested in the Municipality (a). Therefore the sun shade of a house overhanging the drain space, forming part of the public street, could be removed by the President of the Corporation under S. 248 (1) of the Act, after giving notice as required by the Act. In such a case it is not necessary for the President to prove that the sun shade interferes "with the repairing and proper management of the drain."

6.—Madras Acts—(Continued).

Act III of 1904 (Madras City Municipal)—(Concluded).

Corporation of Madras v. Mohan Lal Sowcar, 30 Ind. Cas. 688.

SADASIVA AIYAR and NAPIER, JJ.

References:—(a) 4 Ind. Cas. 328=7 M.L.T. 66=19 M.L.J. 757, *F*.

(2) S. 247—*Obstruction or fence in private street—Authority of Municipal Council over it.*

Where, at the blind end of a private street, the Corporation purchased a house and pulled it down and converted the site into a street connecting the private street with other streets beyond and enabled traffic to pass through it, and the plaintiff erected demarcation stones to prevent carriages and cattle passing through the private street: *Held*—

Phillips, J.—That, in a town, private owners have to put up with inconvenience in many respects *pro bono publico* and the Corporation cannot be said to have done any wrong in pulling down the houses and they will not forfeit whatever right of access to the private street they had as owners of the site. The Municipal Act gives the Corporation considerable powers for the purpose of protecting the health, safety and convenience of the public, and the erection amounted to an obstruction within the meaning of S. 247, and the Corporation cannot be restrained by injunction from requiring the owner (plaintiff) to remove such obstruction under the powers given to them under that section.

The sections of the Act which give powers or restrict the rights of individuals must be strictly construed.

Wallis, C.J.—The demarcation stones do not amount to an obstruction but would constitute a fence, in fact, a boundary fence, within the meaning of S. 247. S. 247 gives very wide powers to the Corporation. It may seem strange that the Legislature should prevent the owners of a private street from erecting a fence for the preservation of their rights, but the language is express. *Rudrappa Achary v. The Corporation of Madras*, (1916) M.W.N. 894=34 Ind. Cas. 735.

WALLIS, C.J. and PHILLIPS, J.

(3) S. 248. See No. 1, *supra*.

Act III of 1905 (Madras Land Encroachment).

(1) Ss. 5, 6, 7 and 14—*Notice by Government to vacate land—Suit for declaration of title—Limitation—Mere issue of notice—No cause of action.*

A suit for a declaration of title to a land in dispute, if brought in consequence of a notice given under S. 7 of Act III of 1905 to vacate the land, is governed by the six months' limitation provided in S. 14 of the Act; but the mere issue of such a notice does not give rise to a cause of action. *Secretary of State for India v. Illikkal Assan*, 19 M.L.T. 157=3 L.W. 228=(1916) M.W.N. 167=30 M.L.J. 255=32 Ind. Cas. 755=39 M. 727 (*F.B.*).

WALLIS, C.J., ABQUR RAHIM and SESHAGIRI AIYAR, JJ.

6.—Madras Acts—(Continued).

Act III of 1905 (Madras Land Encroachment) —(Concluded).

(2) S. 6. See No. 1, *supra*.

(3) S. 7. See No. 1, *supra*.

(4) S. 14—*Eviction by Tahsildar under the orders of the Collector, if legal—Suit for recovery of possession of land by the evicted person, whether one under the Act or the general law—Limitation applicable, whether one prescribed by the special Act or by the general limitation law.*

Under the Madras Land Encroachments Act, it is perfectly legal for a Tahsildar, acting under the written order of the Collector, to evict a person from the possession of land encroached upon by him.

S. 14 of the Madras Land Encroachments Act is very wide in its terms and gives a remedy to any person who deems himself aggrieved by any proceeding under the Act.

A suit to recover possession of land from which a person has been evicted under the provisions of the Madras Land Encroachments Act is one under the special statute and not one for the recovery of real property under the general law and is governed by the shorter period of limitation prescribed by that Act. *Gangamma Naidu v. Secretary of State*, 3 L.W. 315= (1916) 2 M.W.N. 82=33 Ind. Cas. 665.

COUTTS-TROTTER and SESHAGIRI AIYAR, JJ.

References:—16 M. 317; 16 M. 296, D.

(5) S. 14. See No. 1, *supra*.

Act I of 1908 (Madras Estates Land).

(1) *Suit for rent—Land situated in a Zamindari—Ryoti land—Ijara lease—Jurisdiction of Civil Court to try.*

Prima facie a land within the ambit of a zamindari must be deemed to be *ryoti* land unless the zamindar shows it is private land. When there is no allegation in the plaint as regards the nature of the land, being an 'estate' and the claim being one for rent, the suit lies in the Revenue Courts.

Where there is a *ryoti* land and the suit is for rent, the proper forum is the Revenue Court and not the Civil Court, notwithstanding that the claim for rent arises out of an *ijara* lease.

Where in a connected batch of suits the High Court has held that the proper forum is the Revenue Court and not the Civil Court, it would be creating an anomalous state of affairs now to hold that the proper forum is the Civil Court. *Goplaetti Narayanaaswami Naidu v. Gangi Setti Bangarayya*, (1916) 2 M.W.N. 240=4 L.W. 371.

SESHAGIRI IYER, J.

(2) Ss. 2 (15), (16) (b), 6 (2) (4), 45, 153, 157, 163 (1)—"Old waste *ryoti* land"—Tenants admitted to possession of old waste *ryoti* land—Tenant cultivating without permission of landlord—Landlord accepting subsequently *sivai jama*—Civil Court.

Defendants cultivated their respective portions of "old waste *ryoti* land" without permission

6.—Madras Acts—(Continued).

Act I of 1908 (Madras Estates Land)—(Ctd.).

of the landlord from Fasli 1815 to 1818. They however applied for pattas in Faslis 1818 and 1820 and payments were accepted from them; but no pattas were given them. In Fasli 1821 the landlord decided to reserve the land for forest and directed the filing of the suit to eject delinquents. Held that there was a presumption that the land was "old waste *ryoti* land" within the meaning of S. 2 (3) of Act I of 1908 (Madras Estates Land); that the defendants were "admitted to possession" of the land and were "ryots"; and that under S. 163 (1) of the Act, they were not liable to be ejected as trespassers, but that the suit came under the purview of Ss. 153 and 157 of the Act and should be brought in Revenue Court (a).

Oldfield, J.—It is for the party, who seeks to oust the jurisdiction of the ordinary Civil Courts, to establish his right to do so (b).

The burden of proof that the land comes within one of the exemptions in S. 2 (16) (b) or 6 (4) of Act I of 1908 (Madras Estates Land) is on the party asserting it.

A person from whom a landholder has received the payment due under S. 45 in respect of his occupation of old waste must be deemed to have been admitted to possession, and S. 163 confers a right of suit in the Civil Court only against those who are liable under S. 45, but have made no payment, those who have made such payment being treated as having been admitted. The payment under S. 45 is referred to in the section itself as "rent"; and persons, who continue to hold after making a payment voluntarily and in consequence of the Collector's decision must be treated as holding on condition of making such payment and are, therefore, within the definition of S. 2 (15) of Act I of 1908 (Madras Estates Land). Suits to eject them will, therefore, lie under S. 153 in the Revenue Court. The provisions of S. 153 are not exhaustive of all possible causes of eviction.

Sadasiva Aiyar, J.—Actual cultivation by a tenant without his having been obliged to incur any extraordinary expense or trouble in bringing the land under cultivation, is almost conclusive evidence that the land is cultivable land. The whole policy of the Madras Estates Land Act is in favour of raising a presumption that a land in an estate is *ryoti* land.

Sivai jama rent paid by tenants is not in the eye of the law merely damages agreed upon between the landowner and the trespasser. It is rent payable by persons who are really entitled to be called 'tenants.' *President, District Board, Tanjore v. Kannaswami Thondaman*, 35 Ind. Cas. 121.

OLDFIELD and SADASIVA AIYAR, JJ.

References:—(a) 24 Ind. Cas. 904; 1 L.W. 399 (1914) M.W.N. 388; 38 M. 843; 26 M.L.J. 285 1 L.W. 218; 15 M.L.T. 299; 24 Ind. Cas. 217 F. (b) 39 M. 21; 25 Ind. Cas. 891; 27 M. L.J. 233, R.

(3) S. 3—Proof whether village as a whole granted as an *Inam*.

6.—*Madras Acts*—(Continued).

Act I of 1908 (Madras Estates Land)—(Old.).

The fact that a village, —granted as an Inam and containing Inam and ryotwari holdings, — was treated as a whole Inam village at the Inam Settlement and the Revenue authorities themselves subsequently recognised it as such, is a clear proof that the whole village was granted as an Inam and is an "estate" within the meaning of Act I of 1908. *Kasturi Aiyangar v. Gulam Ghose Sahib*, 31 Ind. Cas. 791.

CLEGG, F. M.

(4) S. 3—"Rent"—Meaning—Money payable for land let for building houses—"Jerayati."

Money payable on account of land let for purposes of building houses is not rent within the meaning of S. 3 of the Madras Estates Land Act and a suit to recover the said amount is cognisable by the Civil Court and not by a Revenue Court.

"Jerayati" may mean cultivable land but it is also used in the Madras Presidency as opposed to Inam land. *Ramachandra Mardaraja Deo v. Dukka Podhano*, 31 Ind. Cas. 852.

ABDUR RAHIM and SPENCER, JJ.

(4-a) Ss. 3 and 40—Estate—Grant to Brahmin before Permanent Settlement for subsistence—Onus—Suit for commutation of rent.

Where at some time previous to the Permanent Settlement a Zemindar granted a village to a Brahmin for subsistence and there was a *jodi* payable at the time of the Permanent Settlement to the Zamindar it is a correct presumption to make that the grant was of the *melvaram* only. The question of onus whether the village granted constitutes an estate within the meaning of the Madras Estates Land Act depends on the circumstances of each case.

The *ryots* in occupation of certain lands in an Inam village instituted a suit under S. 40 of the Madras Estates Land Act for commutation of rent in kind into money rent. The evidence showed that the *ryots* have been in possession of their holdings at more or less fixed rates for years and their fathers before them and that there were at times exchanges of land according to custom, that there had been no relinquishment and that the relinquishment clause had not been acted upon.

Held that the burden of proving that the grantee was the owner of the *kudivaram* lay on the defendant landlord and that, in the absence of evidence, the village must be deemed to be an estate under S. 3 (2) (d) of the Act and that commutation should be allowed. *Radha Krishna Das Goswami v. Bikari Behara*, 32 Ind. Cas. 229.

CLEGG, F. M.

(4-b) Ss. 3, 55—Suit for patta, when lies.

Under S. 55 of the Madras Estates Land Act, a suit for patta can be brought only by a *ryot* in respect of the land classed as *ryoti* land and not in respect of the land excluded from the category of *ryoti* land. *Ramaswami Nalcker v. Sreenimakkayya Veluchami*, 32 Ind. Cas. 594.

WALLIS, C.J. and AYLING, J.

6.—*Madras Acts*—(Continued).

Act I of 1908 (Madras Estates Land)—(Old.).

(5) S. 8 (2) (c) (d)—Distinction between Jaghir and Inam—Grant by the Nawab of the Carnatic for subsistence—Whether Jaghir or Inam—Acquisition of Kudivaram—Effect—Meaning of 'recognised'—Suit for eviction—Jurisdiction of Civil Courts.

In this case a personal grant for subsistence was originally made by the Nabob of the Carnatic to a member of his family. At the time of the grant the villages in question were *mirasi* villages, and long before 1843 plaintiff's predecessors had become the owners of both the *kudivaram* and *melvaram* therein, and no occupancy right had been acquired, before the coming into force of the Estates Land Act, by the defendant or his predecessors who were let in as tenants for cultivation of the lands.

Held, the grant, though styled a jaghir, was only an 'Inam' within the meaning of S. 8 (2) (d) of the Estates Land Act, and an action to evict the defendant (tenant) was maintainable in the ordinary Civil Courts (a).

The nature of Jaghir tenure and the distinction between 'Jaghir' and 'Inam' discussed (b).

Per *Srinivasa Aiyangar, J.*—"Recognition" in S. 3 (2) (d) of the Act implies something more than mere acquiescence, something done by the Government, as for instance, by acceptance of service, *jhodi*, etc. (c). *Sam v. Ramalinga Mudaliyar*, 30 M.L.J. 600=34 Ind. Cas. 803.

COUTTS-TROTTER and SRINIVASA AIYANGAR, JJ.

References:—(a) 38 M. 843=26 M.L.J. 285, R. (b) 27 M.L.J. 718; 42 I.A. 229; 36 B. 639, R. (c) 24 M.L.J. 538, R.

(6) S. 3 (2) (d)—Grant of Inam village—Presumption as to grantee being owner of kudivaram at the time of grant—Party seeking to oust jurisdiction of Civil Court must establish his right to do so. *Srimathi Kidambi Jagannathacharyulu Ayyavaru v. Pidipta Kutumbarayudu*, 27 M.L.J. 233=25 Ind. Cas. 891=39 M. 21. See Final Part, 1914, Col. 149.

(7) S. 3, sub-S. 2, cl. (d) and cl. 5. Estate—Landholder—Receiver, power of, to let tenants into possession of cultivable lands—Agrabaram, grant of, whether conveys only revenue of a portion of the village—Burden of proof. *Gopiseti Narayanaswami Naidu Garu v. Nalam Subrahmanyam*, 2 L.W. 683=18 M.L.T. 148=(1916) M.W.N. 690=29 M.L.J. 478=30 Ind. Cas. 375=39 M. 683. See Final Part, 1915, Col. 186.

(7-a) S. 3 (5)—Dispute between joint landlords as to collection of rent—Collector's order declaring particular person as landlord—Revision.

There was a *bona fide* dispute between joint landholders in a village as to collection of rents and the Collector declared a particular person as landholder under S. 3 (5) of the Act. The order was in force until the death of that person and the present counter-petitioner succeeded him after his death. Petitioner, the owner of

6.—Madras Acts—(Continued).

Act I of 1908 (Madras Estates Land)—(Ctd.).

certain lands in the village, applied to the Board of Revenue to revise the order of the Collector. *Held* that as the counter-petitioner was admittedly entitled to the largest share of the income of the village, there were not sufficient grounds for interference with the Collector's order. *Yellaawami Tevar v. R. Srinivasa Ayyar*, 36 Ind. Cas. 212.

CLEGG, F.M.

(7-b) S. 3 (5)—Landlord—Receiver appointed to realise arrears of rent if landlord.

A Receiver appointed by order of Court to realise the arrears of rents for certain faslis from the ryots of an estate governed by Act I of 1908 is a landlord within the meaning of S. 3 (5) of the Act, notwithstanding that he may have restricted powers. *Macca Meera Leval Rowther v. Eastern Development Corporation Company of London*, 36 Ind. Cas. 82.

OLEGG, F.M.

(8) S. 3, cl. 7, sub-cl. 1 and 2—"Old Waste" definition of—"Time of letting" whether refers only to letting in question—Absence of "immediately prior to such letting" in sub-cl. 1, whether makes any difference from sub-cl. 2—Lands uncultivated for ten years prior to the Act but not immediately prior to the letting in question—Whether old waste or ryoti land.

The suit lands had remained uncultivated for ten years immediately preceding 1900. In 1900, they were left for cultivation on a lease for five years. In 1906 the lands were let to the defendant under a lease for three years and were in the defendants' occupation at the time of the passing of the Madras Estates Land Act. In 1910 the landholder sued to eject the defendants as the lease had expired on 30th June 1909. The defendants contended that they had acquired occupancy rights under S. 6 of the Estates Land Act. The contention of the landholder was that the lands were "old waste" within the meaning of S. 3, cl. 7, sub-cl. (1) and that therefore no occupancy right could be acquired under S. 6:

Held per curiam (1) that the lands are not "old waste" but "ryoti land" and that under S. 6 (1) the ryots had acquired occupancy rights therein;

(2) that the words "time of letting" in S. 3, cl. 7, sub-cl. 1 and 2, refer only to the time of admission of the particular person who is claiming occupancy right by virtue of such admission and not to be first letting of land which till then remained uncultivated.

Semble: The words "letting" and "tenant" are used throughout the Act only in cases where no occupancy right is conferred.

Per Wallis, C. J., and Srinivasa Aiyangar, J.—The period of "ten years" referred to in sub-cl. 1 must also be "immediately prior to the letting," even though these words do not appear in sub-cl. 1 as they do in sub-cl. (2).

Per Wallis, C. J.—The only difference between the two parts of the definition of "old waste"

6.—Madras Acts—(Continued).

Act I of 1908 (Madras Estates Land)—(Ctd.).

is that in the second part the letting must be after the passing of the Act.

Per Curiam.—The main principle of the Madras Estates Land Act is to confer occupancy rights on all persons in possession of cultivable land in Zamindaris at the time of the passing of the Act.

Per Abdur Rahim and Srinivasa Aiyangar, JJ.—Land which was once old waste may become ordinary ryoti land not being old waste and vice versa, the character of the land varying with the conditions of its occupation.

Per Abdur Rahim, J.—Of two possible constructions that one must be preferred which gives a consistent meaning to the different parts of the enactment. *Sunkara Venkataratnam v. Sri Rajah Yaradaraiah Appa Rao Bahadur Garu*, 3 L.W. 592 = (1916) 4 M.W.N. 7 = 31 M. L.J. 123 = 20 M.L.T. 118 = 35 Ind. Cas. 213.

WALLIS, C.J., ABDUR RAHIM and SRINIVASA AIYANGAR, JJ.

(9) S. 3, cl. 7 (2), S. 6—Old waste—Expiry of lease and tenants giving up possession on 30th June 1908—Land let to the tenants after the 1st July 1908—No occupancy rights previous to the Act—Nature of the land—Whether tenants acquire occupancy right under the Act—"Passing of the Act," "coming into force of the Act," meaning of.

The tenants who were in possession of certain Lankas in which they had no occupancy rights under leases gave up possession of the Lankas on 30th June 1908. The Madras Estates Land Act which received the assent of the Governor-General on 28th June 1908, came into force on the 1st July 1908. The lands were again let to the tenants and possession given to them about a month later. The letting was, however, for the whole of the Fasli 1318 as well as for the two subsequent faslis.

Held, that although the tenants obtained the right to possession of the lands from the 1st July 1908, the date of the commencement of the period of the lease, still since they had no possession either legal or actual on that date, they could not be said to be "ryots now in possession" of the lands within the meaning of S. 6 of the Estates Land Act.

Held also, that whatever might be the meaning of the expression "the time of letting" in S. 3, cl. 7 (2) whether the date from which the lease took effect or the date when it was executed since that date was subsequent to 28th June 1908, on which the Act was passed by receiving the assent of the Governor-General and since at that time the land had remained without occupancy rights for over ten years, they came within the definition of "Old waste" in S. 3, cl. 7 (2) of the Act and consequently S. 6, cl. (1), was inapplicable.

The word "possession" in S. 6 does not cover a mere right to possession.

The words "passing of the Act" do not mean the same thing as "the coming into force of the Act." Under S. 1, the Act came into force on the 1st July 1908, but the Act was

5.—Madras Acts—(Continued).

Act I of 1908 (Madras Estates Land)—(Old.).

passed when it received the assent of the Governor-General on the 28th June 1908. *Mygapula Ganganna v. Venkata Yljaya Gopalaraju Garu*, 20 M.L.T. 520—31 M.L.J. 870—(1917) M.W.N. 148.

SPENCER and KRISHNAN, JJ.;

- (10) *Ss. 3, 4, 73, 143—Patta, terms of—Kanganam fee whether illegal cess—Zamindar's right of entry on holding for estimate of outturn—Loss of crops owing to theft, cattle, etc.—Liability of the tenant—Right of Zamindar to charge rent on uncultivated portion—Liability to rent under S. 4, subject to custom—Kulam Korvai lands—Obstruction to free flow of rain water to the tank—Right of the Zamindar for sarasari—Raising of dry crops on Nanja land—Liability for wet rates.*

Kanganam fee which is a contribution paid by the tenant to reimburse the landlord for the cost of the supervision of harvest out of which *Melwaram* has to be delivered to the landlord falls under S. 3 (ii), cl. (a) of the Estates Land Act and is not an illegal cess within the meaning of S. 143 of the Act. Consequently a term in the patta providing for its levy is not improper.

The claim of the Zamindar to enter upon the holding for the purpose of forming an estimate of the outturn is opposed to S. 73 of the Act and should not be allowed.

The Act does not cast on the tenant any liability for *Panchamati* or compensation to the landlord for loss caused to the crop by cattle, theft or clandestine removal.

Where it is proved that by custom only cultivated extents were being charged with rent and not lands left uncultivated, no rent can be charged in respect of the uncultivated portion.

The liability of the ryot to pay rent under S. 4 of the Estates Land Act is subject to any custom or contract to the contrary that may be established.

In the case of *kulam korvai* lands i.e., lands in the tank bed, in the absence of proof of any custom by the tenants to put up ridges on the land, the landlord has got the right to prevent tenants from putting up ridges so as to prevent the tanks having the full benefit of the rain water flowing into them. Therefore the tenants are bound to pay *sarasari* if they should put up ridges and cultivate *kulam korvai* lands.

The tenants are liable to pay *sarasari* wet rates if they raised dry crops on Nanja land while they could have raised wet crops, but to pay the usual dry rates if they raised dry crops owing to insufficiency of water. *Arunachalam Chettiar v. Mangalam*, 20 M.L.T. 70—4 L.W. 37—31 M.L.J. 168—35 Ind. Cas. 329.

KUMARASWAMI SASTRI and PHILLIPS, JJ.

- (11) *Ss. 3 and 6—Ryot—Saline land leased only for pasture—Tenant thereof whether a ryot and entitled to occupancy right—'Cultivable land,' what is—Jeroyati, meaning of—Saline land used only for pasture if 'old waste'—Agriculture, meaning of.*

6.—Madras Acts—(Continued).

Act I of 1908 (Madras Estates Land)—(Old.).

A tenant does not become a *ryot* in respect of land held by him only for pasturing purposes, though, it may be, that the use of the land solely for pasture may not deprive him of his claim to be called '*ryot*' provided he has the right to use it for agriculture (a).

Unless a land is of such a nature that it is ordinarily cultivable, or cultivable at intervals of not unusual length, it is not 'cultivable' land and, therefore, not '*ryoti*' land and the tenant of such a land is not a '*ryot*.'

The term '*Jeroyati*,' as used in some parts of the Telugu country, means merely '*non-inam*' (b).

Saline land used only for grazing purposes is old waste within the meaning of S. 3 (7) (1) of the Madras Estates Land Act.

The ordinary meaning of 'agriculture' is the raising of annual or periodical grain crops through the operation of ploughing, sowing, etc. (c).

A tenant in possession of saline grazing land let only for the purpose of pasture is not entitled to claim occupancy right therein by virtue of S. 6 of the Madras Estates Land Act.

Pasturage dues are not rent and a suit therefore is not exempted from the cognizance of Civil Courts. *Sree Ravu Seshayya Garu v. The Raja of Pittapur*, 3 L.W. 485—(1916) M. W.N. 396—31 M.L.J. 214—34 Ind. Cas. 730.

SADASIVA AIYAR and MOORE, JJ.

References:—(a) 25 M.L.J. 50, F. (b) 31 Ind. Cas. 852, R. (c) 38 M. 738, F.

- (12) *Ss. 3 (15), (16), 6 (4)—Waste land let for pasturage, if ryoti—Onus of proving it is cultivable is on those who assert it is ryoti—Pasturage whether an agricultural purpose—Ryot and ryoti land defined—Admission to waste land for pasturage only whether confers right of occupancy.*

A '*ryot*' under the Estates Land Act is a person who holds for the purpose of agriculture *ryoti* land in an estate.

Ryoti land is cultivable land in an estate other than private land.

Land fit usually only for pasturing cattle and not for ploughing and raising agricultural crops is not *ryoti* land (a).

Where a piece of land has for a great many years not been cultivated but has been used only for pasturing cattle, the onus of showing that it is cultivable is on those who assert it is *ryoti*.

Waste land is land not under cultivation and it may or may not be cultivable land. Land which is not *ryoti* does not become *ryoti* land, merely because it is let for pasturage.

Admission for purposes of pasturage only, to waste land even though *ryoti* does not confer on the person so admitted any right of permanent occupancy.

Quere:—Whether land held for pasturage only is land held for purposes of agriculture within the meaning of S. 3 (15) of the Estates Land Act.

6.—Madras Acts—(Continued).

Act I of 1908 (Madras Estates Land)—(Ctd.).

Estates Land Act, S. 3, cls. 15, 16 and S. 6 (d) (4) considered. *Maharaja of Venkatagiri v. Yellikanti Rami Reddi*, 3 L.W. 582—(1916) 2 M.W.N. 21=31 M.L.J. 211=34 Ind. Cas. 607.

WALLIS, C.J. and PHILLIPS, J.

Reference:—(a) 38 M. 738, R.

(13) Ss. 3, cl. 2 (d), and 8—*Estate—Village in which grantees owning kudivaram in some lands, whether not an estate—Occupancy rights, absence of, in tenants—Presumption of kudivaram being in landlord if justifiable—Exception to S. 8, scope of.*

A village will not cease to be an 'estate' within the meaning of cl. 2 (d) of S. 3 of Madras Estates Land Act, merely because the grantee owned the *kudivaram* in certain lands included therein. To remove a village from the definition, it is necessary that the 'grantee' should at the time of the grant own the *kudivaram* of all the lands then brought under cultivation.

Though the fact that the tenants had no occupancy rights in the suit lands may give rise to a presumption that the landlord owned the *kudivaram* in those lands, that is insufficient to remove the case outside the definition in cl. (d), sub-S. (2), S. 3 of the said Act.

The exception to S. 8 of the Act does not apply to cases where, at any time before the passing of the Act, the *kudivaram* was held by a person who subsequently became, as *inamdar*, possessed of the land revenue. It has reference only to cases in which a person who is already *inamdar* acquires the *kudivaram* right. *Raja Varadaraja Appa Rao v. Katnani Kuruvanna*, 3 L.W. 196=19 M.L.T. 159=30 M.L.J. 249=32 Ind. Cas. 722.

ABDUR RAHIM and AYLING, JJ.

(14) Ss. 3 and 8, 185—*Ryoti land when becomes private land—Proof—Speeches in the Legislative Council—Construction of S. 185—Proviso an exception to S. 8. Zemindar of Chellappalli v. Rajalapati Somayya*, 16 M.L.T. 576=27 M.L.J. 718=(1915) M.W.N. 1=2 L.W. 117=27 Ind. Cas. 77=39 M. 341. See Final Part, 1914, Col. 154.

(15) Ss. 3 (11); 51, 148—*Rusums—'Fees paid with rent' whether can be included in Patta 'Rent,' meaning of. Karri Peddi Reddy v. Receiver, Nidadavole and Medur Estates*, 18 M.L.T. 171=30 Ind. Cas. 529. See Final Part, 1915, Col. 189.

(16) S. 3, cl. 11 (a) and Ss. 60 and 61—*Madras Local Boards Act* (V of 1904), S. 73—*Rent—Local cess—Interest.*

S. 3, cl. 11, (a) of the Madras Estates Land Act refers only to money recoverable from a 'ryot' by the landholder. It has no general application to money recoverable by any person from any other person as if it was rent.

The local cess paid by a landholder and recoverable from the intermediate landholder under S. 78 of the Madras Local Boards Act, is neither an 'instalment' of rent within the

6.—Madras Acts—(Continued).

Act I of 1908 (Madras Estates Land)—(Ctd.).

meaning of S. 60, nor an 'arrear' of rent within the meaning of S. 61 of the Madras Estates Land Act, and no interest is recoverable upon the amount of such cess. *Narayanawami Nayudu v. Pannala Ramanandam*, 3 L.W. 32=32 Ind. Cas. 433.

SADASIVA AYYAR, J.

(16-a) S. 4. See No. 10, *supra*.

(16-b) S. 4, cl. (3)—*Commutation of rent—Rate—List of prices prepared by Collector.*

In commutation of rent, a Court is not justified in accepting the list of prices prepared in the Collector's Office without further proof that these were prices actually prevailing in that locality during the years in question. *Sivaji Rajah Saib v. Court of the Subordinate Judge of Tanjore*, 32 Ind. Cas. 493.

COUTTS TROTTER and SRINIVASA IYENGAR, JJ.

(16-c) S. 6. See Nos. 2, 9, 11, 12, *supra* and No. 20, *infra*.

(17) S. 6, sub-S. (6) and S. 8—*Government lands under ryotwari tenure, purchased by samindar—Jurisdiction of Civil Courts—Acquisition by landholder of occupancy right—Acquisition by tenant of landholder's right, difference between.*

The language of S. 8 indicates that in framing it the legislature was thinking of the acquisition of occupancy rights by landholders and not of the acquisition of landholders' rights by ryots.

The general provisions of S. 8 (1) must yield to the special provisions of the explanation to sub-S. (6) to S. 6 on the principle *generalia specialibus non derogant*.

Where a zamindar was in the position of a Government ryot and owner of the *kudivaram* right, (i.e.) where he had a right of occupancy in certain lands within the meaning of the explanation to sub S. 6 of S. 6 of the Madras Estates Land Act he would not by the terms of the said explanation lose such occupancy right by becoming interested in the land as landholder, that is, by the land becoming part of his estate. *Zamindar of Sanivarappet v. Zamindar of South Vallur*, 39 M. 944=34 Ind. Cas. 444.

WALLIS, C.J. and SESHAGIRI AYYAR, J.

(18) Ss. 6 and 55—*Suit for patta—Auction-lease of a lanka—Lease different from an ordinary jeroiyili patta—Lessee whether a "ryot"—Ryot out of possession of the holding, whether can sue for a patta.*

The plaintiffs, who obtained a lease dated 28-2-08 of a lanka for 3 years commencing with Fasli 1317, sued the defendant for the grant of a patta under S. 55 of the Madras Estates Land Act, on the ground that, as they had been in possession of the land as ryots on 1-7-08, the date on which the Act came into force, they had acquired permanent rights of occupancy in the holding. At the time of the suit, however, they were not in possession of

6.—Madras Acts—(Continued).

Act I of 1908 (Madras Estates Land)—(Ctd.).

the holding having been ejected by the defendant but they based their claim on their possession on 1-7-08. The lease differed from the ordinary jeroyiti patta in the following respects:—(1) The Isaradars were not the residents of the village; (2) the lanka was leased in an auction and the lessees were called Isaradars; (3) the rent was a lump sum and not so much per acre; (4) the land was periodically sold in public auction to the highest bidder; (5) the Isaradars and the rent changed at the end of lease; (6) the Isaradars had no right to relinquish before the expiry of the lease; (7) the lanka was watched by the estate servants and repaired at great cost; and (8) the lessee was not entitled to reduction or remission of rent for any cause.

Held, that the plaintiffs were not ryots within the meaning of the Estates Land Act, and therefore did not acquire rights of permanent occupancy.

Held, also, that a ryot can sue the landlord in a Revenue Court for the grant of a patta although he is not in physical possession of his holding at the time of the suit, and that he is not obliged to obtain possession through a Civil Court before suing for the patta. *Talla-pragada Subba Rao v. Gopisetti Narayana-swami Naidu Garu*, 20 M.L.T. 36=4 L.W. 293=81 M.L.J. 339=86 Ind. Cas. 727.

AYLING and NAPIER, JJ.

(18-a) S. 8. See Nos. 13, 14, 17, *supra*.

(19) S. 8, cls. 1 and 3—*Purchase by landlord of kudivaram right from tenant—Ryoti land—Conversion into private land.*

Where the kudivaram right of a ryot is purchased by the landholder under S. 8, cls. 1 and 3 of Act I of 1908, the ryoti land cannot cease to be such owing to such merger of the melevaram and kudivaram rights, and the landlord, purchaser, is entitled to continue to treat the land as a ryoti land.

S. 8, cls. 1 and 3 of the Act prevents lands once ryoti from being converted into private lands, on the ground of merger of the Kudivaram rights into melevaram rights. It is only when there are acts of strong and unequivocal character that the Court would be justified in giving an exceptional finding in favour of the conversion of ryoti into private land. *Methuku Sivaramayya v. Munireddigari Chinna Munesappa*, 80 Ind. Cas. 812.

SADASIVA AIYAR and NAPIER, JJ.

(20) S. 8, cls. 1 and 2, S. 6, cl. 6, *Explanation—Occupancy ryot subsequently acquiring melvaram—Rule of merger, whether applies—Insufficiency or invalidity of notice, if can be pleaded for the first time in Second Appeal—Estates Land Act explicit—Principles of general law, if applicable.*

S. 8, cl. (1) of the Madras Estates Land Act (I of 1908), simply enunciates the general law of merger, and the same is subject to qualifications to be found in other portions of the Act.

6.—Madras Acts—(Continued).

Act I of 1908 (Madras Estates Land)—(Ctd.).

S. 8, cl. 2, is an application of the general rule in cl. (1) to the particular case where one amongst several co-landholders subsequently acquires the occupancy right.

But where one out of several mirasidars or ryots becomes entitled to the rights of a landholder in respect of the same land it is the converse of S. 8, cl. (2), and is specifically provided for by explanation to cl. 6 of S. 6.

Where one of two persons jointly entitled to the occupancy right in a certain estate became entitled by purchase to the semindari or melvaram right also.

Held (1) that he does not thereby lose his occupancy right; (Bengal Tenancy Act, S. 22, Explanation and 28 A. 763, referred to);

(2) that the restriction that such acquisition should be by inheritance or devise applies only to cl. 6 of S. 6 and not to the explanation to cl. (6).

The Madras Estates Land Act is a comprehensive tenancy Code and wherever it is explicit, a discussion of the general law is irrelevant.

In an ejectment suit where the defendants did not plead any want of notice in the first Court and there was no issue regarding it, *held* that the plea of insufficiency or invalidity of notice cannot be allowed to be raised for the first time in second appeal. *Muthu Reddi v. Muthu Venkatapathi Reddi*, 4 L.W. 168=31 M.L.J. 354=(1916) 2 M.W.N. 180.

OLDFIELD and SADASIVA AIYAR, JJ.

(21) Ss. 11, 151, cls. 1 and 2—*Supplementary Difference between Ss. 11 and 151—Holding as a whole rendered substantially unfit—Otherwise no injunction. Navanna Vena Rama Chetty v. A. L. A. R. R. M. Arunachalam Chettiar*, (1915) M.W.N. 801=18 M.L.T. 343=29 M.L.J. 724=39 M. 673=31 Ind. Cas. 98. See Final Part, 1915, Col. 191.

(22) Ss. 12 and 213—*Breach of the provisions of that Act—Jurisdiction—Suit, whether cognisable by the Revenue Court.* See CIV. PRO. CODE (1908), No. 194, 20 M.L.T. 281.

(23) S. 13 (3)—*Improvements effected at tenant's expense before the Act—Contract to pay enhanced rent for crops raised with the help of such improvements—Tenant whether entitled to claim exemption under the Act from liability to pay higher rate—Act whether retrospective—Payment of higher rent for 60 years—Presumption as to consideration for contract—Sadelwas and Madiri Kasuvu whether rent or illegal cesses. Rajah Kumara Yenkata Perumal Raju Deva Maharaajulungaru v. Ramudu*, 28 M.L.J. 81=(1915) M.W.N. 132=17 M.L.T. 129=27 Ind. Cas. 688=39 M. 84. See Final Part, 1915, Col. 192.

(24) S. 13 (3)—*Landlord and tenant—Extra charge for Vanpayir claimed—Long continued course of payment—Contract to pay—Presumption. A. L. A. R. Arunachalam Chetty v. Sayyad Ahamed Ambalam*, 2 L.W. 1117=19 M.L.T. 188=(1916) M.W.N. 237=31 Ind. Cas. 539. See Final Part, 1915, Col. 193.

6.—Madras Acts—(Continued).

Act I of 1908 (Madras Estates Land)—(Ctd.).

(24-a) S. 16. See No. 2, *supra*.

(25) S. 38—*Landlord and tenant—Grounds for reduction of rent.* Nallaya Koundar v. P. N. Sadaya Koundar *alias* Appavu Koundar, (1915) M.W.N. 791—33 Ind. Cas. 809. See Final Part, 1915, Col. 194.

(26) S. 40—*Landlord and tenant—Commutation of rent—Principles regarding award of.*

Under S. 40 of the Estates Land Act, the occupancy ryot has the right to sue for commutation. The Act gives him this right and it is not a matter resting within the option and discretion of the proprietor, but is within the discretion of the Court to allow or refuse.

It is to the convenience of both parties to have a fixed money rent and the advantages are generally in favour of commutation. Gopala Krishna Aiyar v. C. Srinivasa Row Sahib, 34 Ind. Cas. 935.

OLEGG, F.M.

(27) Ss. 40, 189 (2), 205, *Sch. A—Commutation suit—No definite order for commutation—No appeal and second appeal where no decree was passed.*

In a commutation suit, there was no written order on record allowing the particular parties to commute but it appeared some verbal order was passed the nature of which was not ascertainable from the record. There was only an expression of opinion that the question whether commutation should be allowed could not be considered again as it had already been settled in the affirmative. *Held* that as there was no decree within the meaning of the definition in the Civ. Pro. Code, there could be no appeal and second appeal upon the record as it stood. *And* Thevan v. Zamindar of Sivagiri, 34 Ind. Cas. 460.

OLEGG, F.M.

(27-a) S. 45. See No. 2, *supra*.

(27-b) S. 51. See No. 15, *supra*.

(28) Ch. IV, S. 52—*No retrospective operation—Agreement before the Act came into force—Not binding.* Rajah of Pittapuram v. Venkata Subba Row, (1915) M.W.N. 813—18 M. L.T. 348—31 Ind. Cas. 93. See Final Part, 1915, Col. 195.

(28-a) S. 55. See No. 18, *supra*.

(28-b) S. 60. See No. 16, *supra*.

(28-c) S. 61. See No. 16, *supra*.

(28-d) S. 73. See No. 10, *supra*.

(28-e) Ss. 74, 75, *Proceedings under nature of—Finding of Collector re rent—Subsequent suit for determining rent—Res judicata.*

The proceedings under Ss. 74 and 75 are more or less of a summary character. No appeal is provided. S. 75 does not say anywhere that the finding of the Collector that the rent was payable in cash, not in kind would have the effect of a decree and operate as *res judicata* so as to bar a subsequent suit for the determination of rent. Talagapu Tavedu v. Zamindar of Tarla, 32 Ind. Cas. 706.

ABDUR RAHIM and AYLING, JJ.

6.—Madras Acts—(Continued).

Act I of 1908 (Madras Estates Land)—(Ctd.).

(29) Ss. 74, 75 and 205—*Award made under S. 75 (6), confirmed under cl. 7—Suit by landlord for arrears of rent, whether maintainable—Legality of award, when and how to be questioned—Acts of Revenue Officer under the Act—Power of the High Court to revise.*

Certain ryots in Kallikota and Attagada applied under S. 74 of the Madras Estates Land Act to the Deputy Collector to depute an officer to make a division of the produce. Notice was served on the landlord under S. 75, who after 17 days filed an objection petition before the Deputy Collector that an estimate had already been made by the estate Revenue-Inspector which had not been objected to by the ryots and that the latter had already carried away nearly half the produce. The officer deputed made an award on 28th May 1912 noting the objection of the Estate Manager about removal and divided the crops. No objection was filed by the landlord against the award and after a month it was confirmed by the Deputy Collector under S. 75 (7). There was no appraisal of the standing crop, no finding as to the removal and no determination of what would be a full crop as the tenants had already harvested the crops and stored it on the threshing floor even before they applied for the deputation of an officer.

The landlord contended that the award was therefore no award in law but a nullity.

Held (1) that the award was final and the landlord was bound by it;

(2) that if the landlord had any grievance against the award he should have filed an objection within a week of its delivery under S. 75 (7);

(3) that where the law provides a means of questioning the legality of an award, and the landlord had not chosen to avail himself of it, he has no right to question it afterwards (a).

Per Krishnam, J.—A landholder's claim for rent becomes merged in the award confirmed by the Collector under S. 75 (7) of the Act and he has no cause of action afterwards to sustain a suit for arrears of rent.

Per Curiam.—Under S. 205 of the Madras Estates Land Act the Collector and the Board of Revenue alone have the power to revise an order of a Revenue Officer and the High Court has no power to revise an order made under the Act. Ramachandra Marda Raja v. Mull Podhano, 4 L.W. 278—35 Ind. Cas. 640.

SPENCER and KRISHNAM, JJ.

Reference:—(a) 32 Ind. Cas. 76, *Expt. & D.*

(29-a) S. 75. See No. 29, *supra*.

(30) Ss. 77, 210, 211—*Suit for arrears of rent for Faslies which expired more than 8 years before the Act—Limitation—Effect of plaintiff's minority—S. 7, Limitation Act—Applicability—Construction of Acts—Retrospective operation—S. 6 (c), General Clauses Act, S. 8 (d), (e)*

6.—*Madras Acts—(Continued).***Act I of 1908 (Madras Estates Land)—(Ctd.).**

Madras Act I of 1891 (General Clauses). *Rajah of Pitapur v. Gani Venkata Subba Row*, 29 M.L.J. 1=18 M.L.T. 67=2 L.W. 661=(1915) M.W.N. 547=30 Ind. Cas. 94=39 M. 645 (F.B.). See Final Part, 1915, Col. 196.

(81) *S. 112—Landlord and Tenant—Remission for shavi—Nature of obligation—Enforceability.*

In the absence of proof as to the existence of custom or contract, an obligation to grant remission for shavi owing to non-repair of irrigation source by the landlord is purely moral and not legal and cannot be enforced by suit. *Ramakrishna Rayanlu Garu v. Ranga Charlar*, 9 L.W. 800=32 Ind. Cas. 737.

KUMARASWAMI SASTRI and PHILLIPS, JJ.
References:—S.A.R. (1869) 105; 13 M.L.J. 377, F.

(32) *S. 112—Landholder—Lessee—Rent in arrear during currency of lease—Expiry of lease—Attachment, proceedings by way of, if open to the lessee, after expiry of term.* *Sundaram Iyer v. Kulathu Aiyar*, 2 L.W. 867=(1915) M.W.N. 731=18 M.L.T. 316=29 M.L.J. 505=31 Ind. Cas. 81=39 M. 1018. See Final Part, 1915, Col. 197.

(33) *Ss. 112, 113, 189—Sale under the Act—Suit to contest sale—Jurisdiction—Civil suit barred both before and after sale.* *Ramanathan Chetty v. Ramasawmi Chetty* 27 Ind. Cas. 409=39 M. 60. See Final Part, 1915, Col. 198.

(33-a) *Ss. 112, 117, 205—Sale proclamation—Ambiguity—Notice of intention to sell—Civ. Pro. Code, 1908, S. 151.*

A sale proclamation under S. 117 of Act I of 1908 must notify the notice of intention to sell under S. 112 of that Act.

If there is ambiguity in the sale proclamation under S. 117 of Act I of 1908 resulting in a serious miscarriage of justice, under S. 205 of that Act the sale is liable to be set aside. *Vedachallam Dhikshadar v. Venkatru Subbaraya*, 32 Ind. Cas. 967.

OLEGG, F.M.

(33-b) *S. 113. See No. 33, supra.*

(34) *Ss. 122, 128, 189 and 213 and Art. 21, Sch. A, scope of—A's land attached as B's for arrears due by B—A paying arrears under protest to avoid sale—Suit by A against landlord and B for recovery of the amount paid by him—Civil Court—Jurisdiction—Contract Act, Ss. 69 and 72—"Money had and received."*

Certain lands belonging to the plaintiff were attached as belonging to defendants 2 and 3 and for arrears of rent due by them. The plaintiff preferred a claim petition, but, as, in spite of his objections, the land was about to be sold, he paid the rent due under protest and instituted the present suit for recovering that amount, impleading therein both the landlord (the 1st defendant) and the tenants, who had committed default (defendants 2 and 3).

Held per Seshagiri Aiyar, J.—S. 128 of the Madras Estates Land Act permits a third party,

6.—*Madras Acts—(Continued).***Act I of 1908 (Madras Estates Land)—(Ctd.).**

whose property has been attached, to protect that property by paying the arrears said to be due on it. In such a case a derivative owner will, under cl. (1) of the section, be entitled to a charge for the amount so paid and he can tack it on to his mortgage if he has one. On the other hand an independent owner's rights are not restricted to the charge under cl. (1), but are saved by cl. (2), and he is free to institute other proceedings for enforcing them. S. 213 does not bar the jurisdiction of the Civil Courts in such cases.

A person, whose property is sought to be sold wrongfully and who pays the money to save it from sale, has a right of suit, independent of the Madras Estates Land Act, for money had and received (a).

The restrictive language of S. 213 of the Madras Estates Land Act does not debar the jurisdiction of a Civil Court where a claim is made not only against the landlord for acts done under colour of the Act, but also against the tenants in the alternative for recovery from them of moneys payable by them but paid by the plaintiff under protest, as such a suit does not sound in damages. S. 213 applies only where the relationship of landlord and tenant subsists and the landlord has used the remedies given by the Act wrongfully, and not to a case where, *ex concessi*, no proceedings are taken against the plaintiff, because he is not regarded as owner of the property. In the latter case the fact that the plaintiff is also a tenant of the common landlord is immaterial.

The scope of S. 213 of the Madras Estates Land Act is to give a speedy remedy as between landlord and tenant in matters in regard to which the landlord, while purporting to invoke the aid of the Act, has failed to comply with the provisions enacted therefor; in other words, its object is to give a summary remedy to those against whom irregularities in procedure have been committed. The section does not cover cases where there is no power in the landlord to invoke the aid of the Act against an individual. This view is favoured by the analogy furnished by Ss. 89 to 91 of the said Act.

Per *Bakewell, J.*—The suit is one for damages within the meaning of S. 189 and Art. 21 of Sch. A to the Madras Estates Land Act, and the Civil Court's jurisdiction is barred by S. 213 of the said Act. The *Rajah of Vizianagaram v. Narasimharaju*, 9 L.W. 517=19 M.L.T. 374=(1916) M.W.N. 391=34 Ind. Cas. 480.

SESHAGIRI AIYAR and BAKEWELL, JJ.
References:—(a) 12 M.I.A. 65; 25 M. 540, F.

(34-a) *S. 128. See No. 34, supra.*

(35) *Ss. 131, 205—Setting aside sale—Small er amount deposited—Information re precise amount not being available—Defect, nature of—S. 315, Civ. Pro. Code, 1882,—Civ. Pro. Code, 1908, O. XXI, r. 93.*

On a depositor depositing a smaller amount than required for want of information because

6.—*Madras Acts—(Continued).***Act I of 1908 (Madras Estates Land)—(Ctd.).**

he had no means of knowing the exact amount required under S. 131 (1) of the Madras Estates Land Act for setting aside sale, held that the depositor can have the sale set aside. *Pentakota Garsebu v. Pentakota Peddarayudu*, 35 Ind. Cas. 153.

OLEGG, F.M.

(35-a) Ss. 131, 215—*Power of Deputy Collector to revise order of predecessor in office—Procedure—Deposit in Sub-Treasury—Notice—Order setting aside sale.*

An order of a Deputy Collector cancelling that of his predecessor in office is one passed without jurisdiction. The proper procedure is to ask the District Collector to revise the same.

A deposit in the Sub Treasury is equivalent to a deposit with the Collector. The presentation of a *challan* containing purpose and particulars of the deposit seems to be a sufficient application (a).

Since under the rule framed under S. 215 a notice should have been given to the auction-purchaser, an order setting aside a sale, without giving such notice, is one passed without jurisdiction. *Sundraraja Aliyengar v. A. Sri Naidu*, 32 Ind. Cas. 891.

OLEGG, F.M.

Reference :—(a) 25 O. 216, R.

(35-b) S. 143. See No. 10, *supra*.

(36) Ss. 143 and 144—"Exact", meaning of. The word "exact" occurring in Ss. 143 and 144 of the Act means to compel payment or delivery of, to enforce the yielding of, to extort (as, to exact tribute, fees, obedience and the like), to practise extortion, to demand and compel to pay or yield under colour of authority; or to levy by force.

A cess will be obligatorily leviable against the ryot only when the Zamindar can show that after the object for which it was originally intended failed, there was a fresh contract founded on fresh consideration to continue to make the payment.

A ryot is precluded by Ss. 143 and 144 of the Act from recovering back the sums paid, unless it is shown that they were "exacted," so, where money was paid by a ryot to the Zamindar without the issue of any coercive process or demand, the money so paid cannot be recovered by means of a suit. *Ramaswami Aiyar v. Sundaram Aiyar*, 30 Ind. Cas. 166.

SADASIVA AIYAR and TYABJI, JJ.

(36-a) S. 144. See No. 36, *supra*.

(36-b) S. 148. See No. 15, *supra*.

(36-c) S. 151. See No. 21, *supra*.

(37) Ss. 151, 152—*Power of Court to award compensation in lieu of ejectment in cases of waste—Whether awarding of the compensation puts an end to the relationship of landlord and tenant.* *Sankaralinga Mooppanar v. T.Y. Subramanja Pillai*, 29 M.L.J. 514—21 Ind. Cas. 278. See Final Part, 1915, Col. 198.

(37-a) S. 152. See No. 37, *supra*.

(37-b) S. 158. See No. 2, *supra*.

6.—*Madras Acts—(Continued).***Act I of 1908 (Madras Estates Land)—(Ctd.).**

(37-c) S. 157. See No. 2, *supra*.

(37-d) S. 163. See No. 2, *supra*.

(38) Ss. 163 to 167—*Record of rights, officer preparing, whether a Court for purposes of S. 476, Crim. Pro. Code—Court, test for determining what is a.* *In re Yenkata Hanumautha Rao*, 2 L.W. 180—(1915) M.W.N. 177—28 M. L.J. 123—28 Ind. Cas. 97—39 M. 414. See Final Part, 1915, Col. 199.

(38-a) S. 164. See No. 38, *supra*.

(38-b) S. 165. See No. 38, *supra*.

(38-c) S. 166. See No. 38, *supra*.

(38-d) S. 167. See No. 38, *supra*.

(39) Ss. 182 and 218 and Sch. A, Art. 21—*Ryotwari landowner—Distraint of moveables of tenant or sub-tenant—Damages, suit for, whether cognisable by Revenue or Civil Court—Jurisdiction.* *Narayanaswami Aiyar v. D. Venkataramana Aiyar*, 29 M.L.J. 607—2 L.W. 1037—18 M.L.T. 426—(1915) M.W.N. 921—39 M. 239—31 Ind. Cas. 326 (F.B.). See Final Part, 1915, Col. 199.

(39-a) S. 185. See No. 14, *supra*.

(40) S. 186—*Certificate of necessity for sale, if can be granted by a Deputy Collector—District Court, if bound to receive evidence tendered regarding reasonableness and sufficiency of the purpose.*

A Deputy Collector has jurisdiction to grant the certificate required by S. 186 of the Madras Estates Land Act to support an application to the District Judge for the compulsory sale of land by a ryot to his landholder.

Quære.—Whether the District Judge is bound to take evidence regarding the reasonableness and sufficiency of the purpose for which a certificate had been granted by a Deputy Collector under S. 186 of the Act. *Menakshammal v. Orr*, 9 L.W. 227—32 Ind. Cas. 986.

SADASIVA AIYAR and MOORE, JJ.

(41) S. 189. See RES JUDICATA; No. 21, 34 Ind. Cas. 354.

(41-a) S. 189. See Nos. 27, 33, 34, *supra*.

(42) S. 205—*Decision of a Revenue Court—Revision to High Court, if competent—Jurisdiction, conflict of—Civ. Pro. Code (1908), S. 115—Charter Act, S. 15—Ex parte decree—Setting aside without notice—Review—Both sides heard—Order confirmed—Revisability.*

Quære.—Whether S. 205 of the Madras Estates Land Act bars the power of the High Court to entertain a revision petition against the order of a Sub-Collector exercising jurisdiction in a suit under that Act.

In a suit brought under the Madras Estates Land Act, the Sub-Collector passed an *ex parte* decree. Later on he set aside the said decree without notice to the plaintiff. An application to review this order was made but after hearing both sides the Sub-Collector confirmed his previous order.

6.—Madras Acts—(Concluded).**Act I of 1908 (Madras Estates Land)—(Old.).**

Held, that, though the second order did not expressly state that the review petition was dismissed on the merits and that a fresh order on the same terms as the first order was passed, that was what the Sub-Collector intended in substance to do and that the circumstances of the case did not warrant the interference of the High Court in revision. **Ramaswami Nalcker v. Subbarayulu Nalcker**, 3 L.W. 158—82 Ind. Cas. 567.

SADASIVA AIYAR and MOORE, JJ.

(42-a) S. 205. See Nos. 27, 29, 35, *supra*.

(42-b) S. 210. See No. 30, *supra*.

(43) Ss. 210 and 211—*Suit for rent due for faslris prior to passing of the Act—Whether governed by that Act or by Limitation Act.* **Rajah Saheb Meharban-i-Distan Sri Raja Row Yenkatakumara Mahipathi Surya Row Bahadur Garu, Raja of Pittapore v. Ganai Yenkatasubba Row**, 14 M.L.T. 427—(1913) M.W.N. 989—21 Ind. Cas. 595—39 M. 646. See Final Part, 1913, Col. 182.

(44) S. 211. See Nos. 30, 43, *supra*.

(45) S. 213. See Nos. 22, 31, 39, *supra*.

Act I of 1914 (Hindu Transfers and Bequests).

S. 2 (2)—Life estate to widow—Residue to grandsons of testator then in existence and thereafter to be born—Validity of will—Meaning and effect of S. 2 (2). See **HINDU LAW (WILL)**, No. 5, 31 M.L.J. 33.

7.—U.P. Acts.**Act XIX of 1873 (Agra Land Revenue).**

(1) See **PARTITION**, No. 8, 19 O.O. 151.

(2) S. 205-B. See **DISQUALIFIED PROPRIETORS**, No. 1, 14 A.L.J. 477.

Act XII of 1881 (N.W.P. Rent).

(1) S. 8—*Occupancy right.—Trespasser—Tenant.*

From the mere fact that a person had been in possession of a holding for 12 years without the consent of the landholder it cannot be said that such a person acquired occupancy right in the holding, even if the period of 12 years was completed prior to the operation of the Tenancy Act II of 1901. **Nirman Singh v. Bahadur Singh**, 81 Ind. Cas. 445.

HOLMS, S.M. and CAMPBELL, J.M.

References:—S.D. No. 3 of 1910, F.

(3) S. 203. See **U.P. ACT III OF 1901 (U. P. LAND REVENUE)**, No. 3 (b), 82 Ind. Cas. 573.

Act XIV of 1886 (Agra Rent).

See **INHERITANCE**, No. 1, 88 Ind. Cas. 330.

Act III of 1899 (U.P. Court of Wards).

(1) *Suit brought and decree obtained against ward—Execution of decree against Collector—Substitution of Collector for ward.*

Where an estate is under the management of a Collector under Act III of 1899, a suit to enforce any obligation against the ward must be brought against the Collector as representing

7.—U.P. Acts—(Continued).**Act III of 1899 (U.P. Court of Wards)—(Old.).**

the ward. The ward personally is in the eye of the law nobody for the purposes of suits brought by or against him. A decree obtained against the ward personally without making the Collector a party to the suit is a nullity and such decree cannot be enforced by substituting the Collector for the ward in execution proceedings. **Sankata Parshad v. Deputy Commissioner of Kheri**, 30 Ind. Cas. 768.

LINDSAY, J.O.

(2) *Personal decree against a ward, effect of—Collector, substitution of, in place of ward.* **Sankata Parshad v. Deputy Commissioners of Kheri**, 18 O.O. 145—30 Ind. Cas. 768. See Final Part, 1915, Col. 202.

(3) Ss. 15, 35, 42 (1)—*Properties outside jurisdiction of United Provinces Government—Jurisdiction—Ward's death; Superintendence after—Ward a disqualified proprietor—Sale for debts—Consent of heirs—Presumption re acts of Executive Government.*

The Court of Wards of the United Provinces of Agra and Oudh has jurisdiction to deal with the property of a disqualified proprietor situated outside the limits of the territories subject to the Lieutenant-Governor of the said Province.

As S. 15 makes no distinction at all between moveable and immoveable property it is quite clear that properties both within the limits of the Provinces of Agra and Oudh as well as outside thereof are subject to the administration set up by the Act in the event of a person coming under the terms of the Act.

S. 35 of the Court of Wards Act of the United Provinces gives a general power to the Court of Wards to sell or mortgage any part of any property under its superintendence. The power conferred by the Act is subject to a proviso, namely, that where the property has been taken charge of by the Court of Wards under S. 9 of the Act, the sale should not be made without the consent of the proprietor.

On the death of a ward, a disqualified proprietor, the Court of Wards may retain charge of his property until the debts and liabilities of the ward have been discharged.

The ordinary presumption must be made in favour of the Acts of the Executive Government. **Gadadhar Bhatta v. Sarat Chandra Mukherjee**, 85 Ind. Cas. 634.

FLETCHER and TEUNON, JJ.

(4) Ss. 16, 20—*Claim not notified—Effect of, on suit—Documents whether admissible in evidence.* **Ashraf Ali v. Kalyan Das**, 13 A.L.J. 796—37 A. 585—30 Ind. Cas. 945 (F.B.). See Final Part, 1915, Col. 202.

(5) S. 20. See No. 4, *supra*.

(6) S. 35. See No. 3, *supra*.

(7) S. 42. See No. 3, *supra*.

Act I of 1900 (U.P. Municipalities).

(1) Ss. 52, 57, 88—*Re erection of a building without conforming to the permission granted—Notice—Civil suit.*

7.—U.P. Acts—(Continued).

Act I of 1900 (U.P. Municipalities)—(Old.).

A notice by the Municipal Board partly under S. 87 and partly under S. 88 for re-erection of a building without confirming to the permission given, is a valid notice and the only remedy open to a person aggrieved by such notice is laid down by S. 52. Such aggrieved person cannot bring a regular suit in the Civil Court for contesting the validity of that notice. S. 87 is not applicable only to that part of a building which abuts on and overhangs a public street since a building may adjoin a public street and yet may not overhang or project into it. *Rahas Bihari Lal v. Municipal Board, Cawnpore*, 35 Ind. Cas. 222.

RAFIQ, J.

(2) S. 87. See No. 1, *supra*.

(3) S. 88. See No. 1, *supra*.

Act II of 1901 (Agra Tenancy).

(1) *Tank land — Acquisition of right of occupancy — Continuous occupation for twelve years.*

The land from which the plaintiff sued to eject the defendant was a tank or depression which could only carry crops of *singhara* or paddy in years of heavy rainfall. The rent carried very largely from year to year. The defendant admittedly paid no rent in the years when there had been no cultivation, but he claimed that he had been in continuous possession on the ground that he grazed cattle when cultivation was impossible. *Held* that this was not the same as the case in which cultivated land was left fallow for a year or two without the period necessary for the acquisition of a right of occupancy being interrupted and that under the circumstances occupancy rights were not acquired by the defendant as he did not hold the lands continuously for 12 years. *Naunihal Singh v. Chabbi*, 31 Ind. Cas. 458.

HOLMS, S.M. and CAMPBELL, J.M.

(2) *Rent free grant—Resumption of land so granted by forcible dispossession.*

Where a rent free grant is made and the land so granted is resumed in a legal manner in pursuance of the provisions of the Act, it is not competent to the zamindar to take forcible possession of the land so granted. *Ambika Prasad v. Jag Prasad Singh*, 36 Ind. Cas. 968.

RICHARDS, C.J., and BANERJI, J.

(2-a) See INHERITANCE, No. 1, 33 Ind. Cas. 390.

(3) Ss. 3, 12, proviso — *Lease—Stipulation against the applicability of proviso to S. 12 — Validity—Not unlawful—Contract Act, S. 23.*

Where a lease contained a definite stipulation that the lease which was being executed was not to interfere with the accrual of occupancy rights either in the past or in the future, that is to say, the zamindar practically agreed that the proviso to S. 12 of the Agra Tenancy Act, 1901, should not apply.

7.—U.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

Held that the stipulation is valid and can have effect as making the proviso inapplicable in this case (a).

The stipulation is not unlawful under S. 23, Contract Act, as being of such a nature that it permitted it would defeat the provisions of the Agra Tenancy Act. *Hardeo v. Chaudhri Sher Singh*, 34 Ind. Cas. 148.

HOLMS, S.M. and CAMPBELL, J.M.

References:—(a) 10 A.L.J. 52—16 Ind. Cas. 339, R.

(3-a) S. 9. See No. 5, *infra*.

(4) S. 4 (2). See CUSTOM, No. 2, 31 Ind. Cas. 979.

(5) Ss. 4, 9, 167, 180, 185—*Suit for arrears of rent—Tenant at fixed rates—Presumption—Second appeal to District Judge—Revision—Jurisdiction—High Court's powers—Code of Civil Procedure (1908), S. 115.*

The Maharaja of Benares brought a suit for arrears of rent against the defendant, describing him as a fixed rate-tenant, under S. 102 of the Tenancy Act in the Court of an Assistant Collector of the second class. The defendant was entered in the revenue registers at the last revision of settlement of the Benares district as a fixed-rate-tenant. The defendant denied the relation of landlord and tenant between the Maharaja and himself and disputed the amount of rent claimed. The Judge in Second Appeal held that the plot in suit did not fall within the definition of the word "land" in the Tenancy Act and that upon the plaint as framed a suit would not lie in the Civil Court.

On an application for revision being presented, *held* (per Piggott, J.)—(1) that the application could not be brought within the narrow compass of S. 115 of the Code of Civil Procedure, inasmuch as the District Judge had not refused to exercise a jurisdiction vested in him by law, or acted with material irregularity in the exercise of jurisdiction; (2) that, having regard to S. 167 of the Tenancy Act, the High Court could not entertain the application for revision.

Per Walsh, J.—The decision of the District Judge given by way of an appeal from a Revenue Court is a decision of a Civil Court and is therefore subject to revision. *Parbhu Narain Singh, Kashi Nareesh v. Harbans Lal*, 14 A.L.J. 281—35 Ind. Cas. 279.

PIGGOTT and WALSH, JJ.

(6) S. 10—*Nature of sir, when transferred by gift to one not a co-sharer.*

A transfer by gift does not deprive the land of its character of sir whether the transfer be in favour of a co-sharer or of a person not a co-sharer. *Elahi Bux v. Nand Kishore*, 31 Ind. Cas. 906.

BAILLIE, S.M.

(6-a) S. 10—*Will leaving proprietary rights to third persons—No expropriatory right in Sir to heirs.*

When a person leaves by will his proprietary rights to third persons, his heirs do not get

7.—U.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

expropriatory rights in the *Sir. Bagridi Khan v. Zakir Hussain*, 32 Ind. Cas. 737.

TWEEDY, S.M. and HOLMS, J.M.

(7) S. 11—Acquisition of occupancy right—Possession for more than 12 years—Payment of rent.

Occupancy rights are acquired by 12 years' possession as a tenant.

To constitute a person a tenant he must be liable to pay rent, whether he held the land with or without the consent of the land-holder, unless some contract express or implied is proved by which he is freed from payment. *Jasoda Kuar v. Dalail Singh*, 30 Ind. Cas. 798.

BAILLIE, S.M.

(7-a) S. 11—Ejectment under S. 35, N.W.P. Rent Act (XII of 1881)—Possession.

A tenant who was ejected under S. 35 of Act XII of 1881 for arrears of rent but who was allowed to remain in occupation of the land for less than 12 years after the ejectment could not by any possibility acquire the occupancy rights, whether his possession was disturbed or not. *Sundar Umrao Singh v. Ram Tahal Singh*, 32 Ind. Cas. 386.

BAILLIE, S.M. and TWEEDY, J.M.

(7-b) S. 11—Mortgage to non-occupancy tenant—Rights of occupancy, acquisition of.

A mortgagee cannot acquire in the mortgaged property rights prejudicial to the mortgagor. A non-occupancy tenant who takes a mortgage of a share of a village in which the holding is situate cannot count towards occupancy rights the period between the time the mortgage was made and the time of redemption. *Brij Nandan Tewari v. Phallu Ram Meht*, 32 Ind. Cas. 387.

TWEEDY, J.M.

(7-c) S. 11—Sub-lease for one year continued for another year—Rights of occupancy.

Where a sub-lease was given originally for one year and then continued for another year, the whole two years during which the land was sub-let should be considered to be the time for which the land was sub-let in contravention of the provisions of the Tenancy Act and should accordingly be excluded under the second proviso to S. 11 of the Act from the period of twelve years necessary for rights of occupancy (a). *Hargobind v. Tulsi*, 32 Ind. Cas. 399.

HOLMS, S.M. and CAMPBELL, J.M.

Reference:—(a) S.D. No. 15 of 1914.

(7-d) S. 11—Tenant, meaning—Rent not payable—Acquisition of occupancy rights.

To acquire occupancy rights, possession for twelve years as a tenant must be proved. A tenant is a person by whom rent is or but for a contract, express or implied, would be payable. Therefore the period for which no rent was paid cannot be counted by him in the computation of the period. *Nasir-ud-din v. Munir-ud-din*, 32 Ind. Cas. 379.

BAILLIE, S.M. and TWEEDY, J.M.

7.—U.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

(7-e) Ss. 11, 58—Cultivation by a person for a number of previous and subsequent years—Presumption—Ejectment.

The presumption that arises from the fact of a person cultivating a land for a number of previous and subsequent years in the absence of proof of any other person cultivating the same in intervening years, is that the same person cultivated it throughout. *Kiddha v. Nek Ram*, 32 Ind. Cas. 765.

HOLMS, S.M. and CAMPBELL, J.M.

(8) Ss. 11, 34—Tenant holding without landlord's consent—Occupancy rights.

The presumption should be that a tenant is holding without the consent of his landholder until he begins to pay rent, unless he can produce very strong evidence in contradiction of this presumption. A person occupying land shall be deemed to hold land within the meaning of S. 11 until he begins to pay rent therefor. *Ghansham Singh v. Mohan Singh*, 31 Ind. Cas. 486.

HOLMS, S.M. and CAMPBELL, J.M.

Reference:—S.D. 3 of 1910, F.

(8-a) S. 13—Ejectment—Ejected tenant's son in possession—Zamindar's son entered as tenant-in-chief in patwari papers—Effect—Tenancy, break of.

Where after a tenant has been ejected, his son remains in possession and is recorded as paying the same rent as paid by the tenant-in-chief; there is no break of the tenancy although a servant of the zamindar is shown in the patwari papers as tenant-in-chief. *Bidhu Chand v. Durga Prasad*, 32 Ind. Cas. 595.

HOLMS, S.M., and CAMPBELL, J.M.

(9) Ss. 13 (a) (b) and (c), 14 (1) (a), 168—Regaining of possession after wrongful dispossession.

For the application of S. 13 (a) of the Agra Tenancy Act 1901 to a tenant wrongfully dispossessed, it is not necessary that the possession should have been regained within six months. *Dwarka v. Nazir Hasain Khan*, 31 Ind. Cas. 863.

HOLMS, S.M., and CAMPBELL, J.M.

(10) Ss. 13 (a) (b), 14 (1) (a), 168—Regaining possession after wrongful dispossession—Limitation Act, 1908, S. 28—Attestation.

Under S. 168 of the Tenancy Act, S. 28 of the Limitation Act of 1908 applies to suits under the former Act "subject to the provision of the later Act." The question whether for S. 13 (a) of the Tenancy Act to apply it is not necessary that the tenant should have regained possession within a year from wrongful dispossession was not decided in the case.

A mere attestation of the *parcha* at the settlement by a tenant that he is a non-occupancy tenant of the plot does not mean that he has given up his claims to occupancy rights. *Ram Bharos v. Nazir Hasain*, 31 Ind. Cas. 815.

HOLMS, S.M., and CAMPBELL, J.M.

7.—U.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

- (11) S. 14—*Landlord and tenant—Agreement to exchange holding for a new one—Cultivation of both holdings in the same year—Effect—Right of exchange not lost.*

Where there was an agreement between the landlord and tenant that the latter should exchange the holding in his possession and should receive in exchange land of approximately equivalent value and where the latter cultivated both the holdings in the same year.

Held that the tenant did not sacrifice his right of exchange under S. 14 of the Agra Tenancy Act, because he had not lost possession of his first holding before he got possession of the new one.

A tenant must be admitted to possession of a new holding within a year of loss of possession of the old one to claim a right of exchange; but there is nothing to prevent the landholder from giving possession of the new holding before the old holding has been actually vacated; nor would the tenant thereby be deprived of his right of exchange in the new holding. *Mohammad Husain Khan v. Sis Khan*, 34 Ind. Cas. 186.

CAMPBELL, J.M.

- (12) S. 14—"Letting value" meaning.

The letting value to be considered under S. 14 of the Tenancy Act is the letting value at the time of the exchange. *Nageshar Prasad v. Mohan*, 31 Ind. Cas. 482.

HOLMS, S.M., and CAMPBELL, J.M.

- (12-i) Ss. 18, 28—*Sub-lease by female expropriatory tenant if binding on landholders.*

It is not easy to distinguish a perpetual sub-lease from a transfer of occupancy rights under S. 20 and the Court would feel grave doubt as to whether any sub-lease given by a female expropriatory tenant should be binding in perpetuity against the landholder under S. 28 for a period after her interest as expropriatory tenant is extinguished. *Khushal Singh v. Bhagwan Das*, 32 Ind. Cas. 857.

HOLMS, S.M. and CAMPBELL, J.M.

- (12-a) Ss. 18, 87—*Applicability—Death of tenant—Abandonment of holding—Cultivation by sub-tenant—Ejectment.*

The right of occupancy can be extinguished only under the circumstances mentioned in S. 18. It may be extinguished owing to the tenant dying leaving no heir to inherit. There can be no abandonment where the holding is admittedly cultivated by sub-tenants, and S. 87 applies only when a tenant has ceased to cultivate his holding either by himself or by some other person. A landlord is not entitled to eject a sub-tenant unless he proves or it can be legally presumed that the tenant has died without heirs. *Raja Singh v. Pargan Singh*, 32 Ind. Cas. 586.

BAILLIE, S.M. and TWEEDY, J.M.

- (12-b) S. 21—*Mortgage before Act—Possession and dispossession after Act—Suit for possession.*

7.—U.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

A usufructuary mortgagee who has once recovered possession, if he is dispossessed by the mortgagor without being paid off, cannot again recover possession if the transaction be invalid. The principle seems to be an illustration of the maxim that where both litigants are parties to an invalid transaction, the position of one in possession is stronger and must prevail (a). *Najaf Khan v. Girdharla*, 32 Ind. Cas. 593.

WALSH, J.

References:—(a) 12 Ind. Cas. 112=8 A.L.J. 981=33 A. 779, R.

- (13) S. 22—*Succession—Occupancy holding—Personal law—Hindu joint family—Mitakshara—Death of one member—Interest, devolution of.*

Ram Prasad with his brothers was a member of a joint Hindu family governed by the Mitakshara. The family owned an occupancy holding. Ram Prasad died leaving a widow and his brothers. The widow granted a lease to the defendant. In a suit by the brothers to set aside the lease:

Held that, Ram Prasad being a member of the co-parcenary which owned the tenancy, he had no "interest" (within the meaning of S. 22 of the Tenancy Act) which devolved upon any one upon his death, and the co-parcenary body consisting of the survivors continued to be the "tenant," and the lease, therefore, was invalid. *Mahabir Singh v. Bhagwantl*, 14 A. L.J. 278=38 A. 325=33 Ind. Cas. 110.

RICHARDS, C.J., and RAFIQ, J.

- (14) S. 22—*Hindu female in possession of occupancy tenancy as such—Law applicable.*

There is nothing in the Agra Tenancy Act to enlarge the estate in an occupancy holding of a Hindu female in possession at the time the Act of 1901 was passed, beyond the ordinary estate of the Hindu females. The Act not having provided for the devolution of the interest in an occupancy holding, where it was, at the passing of the Act, in the possession of a Hindu female as such, the rights of the parties must be ascertained according to the ordinary Hindu Law. *Bleshar Ahir v. Dukharan Ahir*, 14 A.L.J. 127=38 A. 197=32 Ind. Cas. 771.

RICHARDS, C.J., and TUDBALL, J.

- (15) S. 22—*Death of occupancy tenant before Act came into force—Succession by widow—Death of widow after Act came into force—Daughter's sons' right to succession.*

On the death of the last occupancy tenant his widow succeeded him to his holding. This succession took place before the Tenancy Act came into force. After the death of the widow the holding was claimed by the daughter's sons of the last male holder. The claim was opposed by the zamindar, on the ground that the plaintiffs were not born at the time of the death of the last male holder and therefore could not have shared the cultivation with him. *Held* that the plaintiffs were not collaterals and

7.—U.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

the right to inherit after the widow's death accrued to the plaintiffs under the old Act, which governed the present case, without any condition as to their co-sharing in cultivation.

Sital Prasad v. Bishen Dat, 30 Ind. Cas. 804.
BAILLIE, S.M. and BROWN, J.M.

(16) S. 22—Two persons acquiring jointly exproprietary rights—One dying without heirs—Succession by survivorship.

On the death of one of two persons acquiring jointly exproprietary rights, without leaving heirs, the other person gets the entire holding by survivorship. **Har Har Prasad v. Mata Prasad**, 31 Ind. Cas. 864.

HOLMS, S.M.

(17) S. 22—Succession—Occupancy holding—Hindu Law. **Nathu v. Gokalla**, 13 A.L.J. 947 = 37 A. 658 = 30 Ind. Cas. 215. See Final Part, 1915, Col. 207.

(17-a) S. 22—Act XV of 1856 (Hindu Widows' Remarriage), S. 2—Widow's right in occupancy holding—Remarriage.

A widow succeeding her husband's estate under the provisions of S. 22 of the Tenancy Act of 1901 has only an interest in the occupancy holding till her remarriage. S. 2 of Act XV of 1856 does not apply to the interpretation of this section. **Bhalron Ram v. Sidhanna**, 32 Ind. Cas. 801.

TWEEDY, S.M. and HOLMS, J.M.

Reference:—11 A. 390 = A.W.N. (1829) 77, R.

(17-b) S. 22—Death of last male owner of occupancy holding before 1901—Succession by daughter and adoption by her—Act XII of 1881 (N.W.P. Rent).

On the death of the last male occupancy tenant before 1901, his daughter, who immediately succeeded, adopted a son while Act XII of 1881 was in force. But the adopted son did not share in cultivation with his maternal grandfather. *Held* that the adopted son having acquired a right of succession under Act XII of 1881 could not lose that right by the passing of Act II of 1901 (Agra Tenancy) since S. 2 of the new Act preserved such a right. **Chura Mal v. Jitalog**, 32 Ind. Cas. 767.

BAILLIE, S.M. and TWEEDY, J.M.

(17-c) Act II of 1901 (Agra Tenancy), S. 22—Guardian of minor tenants—Sharing in cultivation.

A guardian of minor tenant who looks after the minor's cultivation can be deemed to be sharing in the cultivation of the holding within the meaning of S. 22. **Rahmat v. Sidh Narain Singh**, 32 Ind. Cas. 916.

HOLMS, S.M.

(18) Ss. 23 to 30—Lease, construction of—Permanent heritable lease—Evidence—Right acquired by adverse possession—Admissibility of unregistered deed to prove nature of the right.

Where by the terms of a lease the lessees were to hold the demised land in certain definite fixed boundaries as "*maurasi*" or "*butur*

7.—U.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

maurasi" and the rent was subject to revision at the time of settlement *pari passu* with the revenue:

Held that the lease was a permanent heritable lease, and that the lessees were permanent lessees or *thekadars*, and that by S. 23 of the Agra Tenancy Act the provisions of Ss. 24 to 30 of the Act were inapplicable to sub-leases given by them.

An unregistered lease inadmissible for the purpose of affecting immoveable property may yet be looked to for ascertaining the nature of the rights acquired by adverse possession where it appears that if the lease had been registered those rights would have been acquired under the lease at the date of its execution. **Bhup Singh v. Lachmi Chand**, 33 Ind. Cas. 524.

HOLMS, S.M. and CAMPBELL, J.M.

(18-a) S. 24. See No. 18, *supra*.

(19) S. 25—Sub-letting from year to year—Period of sub-letting exceeding five years.

Where a sub-letting is from year to year and extends over a period exceeding five years each sub-letting is in contravention of S. 25. **Rahat Husain v. Abdul Hafeez**, 30 Ind. Cas. 770.

BAILLIE, S.M.

(19-a) S. 25. See No. 18, *supra*.

(19-b) S. 26. See No. 18, *supra*.

(19-c) S. 27. See No. 18, *supra*.

(19-d) S. 28—Female tenant in her own right granting lease for definite period—Death of tenant, effect of.

It cannot be held that when a female exproprietary tenant in her own right gives a *bona fide* lease of her holding for a term of years, the sub-tenant has no right, after her death. It must be understood that the decision only governs cases in which a female is an exproprietary or an occupancy tenant in her own right and has more than a life interest and further does not apply to perpetual leases. **Moti Chand v. Sultan Begam**, 32 Ind. Cas. 718.

HOLMS, S.M.

(19-e) S. 28. See No. 18, *supra*.

(19-f) S. 29. See No. 18, *supra*.

(19-g) S. 30. See No. 18, *supra*.

(20) S. 31—Occupancy holding mortgaged prior to—Rent suit—Parties—Civ. Pro. Code, 1908, O. I, r. 9.

S. 31 of the Tenancy Act has no application to a mortgage of an occupancy holding entered into before that Act came into force. A mortgage of such a holding is not a necessary party to a suit for arrears of rent. The occupancy tenant is the one and only person responsible for the rent of the holding. **Balwant Singh v. Faisalullah**, 31 Ind. Cas. 456.

TWEEDY, S.M. and HOLMS, J.M.

(21) Ss. 31 and 34—Sir land—Sale of exproprietary right—Suit for specific performance of contract of sale—Right of vendor.

Where a proprietor takes possession of a tenant's land by way of wrongful ejectment,

7.—U.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

S. 34 of the Act cannot be considered to be applicable and the record of such a proprietor as the sub-tenant of his tenant is not proper.

The plaintiff was a proprietor, who got possession under a decree for specific performance of a sale by the defendant, who was the ex-proprietary tenant of the land in question. Plaintiff obtained possession not only as a proprietor but also as person taking actual cultivatory possession of the sir land. The plaintiff sued for correction of papers and prayed for the insertion of his name as sub-tenant. *Held* that, as the plaintiff's possession was wrongful and as no suit was brought by the defendant within six months, the defendant lost all his rights and the plaintiff was entitled to a decree in his favour. *Chandika Prasad v. Bhalron Prasad*, 30 Ind. Cas. 811.

BAILLIE, S.M. and TWEEDY, J.M.
Reference:—S.D. No. 6 of 1912, F.

(21-a) S. 34. See Nos. 8, 21, *supra*.

(21-b) Ss. 34, 58—*Grove held without payment of rent—Suit for ejectment—Grove is not land.*

Where the land in question has been found to be grove and to have been held without payment of rent, a suit for ejectment under S. 58 of the Agra Tenancy Act, 1901, does not lie. S. 34 of the Act does not apply to the area in question as it is grove and not "land" within the definition of the Act. *Ibad-un-Nissa Bibi v. Delganjan Singh*, 32 Ind. Cas. 395.

BAILLIE, S.M.

(22) S. 35. See **LANDLORD AND TENANT**, No. 51, 33 Ind. Cas. 417.

(23) S. 36—*Ex-proprietary rights by person in possession of sir even if he be trespasser.*

Land which has acquired the sir character continues to be sir so long as it is so recorded, unless circumstances arise in which ex-proprietary rights may be claimed in it. Ex-proprietary rights may be claimed when land is transferred in execution of decree or by voluntary alienation. If no such transfer has ever taken place in a land, the sir in it continues to be sir. Where a person has been in possession of a land for 30 years his proprietary title is just as good as if he were the original owner. He is entitled to ex-proprietary rights in it. *Bhagwati Saran Singh v. Rabi Singh*, 31 Ind. Cas. 893.

BAILLIE, S.M.

(24) S. 41 (a), (b)—*United Provinces—Land Revenue Act (III of 1901), S. 36—Rent fixed by Collector—Enhancement by agreement—Validity of—Contracting out of Statutory rights—Freedom of contract—Statute, interpretation of.*

In a free country the right of a free contract cannot be disregarded by Courts of law without an express statutory prohibition. As for the interpretation of a Statute by reference to the policy of the Act, if by that term is meant something which is to be looked at outside the Act and the various views of the advocates and

7.—U.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

opponents of the Act, such a method of interpretation is altogether illegitimate. If it is something inside the Act which is to be looked at, it can only be gathered from the language of the Act itself.

There is nothing to prohibit an agreement enhancing the rent fixed by the Collector. It is perfectly clear that when the rent has not been enhanced or abated within ten years it is open to the parties to adopt the alternative provisions, either by a registered agreement or by an application mentioned in sub-S. (b) of S. 41 of the Tenancy Act. *Bhalron Prasad v. Mahant Samarपुरi*, 34 Ind. Cas. 441.

WALSH, J.

References:—10 Ind. Cas. 465, F.; 36 A. 155, D.

(25) Ss. 41, 97—*Enhancement of rent—Agreement not in writing—Such agreement insufficient.*

Taking Ss. 41 and 97 of the Agra Tenancy Act together, an agreement for enhancement of rent must be contained in a written document, and, although it need not be a registered agreement, it must be a written agreement which through the medium of S. 97 complies with the provisions of S. 41. A mere verbal agreement which in some way or other was attested before a Kanungo is insufficient. *Muhammad Yunas Ali Khan v. Kalan Singh*, 34 Ind. Cas. 369.

WALSH, J.

(26) S. 43—*Rent—Enhancement—Suit—Exemplar area—Prevailing rates.*

In a suit for enhancement of rent the judgment must show clearly the area of the exemplar numbers and how far they correspond with the fields in dispute and must show that the rates devolved really are "prevailing" rates. *Harl v. Sri Thakurji Mahara*, 31 Ind. Cas. 889.

BAILLIE, S.M. and TWEEDY, J.M.

(26-a) S. 43—*Occupancy holding—Enhancement of rent—Rent paid in lump sum together with rent for two fixed-rate holdings.*

A suit by a Zemindar for enhancement of rent of an occupancy-holding the rent for which together with the rent for two fixed rate holdings was paid in a lump sum is not maintainable as it was the duty of the Zemindar to have first the rent really due upon this holding only determined according to law. *Chakuri v. Nakhedisingh*, 32 Ind. Cas. 734.

BAILLIE, S.M. and TWEEDY, J.M.

(27) Ss. 43, 49—*Rent fixed in perpetuity by agreement—Enhancement.*

S. 49 of the Tenancy Act is for the benefit of the State as much as for the benefit of the landholder. On rent being fixed by agreement in perpetuity, a landholder cannot bring a suit for enhancement of rent under S. 43. His proper course is to sue under S. 49. *Kalyan Singh v. Hoti Lal*, 31 Ind. Cas. 459.

HOLMS, S.M. and CAMPBELL, J.M.

7.—U.P. Acts—(Continued);

Act II of 1901 (Agra Tenancy)—(Continued).

(38) Ss. 47, 97—*Agreement to pay enhanced rent—Not registered—Effect of.*

Defendant, zamindar, in 1907 sought to eject the plaintiffs from their holding. In the course of the proceedings a compromise was arrived at under which the zamindar consented to drop the ejectment proceedings, thereby allowing them to acquire occupancy rights and the latter agreed to pay a rent of Rs. 200 instead of Rs. 180 per annum. The compromise embodying the above terms was endorsed upon a paper bearing upon a general stamp of eight annas but the document was not registered under the Registration Act. The Assistant Collector in whose Court it was filed dismissed the ejectment suit, but no decree was framed embodying its terms so as to make it binding on the parties. The endorsement by the Assistant Collector on the document did not show that he had satisfied himself as to the matters provided in S. 97, Tenancy Act. Defendant in 1913 distrained the crops on the holding for arrears of rent at the rate of Rs. 200 per annum. Plaintiffs contested the distraint.

Held, that the original rent of Rs. 180 per annum payable by the plaintiffs could be enhanced by agreement between the parties only if the agreement in question were made by a registered instrument, and the provision of S. 97 of the Tenancy Act did not apply to the case. *Dat Prasad Singh v. Gopal Ram*, 14 A.L.J. 57—34 Ind. Cas. 234.

PIGGOT, J.

(38-a) S. 49. See No. 27, *supra*.

(39) S. 52. See LANDLORD AND TENANT, No. 52, 33 Ind. Cas. 419.

(39-a) Ss. 57 (b), 58—*Land let for agricultural purposes—Enclosure constructed for feeding cattle—Ejectment.*

Where an occupant tenant lets the land for agricultural purposes and the lessee constructs an enclosure thereon for feeding cattle, the latter who is only a sub-tenant has no right to resist ejectment merely because the land is not now held for agricultural purposes. *Babban Misar v. Ram Lochan*, 32 Ind. Cas. 576.

BAILLIE, S. M. and TWEEDY, J. M.

(30) S. 58—*Ejectment in respect of grove.*

Ejectment under S. 58 of the Tenancy Act is only from a holding and a grove does not come under the definition of the holding as it is not land let or held for agricultural purposes. *Nawab Singh v. Hakum Singh*, 31 Ind. Cas. 498.

HOLMS, S. M.

(31) S. 58—*Grove—Occupancy tenant—Mortgage by him to another—Death of mortgagor without heirs—Mortgages in possession for less than 12 years—Landlord's right to eject mortgages—Whether exists.*

Where the occupancy tenant of a grove mortgaged his holding to another and died without heirs and where the landlord sued to eject the mortgagee who was in possession on the ground

7.—U.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

that he was a non-occupancy tenant of less than 12 years' standing :

Held, that the mortgagee cannot be evicted, for he would be entitled to the same rights as his mortgagor and would be entitled to occupy the land so long as it continued to be maintained as a grove (a). *Beal Rai v. Ram Prasad Rai*, 34 Ind. Cas. 84.

PORTER, S. M. and BAILLIE, J. M.

References:—(a) S.D. No. 2 of 1898 and S.D. No. 1, 1908, R.

(31-a) S. 58. See Nos. 31-b, 29-a, *supra*.

(32) Ss. 58, 79—*Landlord taking forcible possession of grove—Grove-holder's remedy.*

On a landlord taking forcible possession of a grove in his zamindari, the grove-holder sued to eject him as his sub-tenant. There was no evidence whatever on the record to show that the landlord entered into any contract with the grove-holder to pay rent or was admitted to the sub-tenancy by the grove-holder. *Held* that if the grove-holder was to be treated as a tenant of a holding, he had his remedy under S. 79 of the Tenancy Act to sue for possession within six months. But if he was not a tenant of a holding, he had no power to sue under S. 58. *Kunji Mal v. Sheo Balak Ram*, 31 Ind. Cas. 453.

HOLMS, S. M.

Reference:—S.J. No. 14 of 1914, R.

(32-a) Ss. 58 and 83—*Contract of sale—Agreement to transfer by surrender of exproprietary rights—Deed of relinquishment in favour of landlord.*

If a contract of sale was entered into which included an agreement to transfer by the surrender of the exproprietary rights as soon as they were created, such a contract would be unenforceable in law. If, however, after a sale-deed has been executed of the proprietary right and if after the occupancy tenancy has come into existence, the exproprietary tenants choose to execute a deed of relinquishment in favour of the landlord there is nothing to prevent them from doing so even though it was all along intended that they should do so. S. 83 of the Tenancy Act expressly empowers a tenant to surrender to his landlord and sub-S. 3 expressly makes legal any arrangement about surrender made between landlord and tenant. *Kamala Charan Sukul v. Sheo Shankar*, 36 Ind. Cas. 1007.

RICHARDS, C. J., and PIGGOT, J.

Reference:—2 Ind. Cas. 409—6 A.L.J. 713, R.

(33) Ss. 58, 177 (e)—*Suit for ejectment—Defendant pleading that he holds as tenant from a third person—Question of proprietary title—Civil Court—Appeal—Jurisdiction.*

In a suit for ejectment under S. 58 of the Tenancy Act, the defendant pleaded that he was a tenant of the land under a person other than the plaintiff. The Court of first instance decreed the claim. *Held*, that an appeal from this decision lay to the District Judge under

7.—U.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

S. 177 (e) of the Act, inasmuch as the question of the plaintiff's proprietary title was put in issue in the Court of first instance and was a matter in issue in the appeal. *Ganga Prasad v. Har Narain*, 14 A.L.J. 666—38 A. 465—35 Ind. Cas. 739.

WALSH and SUNDER LAL, JJ.

(34) S. 59. See CIV. PRO. CODE (1908), No. 351, 31 Ind. Cas. 479.

(34-a) Ss. 59, 60—*Notice of ejectment—Decretal amount not deposited on account of illness—Service of notice—Diligence in effecting personal service.*

A plea of illness by a cultivating tenant for not depositing the decretal amount within the time fixed by the notice issued under S. 60 of the Agra Tenancy Act is not an unreasonable one.

Where a notice was served by affixation and the process server recorded that it was not known where the judgment-debtor was: *Held* that there was not due and reasonable diligence in endeavouring to effect a personal service and that there was no legal service of the notice.

Per Tweedy, J.M.—The utmost care must be exercised in the service of notices under Ss. 59 and 60 of the Tenancy Act and if the law is not complied with in all its strictness the ejectment is liable to be set aside. *Zallim v. Sri Ram*, 32 Ind. Cas. 17.

BAILLIE, S.M. and TWEEDY, J.M.

(35) S. 60—*Notice demanding payment from tenants—Omission to state date of running of time—Material irregularity.*

Where a notice is issued under S. 60 of the Act directing the tenants to pay within certain time, the notice should state from what date the time specified is to run and an omission to do so will operate as material irregularity disentitling the landlord to eject the tenant for non-payment of rent. *Bakhtawar Khan v. Niaz-ul-Nisa*, 30 Ind. Cas. 788.

BAILLIE, S.M. and TWEEDY, J.M.

(35-a) Ss. 60, 61—*Rent-decree—Ejectment before expiry of 15 days.*

An Assistant Collector who without complying with the provisions of Ss. 60, 61 of the Tenancy Act orders ejectment of the tenant before the expiry of the required 15 days commits a gross and palpable error of law resulting in a substantial injustice to the rejected tenant. *Fasal Ram v. Nathu Lal*, 32 Ind. Cas. 755.

HOLMS, S.M. and CAMPBELL, J.M.

(36) S. 66—*Failure to consider applicability of section—Refusal of benefit of section—Revision.*

Where the Court failed to consider the applicability of S. 66 to the facts of the case on hand, such failure is a ground for revision; but if the question was considered and the benefit of the section was refused, there cannot be a revision. *Rahat Hussain v. Abdul Hafeez*, 30 Ind. Cas. 770.

BAILLIE, S.M.

7.—U.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

(36-a) S. 79. See No. 92, *supra*.

(37) S. 87—*Occupancy rights—Modes of determination—Abandonment, requisites of.*

Under the Agra Tenancy Act occupancy rights can determine only by the tenant's abandonment of his holding or by his death without heirs. Abandonment implies not only that the tenant should leave the village but that he should leave the village without making arrangement for the cultivation of his land and the payment of his rent.

In a suit for ejectment of the defendant on the ground that he was a tenant from year to year, it was found that the occupancy tenant of the land had left the village leaving the land in possession of the defendant and making arrangements for its cultivation and for payment of rent. It was also found that in 1908 the plaintiff brought a suit for rent against the occupancy tenant, which showed that the tenant was then alive. *Held* that there was no abandonment of the holding by the occupancy tenant nor presumption of his death, and that the present suit was therefore not maintainable. *Jalkaran Singh v. Ram Charitar Lal*, 33 Ind. Cas. 498.

BAILLIE, S.M. and BROWN, J.M.

(37-a) S. 87. See No. 12-a, *supra*.

(37-b) S. 97. See Nos. 25, 28, *supra*.

(38) S. 150—*Rent free land—Remedy of landlord—Right to eject.*

Where, in a suit by the landlord against the tenant it is found that the land in question is part of a holding and is included in the rent of the holding, the defendant has occupancy rights in it. If the land is held rent free, not being land occupied without the landlord's consent, the defendant is not a tenant and cannot be ejected by a suit under S. 58. The landlord can only proceed by suit under S. 150 of the Act. *Dwarka Prasad v. Dirguj Singh*, 30 Ind. Cas. 789.

BAILLIE, S.M.

(39) Ss. 150, 156—*'Land,' meaning—Grove land—Whether 'land'—Grove—Liability to assessment—General custom—Burden of proof—Landlord's duty to prove.*

Where grove land had come under cultivation, it became land and liable to assessment.

There is no general custom that grove land should pay rent though as a matter of fact a certain proportion of the produce of the trees, or a certain sum per tree is paid by tenants who hold groves. It is for the landlord to prove the custom in individual cases.

S. 156 relates to 'land' not liable to resumption. 'Land' is land let or held for agricultural purposes and land covered with trees, i.e., grove land does not fulfil the terms of the definition. *Maula Bakhsh v. Kalka Singh*, 34 Ind. Cas. 155.

HARDY, S.M.

(39-a) Ss. 151, 158—*Construction—Sale of proprietary rights—Reservation of certain area as rent free—Right to hold free of revenue—Limitation.*

7.—U.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

S. 151 of the Agra Tenancy Act governs all subsequent provisions as to resumption or assessment of revenue. When any tenure comes within the exceptions mentioned in S. 151, no subsequent section is in any way applicable.

Where a person sells his share in a village reserving a certain area for himself rent free and the sale price of the share sold is less as a consequence of the reservation of this area rent free, the right to hold rent free is acquired for valuable consideration within the meaning of S. 151 of the Tenancy Act. *Dwarka Prasad v. Phul Kunwar*, 32 Ind. Cas. 10.

BAILLIE, S.M.

(40) S. 154 (1) (b)—*Resumption of service tenure—Defective notice.*

A notice under S. 154 (1) (b) of the Agra Tenancy Act for resumption of a service tenure is defective if it does not allege the specific service on which the tenure is held and which is no longer required. *Bhajju v. K. Gopal Singh*, 33 Ind. Cas. 772.

HOLMS, S.M. and CAMPBELL, J.M.

(40-a) S. 156. See No. 39, *supra*.(41) S. 158—'Successor,' meaning of—*Joint Hindu family governed by the Mitakshara.*

The word 'successor' as used in S. 158 of the Agra Tenancy Act applies to members of a joint Hindu family governed by the *Mitakshara* who have taken by survivorship. *Dayalpur v. Narain Datt*, 14 A.L.J. 878=34 Ind. Cas. 26.

WALSH, J.

(42) S. 158 — *Muafi Khairati — Whether resumable—Revenue.*

The entry in the *wajib-ul-arz* to the effect that the land is *muafi khairati* means that the grant is an absolute one for charitable purposes and is *not resumable* and entries in subsequent village administration papers cannot affect the circumstances under which the grant was made.

Where such land has been held for 60 years and upwards by two successors to the original grantee, it should be assessed to revenue only. *Janki Prasad v. Lokender Shah*, 31 Ind. Cas. 898.

BAILLIE, S.M. and TWEEDY, J.M.

(43) S. 158—*Rent-free holding—Assessment of revenue—Non-liability to assessment of land held as haqiyat mutafarriqa revenue free.*

A suit for assessment of revenue under S. 158 of the Agra Tenancy Act is not maintainable in respect of a holding described in the Settlement Records as 'haqiyat mutafarriqa' and held revenue free from Government, as such land is not a rent free holding. *Sheopalat Chambey v. Musst. Saliba Bibi*, 33 Ind. Cas. 507.

REYNOLDS, S.M. and TWEEDY, J.M.

(43-a) S. 158—*Sale by proprietor—Reservation of certain area free from all payments—Liability to revenue.*

Where the proprietor of a village sold it reserving a right to hold a certain area free of any

7.—U.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

payment whatsoever: *Held* that the agreement constituted the area a rent-free grant given by the vendee to the vendor in consideration of rights previously vested in him and that the vendee was entitled to sue under S. 158 to have it declared that the vendor was liable to pay revenue, the said agreement being contrary to law. *Kalka Singh v. Dwarka Prasad*, 32 Ind. Cas. 4.

BAILLIE, S.M.

(43-b) S. 158—*Mortgages of rent-free holding not an absolute transferee.*

A mortgagee of a rent-free holding cannot be considered to be an absolute transferee and therefore he cannot claim to be a successor to the holding. *Ghulam Abbas v. Fida Hussain*, 32 Ind. Cas. 766.

CAMPBELL, J.M.

(44) S. 164—*Suit by co-sharer against lambardar for share of profits—Burden of proof.* *Shiva Chander Singh v. Ram Chander Singh*, 13 A. L.J. 851=37 A. 595=30 Ind. Cas. 550. See Final Part, 1915, Col. 215.

(45) S. 164—Income derived from land occupied by dwelling-houses, suit for—Jurisdiction. See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 3, 14 A.L.J. 419.

(46) S. 164—Suit by co-sharers for profits—*Sir* and *khud kasht* held by them to be taken into account. See LAMBARDAR AND CO-SHARERS, No. 1, 14 A.L.J. 252.

(47) S. 165—*Suit for profits against co-sharers—Plaintiffs failing to get rent assessed and to take possession of land from their vendors—Co-sharers in possession of specific plots by arrangement—Suit not maintainable.*

Plaintiffs were purchasers from certain co-sharers. By arrangement the co-sharers in the village were entitled to remain in possession of specific plots of land. The vendors of the plaintiffs remained in possession of their *sir* (and *khud kasht* which was on the same footing as *sir*), and of other land which was of neither character. No attempt was made by the plaintiffs either to get rent fixed in respect of the land which partook of the character of *sir* or to take possession of the other land. In a suit by them for their share of profits: *Held* that the suit must fail as the other co-sharers could not be expected to bear the loss which had been occasioned partly by the failure of the plaintiffs to get rent assessed and partly by their allowing their vendors to remain in possession of land, possession of which they were not entitled to hold. *Bhagwant v. Arjun*, 14 A.L.J. 209=32 Ind. Cas. 617.

RICHARDS, O.J. and RAFIQ, J.

(48) S. 167—*Civil and Revenue Courts—Jurisdiction—Defendant sued as trespasser.* *All Jafar v. Phulmanta Kuer*, 13 A.L.J. 843=30 Ind. Cas. 546. See Final Part, 1915, Col. 216.

(48-a) S. 167. See No. 5, *supra*.

(48-b) S. 168. See Nos. 9 and 10, *supra*.

7.—U.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

- (49) S. 176—*Review rejected—Appeal—Civ. Pro. Code, 1908, O. XLVII, r. 7.*

Under S. 176 of the Tenancy Act any order passed by an Assistant Collector, 2nd class, relating to the trial of any suit or application is appealable to the Collector. Rule 7, O. XLVII, Civ. Pro. Code, 1908, being inconsistent therefore, does not apply. **Paras Ram v. Sheobaran Singh**, 31 Ind. Cas. 912.

BAILLIE, S.M.

- (50) S. 177—*Suit for ejectment—Proprietary title—Acquiescence—Appeal.*

The undoubted intention of the Agra Tenancy Act II of 1901 is that the question of proprietary title should be decided on appeal by the District Judge and not by the Commissioners. **Pratab Bahadur Singh v. Abdus Salam**, 31 Ind. Cas. 857.

HOLMS, S.M. and CAMPBELL, J.M.

- (50-a) S. 177. See No. 33, *supra*.

- (51) Ss. 177 (e), 199—*In ejectment suit, question of proprietary title when arises—Appeal.*

In suits for ejectment, a question of proprietary title arises in cases where the defendant pleads proprietorship in himself as well as in those where he sets up proprietorship in a third person. So an appeal from a decision of the Collector in such cases can be filed before the District Judge. **Adya Saran Singh v. Thakur**, 31 Ind. Cas. 853.

HOLMS, S.M. and CAMPBELL, J.M.

- (51-a) S. 180. See No. 5, *supra*.

- (52) Ss. 181, 182—*Remand—Appeal—Practice and Procedure—Civ. Pro. Code, 1908, O. XLI, r. 23.*

Under the provisions of the Tenancy Act no appeal lies from an order of remand passed by a District Judge under the provisions of O. XLI, r. 23, Civ. Pro. Code, 1908 (a).

The desirability of the Courts of co-ordinate jurisdiction following cognate decision on matters of practice pointed out. **Hira Lal v. Maharaj Singh**, 35 Ind. Cas. 105.

PIGGOTT and WALSH, JJ.

References :—(a) 28 A. 283 ; 38 A. 181, F.

- (52-a) S. 182. See No. 52, *supra*.

- (53) Ss. 182, 193—*Suit for rent—Second appeal to District Judge—Order of remand—No appeal to High Court.*

In a suit for rent instituted in the Court of the Assistant Collector of the second class, a first appeal was taken to the Court of the Collector which upheld the decree of the Assistant Collector, whereupon a second appeal was preferred to the District Judge under S. 180 (2) of the Tenancy Act. The District Judge remanded the case. In appeal against that order, held that no appeal lay to the High Court, the right of appeal being regulated by Ss. 182 and 193 of the Tenancy Act. **Gulzar Lal v. Latiff Hussain**, 14 A.L.J. 81=38 A. 181=35 Ind. Cas. 27.

TUDBALL and WALSH, JJ.

7.—U.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Continued).

- (53-a) S. 185. See No. 5, *supra*.

- (53-b) S. 198. See No. 53, *supra*.

- (54) S. 193 (e). See CIV. PRO. CODE (1908), No. 342, 31 Ind. Cas. 859.

- (54-a) S. 194 (1)—*Ejectment suit by four out of five brothers, one being absent abroad.*

A suit for ejectment by four out of five brothers, one being absent abroad is maintainable, since it must be assumed that the four brothers have been appointed by the absentee as agents to act on his behalf under S. 194 (1) of the Tenancy Act, 1901. **Girwar v. Gulab**, 32 Ind. Cas. 781.

HOLMS, S.M.

- (55) S. 198—*Tenant leaving the village—Holding let to another person by zamindar—Return of the former tenant to the village—Suit by him to eject the new tenant—Whether sustainable.*

After the plaintiff who was the tenant-in-chief of a holding left the village, the zamindar let the holding to the defendant whom he treated as the tenant-in-chief. The defendant was paying rent regularly to the zamindar. On his return to the village, the plaintiff treated the defendant as his sub-tenant and instituted against him the present suit for ejectment. Held that the payment of rent by the defendant was in good faith and that the suit should be dismissed under S. 198, Agra Tenancy Act, 1901, and the plaintiff and the zamindar be left to fight out their case between themselves. **Narpat v. Tika**, 33 Ind. Cas. 69.

HOLMS, S.M. and CAMPBELL, J.M.

- (55-a) S. 198. See No. 51, *supra*.

- (56) S. 202—*Question of tenants' right in Civil Court—Remand—Revenue Court's decision on the question of tenancy in a former suit—Suit in Civil Court for ejectment—Cessation of tenancy.*

Defendants were tenants of one D. D took proceedings in the Revenue Courts to eject them as tenants-at-will. The Assistant Collector dismissed the suit, but the Commissioner allowed the appeal. The Board of Revenue, however, in second appeal dismissed the suit. D in the meantime had executed the decree passed by the Commissioner and obtained possession. Upon the decree passed by the Board of Revenue in their favour, the defendants made an application to be restored to possession, but it was rejected as time-barred. D's son brought the present suit to eject the defendants as trespassers, alleging that he had been in possession of the land as his *khud kash* and that the defendants had entered into forcible possession, and the effect of the Revenue Court proceedings was to extinguish the tenancy. The defendants pleaded that the tenancy subsisted. The Court of first instance decided that the tenancy was subsisting but granted to the plaintiff damages for forcible dispossession. The lower appellate Court remanded the case to the first Court for that Court to act upon the provisions of S. 202, Agra Tenancy Act:—Held that the order was

7.—U.P. Acts—(Continued).

Act II of 1901 (Agra Tenancy)—(Concluded).

the proper one to make in the circumstances of the case, and the question whether, in the events that had happened since the decision by the Board of Revenue, the tenancy was extinguished or not was one which the Revenue Courts were competent to decide. **Bhawan v. Madan Mohan Lal**, 14 A.L.J. 734=38 A. 533. **PIGGOTT and LINDSAY, JJ.**

(57) S. 202—'Grove'—Section not applicable—Scope. See **HES JUDICATA**, No. 26, 34 Ind. Cas. 162.

Act III of 1901 (U.P. Land Revenue).

(a) S. 4—Sir rights—Transfer of—Land ceasing to be sir recorded as sir—Co-sharer becoming tenant—Assertion of occupancy rights—Estoppel.

Sir rights cannot be transferred even though ex-proprietary rights are not claimed. Ex-proprietary rights arise in certain circumstances and when these circumstances occur, the land in which ex-proprietary rights have accrued ceases to be sir.

Where the land in question ceased to be sir when respondent acquired proprietary rights in it but was recorded as sir at Settlement and had been recorded as such ever since, and in a partition in which both parties were parties, the appellant being then a co-sharer, the land was recognised by the co-sharers as sir and was as such allotted to the respondent's mahal and since then the appellant had become a tenant of it, held that the appellant was not estopped from denying that the land was sir and that he was an occupancy tenant of it, unless it appeared that respondent's possession was in any way injuriously affected by appellant's omission to deny that the land was sir at the time of the partition. **Punchum Dube v. Shahzad Kuer**, 32 Ind. Cas. 387.

BAILLIE, S.M. and TWEEDY, J.M.

(1) S. 4 (11), cls. (a), (b), (c)—Sir—Meaning.

A mere record as sir in partition is not sufficient to bring land under the category of cl. (b) of S. 4 (11) which requires the establishment of village custom. **Murid v. Kashla**, 31 Ind. Cas. 855.

HOLMS, S.M., and CAMPBELL, J.M.

(2) S. 4 (12). See **HINDU LAW (WIDOW)**, No. 26, 31 Ind. Cas. 851.

(3) S. 8-B—Partition—Under-proprietary mahal—Specific plots **Bhaheshar Pathak v. Ram Prasad Pathak**, 13 A.L.J. 5 (Rev.)=31 Ind. Cas. 624. See Final Part, 1916, Col. 219.

(3-a) Ss. 32, 40, 133—Annual registers—Corrections in—How made—Possession—Possession under an award—Value of.

In dealing with an application for a correction of the annual registers prescribed by S. 32 of the Oudh Land Revenue Act, 1901, possession is the main factor to be considered (*Vide* S. 40).

Where the members of a talukdar's family are in possession of distinct villages allotted to them under an arbitration award settling the disputes between them.

7.—U.P. Acts—(Continued).

Act III of 1901 (U.P. Land Revenue)—(Ctd.).

Held, that the persons in possession were entitled to be entered in the Revenue Registers as co-sharers along with the talukdar although under S. 138 of the Act the estate could not be partitioned without the sanction of the local Government previously obtained. **Ramzan Ali Khan v. Muhammad Qayum Khan**, 34 Ind. Cas. 749.

CAMPBELL, J.M.

(3-b) S. 34—Mutation case—Jurisdiction—Rent Act (XII of 1881), S. 203—Reference to arbitration by Tahsildar—Award invalid.

When a dispute arises in a mutation case the Tahsildar should at once refer the matter to the Sub-Divisional Officer. After the dispute has arisen the law does not contemplate his continuing to investigate the case.

S. 203 of the Rent Act says clearly that no one but an Assistant Collector of the First Class or some higher Court can refer to arbitration. A Tahsildar has no jurisdiction to refer; therefore an award made upon a reference made by a Tahsildar is waste paper and is null and void *ab initio*. **Satarohan Pande v. Ram Ugra Pande**, 32 Ind. Cas. 573.

BAILLIE, S.M. and TWEEDY, J.M.

(4) S. 36. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 24, 34 Ind. Cas. 441.

(4-a) S. 40. See No 3-a, *supra*.

(5) Ss. 40, 44, 203, 207—Application for mutation of names—Reference to arbitration—Suit in Civil Court based on title—Jurisdiction.

Where an Assistant Collector, either at the request, or by the consent of the parties before him, refers a dispute relating to mutation of names to three arbitrators, and in accordance with the award of the majority rejects the application, *held* that a subsequent suit based on title is not excluded from the jurisdiction of the ordinary Civil Courts, nor does the consent of the plaintiff to such reference to arbitration which is within the four corners of the Land Revenue Act operate as an ouster of the jurisdiction of the Civil Courts. **Girdhari Chaube v. Ram Baran Misir**, 14 A.L.J. 85.=32 Ind. Cas. 761.

WALSH, J.

(6) S. 42—Jurisdiction—Application of—Determination of class or tenure of tenant *ultra vires*.

S. 42 of the U. P. Land Revenue Act (III of 1901) only applies when there is a question of mutation under Chap. III. In the absence of an application for a correction of the *jamabandi*, the Court has no jurisdiction to determine the class or tenure of the tenant merely on application under S. 42, being made by the *Zamin-dar*. **Ram Raj v. Rameshar**, 33 Ind. Cas. 205.

HOLMS, S.M. and CAMPBELL, J.M.

(6-a) S. 44. See No. 5, *supra*.

(7) Ss. 56, 86. See MORTGAGE (USUFRUCTUARY), No. 1, 14 A.L.J. 393.

7.—U.P. Acts—(Continued).

Act III of 1901 (U.P. Land Revenue)—(Ctd.).

- (8) S. 79—Oudh Act XXII of 1886 (Rent), Ss. 33, 35, inapplicability of—Rent, enhancement of—Tenant under heritable perpetual lease.

Where a tenant holds under a heritable perpetual lease, at a rent which is equal to the revenue rate plus 10 per cent., the landlord cannot apply for enhancement of rent under Ss. 33 and 35 of the Oudh Rent Act (XXII of 1886), as they are not obviously applicable to the case. Enhancement of rent in such a case, is possible only under S. 79 of the U. P. Land Revenue Act (III of 1901), and that only during settlement. *Raghuraj Singh v. Ram Lotan Dube*, 33 Ind. Cas. 186.

HOLMS, S.M.

Reference:—Sel. Dec. No. 11 of 1912.

- (9) S. 79—Rent, enhancement of—Settlement.

There can be enhancement (or rather determination) of rent at settlement, under S. 79 of the U. P. Land Revenue Act (III of 1901), and not under the provisions of any other Act. *Dost Muhammad Khan v. Rahman Khan*, 33 Ind. Cas. 180.

HOLMS, S.M.

- (9-a) S. 86. See No. 7, *supra*.

- (9-a-1) Ss. 87, 219—Fixing rent of an ex-proprietary tenant—Settlement officer—Irregularity—Revision—Act II of 1901 (Agra Tenancy), S. 10.

While fixing rent of an ex-proprietary tenant under S. 87 of Act III of 1901 (U. P. Land Revenue) a settlement officer must take action in accordance with S. 10 of the Agra Tenancy Act. If he disregards the said provision of the Agra Tenancy Act he commits a substantial irregularity justifying interference in revision. *Hora Singh v. Jodha Singh*, 32 Ind. Cas. 1001.

HOLMS, S.M. and CAMPBELL, J.M.

- (9-b) S. 103—Coming into possession as reversioner, if transfer.

Coming into possession of certain land as reversioner upon the death of a widow of one who was in proprietary possession is not a transfer of proprietary possession such as is contemplated by S. 103 of the Revenue Act and revenue cannot be assessed on such land till next settlement. *Raghubar Singh v. Bindra Bux Singh*, 32 Ind. Cas. 550.

HOLMS and CAMPBELL, JJ.

- (9-c) S. 109 (2)—Under proprietary mahal—Partition—Compactness.

The partition of an under proprietary mahal should not be disallowed on the ground that a compact partition is not possible. *Gur Prasad v. Ram Gobind*, 32 Ind. Cas. 773.

HOLMS, S.M.

- (10) Ss. 110 and 111—Partition case—Objection by guardian of minors after she was made party—Dismissal of objection as time-barred—Appeals against such order—Revision by Board—Board's Circulars, 21—II, rule 9.

The appellants were two minor brothers, to whom their aunt was appointed as guardian

7.—U.P. Acts—(Continued).

Act III of 1901 (U.P. Land Revenue)—(Ctd.).

under the Guardians and Wards Act by the Civil Court. When a proclamation was issued under S. 110, Act III of 1901, their aunt applied stating that she, as guardian, should have been made a party to the case and raised some objections to the partition which did not concern the shares of the minors. Her application was made on the last day of the time allowed by the proclamation. After several adjournments of the case the Court agreed to her standing as guardian. Within a week thereafter she filed an objection under S. 110 raising a question of proprietary title concerning the shares of her minor wards. The Assistant Collector dismissed the objection as time-barred. This order was appealed to the Deputy Commissioner who passed an order that the appeal was to be returned for presentation to the District Judge, and that meanwhile partition proceedings were to be stayed. Against the order of the Deputy Commissioner an appeal was preferred to the Commissioner and after rejection of the appeal by the Commissioner an appeal was preferred to the Board. *Held* that no such appeal lay to the Board, but in the circumstances of the present case there was ample reason for interference by the Board on revision. *Held* also that the Assistant Collector was wrong in having rejected the objection as time-barred. The guardian of the minors filed her amended objection raising a question of proprietary title within a week after she became a party to the case. Under r. 9, B.C. 21—II, such an objection might, for special reasons, be entertained at a period subsequent to the date fixed for lodging objections. It was the duty of the Assistant Collector to have decided the matter on the merits. *Held*, further that the order of the Assistant Collector not having been passed under S. 111, Act III of 1901, it was appealable to the Deputy Commissioner. In the result the Board set aside the orders of the Assistant Collector and of the Deputy Commissioner and directed the Assistant Collector to pass orders on the objection of the guardian under S. 111 of the Act. *Chaudhuri Amrul Rahman v. Dhan Kumar Das*, 34 Ind. Cas. 689—3 C.L.J. 201.

HOLMS, S.M. and CAMPBELL, J.M.

- (11) Ss. 110, 111, 112—Question of proprietary title—Jurisdiction of Civil and Revenue Courts.

Held that, in partition proceedings instituted in the Revenue Court, an objection to the effect that the village in question had already been partitioned and that the objector had been allotted a definite share which could not be partitioned again, raised a question of proprietary title which the Revenue Court was competent to refer to the Civil Court for trial. *Ram Narain v. Jagannath Prasad*, 14 A.L.J. 23—38 A. 115—32 Ind. Cas. 184.

BANERJI and WALSH, JJ.

- (12) S. 111—Civil Court, jurisdiction of—Direction by Revenue Court to file a suit in

7.—U.P. Acts—(Continued).

Act III of 1901 (U.P. Land Revenue)—(Ctd.).

a Civil Court within a time fixed—Limitation.

Where an Assistant Collector taking action under S. 111 of the Land Revenue Act, directed the plaintiffs to file a suit in a Civil Court within three months to establish the right which they were claiming, *held*, that the Civil Court could not take cognizance of the suit unless it had been brought within three months from the date of the decision of the Assistant Collector. *Dhanesh Prasad v. Gaya Prasad*, 18 O.C. 343=33 Ind. Cas. 865.

LINDSAY, J.C.

(18) S. 111—*Partition—Party required by Collector to file civil suit—Non-compliance with requisition—Appeal to District Judge—Jurisdiction.* *Har Prasad v. Mukand Lal*, 13 A.L.J. 1107=38 A. 70=31 Ind. Cas. 882. See Final Part, 1915, Col. 221.

(13-a) S. 111. See Nos. 10 and 11, *supra*.

(14) Ss. 111, 112, 233 (k)—*Code of Civil Procedure* (1908), Sch. II, O. II, r. 2—*Suit for possession—Application for partition of a portion of property in the Revenue Court.*

A made an application in the Revenue Court for partition of his four biswas share. Plaintiff and his brother were owners of $3\frac{1}{2}$ biswas. Defendant, beyond time, made an application for partition of his $\frac{1}{2}$ biswa share. Mahals were formed by partition in the following way:—A's mahal of 4 biswas; plaintiff's mahal of $\frac{1}{2}$ of $3\frac{1}{2}$ biswas; and defendant's mahal of $\frac{1}{2}$ biswa. Plaintiff brought a suit to recover possession of the mahal allotted to defendant:

Held, (1) that the suit was not barred by S. 233 (k) of the Land Revenue Act inasmuch as it was not a suit in respect of the partition or union of the mahals; (2) that O. II, r. 2, of the Code of Civil Procedure did not apply to proceedings under the Land Revenue Act; (3) that the rule of *res judicata* did not apply, because the Revenue Court would not be competent to try the subsequent suit for possession, and no question of title either was or could have been raised in the partition proceedings. *Kalka Prasad v. Man Mohan Lal*, 14 A.L.J. 378=38 A. 302=33 Ind. Cas. 86 (F.B.)

RICHARDS, C.J., TUDBALL and RAFIQ, JJ.

(14-a) S. 112. See Nos. 11 and 14, *supra*.

(14-b) Ss. 111 and 233 (k)—*Suit for possession—Bar of suit against party to partition—Plea of bar against others.*

Where a person was not a party to a partition proceedings and had not cognizance of them under S. 111 of Act III of 1901, an objection that a suit for possession is barred by S. 233 (k) of the Act cannot be successfully raised against him. *Lakshpat Thakural v. Gursaran Thakural*, 36 Ind. Cas. 278.

KNOX, J.

(15) S. 119. See PARTITION, No. 8, 19 O.C. 151.

7.—U.P. Acts—(Continued).

Act III of 1901 (U.P. Land Revenue)—(Ctd.).

(15-a) S. 133 (3)—*Partition proceedings, whether appeal lies from—Correction of mistake—Confirmation of partition—Appeal.*

A Court is justified in taking up an appeal against the final confirmation of a partition, and amending the partition proceedings, when it is brought to its notice that a gross injustice has been caused to one of the parties in the preparation of the partition proceedings even though no appeal has been lodged against those proceedings. *Sarju Prasad v. Khushal Chaudhri*, 32 Ind. Cas. 832.

HOLMS, S.M. and CAMPBELL, J.M.

(16) Ss. 133 and 212—*Appeal—Disputes after confirmation of partition, orders on—Appealable to Commissioner.*

Where after confirmation of partition disputes arising between parties when they are being put in possession are decided by Deputy Commissioner, such orders are appealable to the Commissioner under Ss. 133 and 212 of the U.P. Land Revenue Act (III of 1901). *Kandhalya Lal v. Narala Das*, 33 Ind. Cas. 262.

HOLMS, S.M. and CAMPBELL, J.M.

(16-a) S. 138. See No. 3-a, *supra*.

(16-b) Ss. 139 and 233 (k)—*Re-union of mahals—Claim for re-union by person having acquired properties in more than one mahal—Jurisdiction of Civil Court to question validity of re-union.*

There is nothing in S. 139 of Act III of 1901 to prevent a re-union of mahals being effected by the common consent of different proprietors of those mahals. S. 13 of Act X of 1897 lays down as a general rule of construction that words in the singular shall include the plural, and therefore there is no justification for limiting the application of S. 139, Act III of 1901, to cases where a particular individual has acquired properties in more mahals than one and seeks re-union of the same.

The validity of a re-union cannot be questioned in a Civil Court under S. 233, cl. (k) of the Act. *Iqbal Hussain v. Ejaz Hussain*, 36 Ind. Cas. 664.

KANHAIYA LAL, A.J.C.

(16-c) S. 203. See No. 5, *supra*.

(16-d) S. 207. See No. 5, *supra*.

(16-e) S. 212. See No. 16, *supra*.

(16-f) S. 219—*Application for correction of Jamabandi—Disposal in summary manner—Res judicata—Entry of land as sir in partition proceedings, effect of.*

If an application for the correction of the *Jamabandi* is disposed of in a summary manner without fixing of issues, the decision does not operate as *res judicata*.

The entry of sir in partition proceedings does not affect the tenant who was no party to the partition. *Ilahikhan v. Rajab Ali*, 32 Ind. Cas. 851.

HOLMS, S.M. and CAMPBELL, J.M.

7.—U.P. Acts—(Continued).

Act III of 1901 (U.P. Land Revenue)—(Ctd.).

(17) S. 233. See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 6, 30 Ind. Cas. 209.

(17-a) S. 233. See Nos. 14 and 16-b, *supra*.

(19) S. 233, cl (i)—*Suit for declaration as to existence of certain proprietary rights—Determination of question as to nature of tenancy—Admissions as to non-existence of certain right—Estoppel.*

The plaintiff sued the defendants for a declaration that the latter had no right, either superior or inferior, in a village. The defendants admitted that they had no under-proprietary or superior proprietary rights in that village, but pleaded that they were perpetual *Thekedars* of certain share and had been in possession and occupation thereof from before the regular settlement. The Judge, who tried the case found that the defendants held the land under certain *Qubuliats* executed by their ancestors in favour of the predecessors-in-title of the plaintiff and were estopped from setting up a perpetual tenancy and that the plaintiff had a good cause of action for the claim. *Held* that the Court could only pass a decree for a declaration that the defendants had no superior proprietary or under proprietary rights without going into the nature of the tenancy. S. 233, cl. (i) of U. P. Act III of 1901 precluded the Civil Court from determining the class of tenancy to which defendants belonged. *Held* also that there was no question of estoppel in the case. *Hirde v. Muhammad Abdul Hasan Khan*, 30 Ind. Cas. 207.

STUART and KANHAIYA LAL, A.J.CS.

(19) S. 233 (k)—*Imperfect partition—No notice issued—Land appertaining to another patti wrongly included in partition—Suit in Civil Court raising question of title—Jurisdiction—Civil and Revenue Courts*

In 1875 a mahal was divided into several *pattis*. *Patti* No. 2 belonged to plaintiff who was a purchaser; *pattis* Nos. 4 and 5 belonged to defendant; and *patti* No. 9 was *shamilat*. Defendant applied to have a perfect partition of his shares in *pattis* Nos. 4 and 5 and in *patti* No. 9. This proceeding was subsequently dropped. Defendant then applied for an imperfect partition of *pattis* Nos. 4 and 5. No notice was issued of this application. By mistake some land appertaining to *patti* No. 2 was included in the partition of *pattis* Nos. 4 and 5. Plaintiff brought the present suit for declaration of his title or in the alternative for possession: *Held* that the suit was not barred by the provisions of S. 233 (k) of the Land Revenue Act, and that the suit was not a suit "relating to the partition or union of a mahal". *Shambhu Singh v. Daljit Singh*, 14 A.L.J. 293=38 A. 248=33 Ind. Cas. 19 (F.B.).

RICHARDS, C.J., TUDBALL and RAFIQ, JJ.
Reference:—23 A. 291, D.

(20) S. 233 (k)—*Application for imperfect partition—No objection—One plot belonging to one patti included in another—Suit in Civil*

7.—U.P. Acts—(Continued).

Act III of 1901 (U.P. Land Revenue)—(Ctd.).

Court—Jurisdiction. Duljit Singh v. Shambhu Singh, 13 A.L.J. 779=30 Ind. Cas. 189. See Final Part, 1915, Col. 223.

(20-a) S. 233 (k). See No. 14-b, *supra*.

(21) Sch. IV, r. (d), S. Nos. 47, 48. See PLEADER AND CLIENT, No. 6, 35 Ind. Cas. 205.

Act II of 1903 (Bundelkhand Land Alienation)

(1) S. 3—*Sale by pre-emption—Consent of Collector—Mortgage—Sale after mortgage—Right of subsequent purchaser Ramnath v. Harani*, 13 A.L.J. 662=37 A. 467=30 Ind. Cas. 404. See Final Part, 1915, Col. 244.

(2) S. 3—*Pre-emption, suit for—Sanction of Collector. Suraj Bhan v. Somwaripuri*, 13 A.L.J. 949=37 A. 662=30 Ind. Cas. 949. See Final Part, 1915, Col. 221.

(3) S. 17—*Mortgage-deed executed by Collector—No exemption under S. 3, Stamp Act (1899)—No power of reference under the Registration Act (1908).*

A decree passed by a Munsif under S. 17 of the Bundelkhand Alienation of Land Act had been sent to the Collector who executed a mortgage-deed on behalf of the judgment debtors. On a reference by the Board of Revenue for the United Provinces as to whether such an instrument was or was not exempted from the stamp duty and registration, *held* that the instrument, though executed by the Collector, was not one which had been executed by, in favour of or on behalf of the Government, and hence was not exempt from the stamp duty under S. 3 of the Stamp Act. *Held* further that the Board of Revenue had no power to refer a question under the Registration Act. *Somwaripuri v. Matabadal*, 14 A.L.J. 422=38 A. 351=34 Ind. Cas. 280 (F.B.).

KNOX, BANERJI and TUDBALL, JJ.

Act IV of 1912 (Court of Wards).

(1) S. 55—*Disabilities of ward extend to every possible cause of action cognizable by a Civil Court—Disabilities confined to the actual ward—Family members joint with the ward, not affected by the disabilities—Oudh Laws Act, S. 9—Co-sharer includes members of joint family though their names be not entered in the khewat.*

One D together with his father and uncle formed a joint Hindu family. The father and uncle applied to have their property placed under the superintendence of the Court of Wards. The application was granted and after the necessary notification the Court of Wards assumed management of the family property.

Held, that S. 55 of the Court of Wards Act (IV of 1912) prohibits a ward from suing and being sued not merely with respect to such property of his as is under the management of the Court of Wards but in respect of every possible cause of action cognizable by a Civil Court.

7.—U.P. Acts—(Concluded).**Act IV of 1912 (Court of Wards)—(Concluded).**

Held further, that D who did not make the application did not become a 'ward' within the meaning of the Act.

Held also, that the disabilities imposed by S 55 apply only to the actual wards and not to other members of the family whose interests in the joint family property are managed by the Court of Wards.

Held further, that a member of a joint Hindu family holding a share in the joint family property is a co-sharer within the meaning of S. 9 of the Oudh Laws Act, although his name does not appear on the *khewat*. **Lalta Singh v. Chhattar Singh**, 19 O.C. 306.

STUART and KANHAIYA LAL, A.J.Cs.

8.—Oudh Acts.**Act XXVI of 1866 (Oudh Sub-Settlement).**

Rule 10 of the Rules under—Modes of acquisition of under-proprietary rights. See **DIHDAR**, No. 1, 19 O.C. 27.

Act XIX of 1868 (Oudh Rent).

S. 5. See **LEASE**, No. 11, 33 Ind. Cas. 170.

Act I of 1869 (Oudh Estates).

(1) Ss. 2, 14, 22—*Primogeniture*, meaning of—*Res judicata*—*Talukdar*—*Heir or legatee of a Talukdar*—"Would have succeeded," meaning of—*Sanad*, nature of estate created by—"Successors," meaning of—"Nearest male heir," interpretation of—*U. P. Act*, 111 of 1910, S. 3. **Ghulam Abbas Khan (Babu) v. Bibi Ummatul Fatima**, 18 O.C. 188=31 Ind. Cas. 748. See Final Part, 1915, Col. 227.

(2) Ss. 3, 8 and 10. See **MAHOMEDAN LAW (INHERITANCE)**, No. 1, 20 M.L.T. 362.

(3) S. 8. See No. 2, *supra*.

(4) S. 10. See No. 2, *supra*.

(5) S. 14. See No. 1, *supra*.

(6) S. 22, cls. 1 to 10—Rule of primogeniture—Application to collateral succession—Applicability of *sanad* to cases governed by the special provisions of. See **LIMITATION ACT (1908)**, No. 246, 18 O.C. 289.

(7) S. 22. See No. 1, *supra*.

(8) S. 33—*Rules of British Indian Association*—*Award of private arbitrators*.

The rules of the British Indian Association, obscure as they were in some respects, did not exhaust the powers of the British Indian Association and the Financial Commissioner as private arbitrators to settle disputes about property between the members of the family. Awards made by the British Indian Association and by the Financial Commissioner irrespective of those rules were therefore obligatory upon the parties to the submissions and upon those whose interests they represented, to the same extent as those made under the rules, or filed and enforced in the manner provided by S. 33 of Act I of 1869.

8.—Oudh Acts—(Continued).**Act I of 1869 (Oudh Estates)—(Concluded).**

Abdul Rahman Khan v. Amir Ali Khan, 30 Ind. Cas. 249.

KANHAIYA LAL, A.J.C.

References:—5 Ind. Cas. 156=7 A.L.J. 41 (P.C.)=14 C.W.N. 237=11 C.L.J. 116=12 Bom. L.R. 161=20 M.L.J. 195=13 O.O. 74=32 A. 92=37 I.A. 12; 7 O.C. 218; 23 C. 838=23 I.A. 64, R.

Act XVII of 1876 (Oudh Land Revenue).

(1) Ss. 173, 174—Protection of estates superintended by Court of Wards—Whether it continues after such superintendence ceases. See **DISQUALIFIED PROPRIETORS**, No. 1, 14 A.L.J. 477.

(2) S. 174. See No. 1, *supra*.

Act XVIII of 1876 (Oudh Laws).

(1) See **PRE-EMPTION**, No. 15, 19 O.C. 153.

(2) Suit by person who became co-sharer after sale, maintainability of—Plaintiff cannot rely on rights acquired subsequent to the accrual of cause of action. See **PRE-EMPTION**, No. 14, 19 O.C. 110.

(3) S. 3—*Gift by way of trust*.

The word *gift* in Oudh Laws Act, S 3, includes a trust which is only a gift to A and B for the benefit of C, the incidents of which will in the case of Mahomedans be governed by the Mahomedan Law. **Mirza Sadik Huseain Khan v. Nawab Saïyed Hashim Ali Khan**, 31 M.L.J. 607=19 O.C. 192=18 Bom. L.R. 1037=14 A.L.J. 1248=21 C.W.N. 130=(1916) 2 M.W.N. 577=21 M.L.T. 40=25 C.L.J. 363=26 Ind. Cas. 104=38 A. 627 (P.C.).

LORD ATKINSON, LORD PARKER OF WADDINGTON, SIR JOHN EDGE and MR. AMEER ALI.

(4) S. 5. See **MAHOMEDAN LAW (DOWER)**, No. 4, 19 O.C. 246.

(5) S. 5—Dower, claim for—Cause of action for dower distinct from that for share in inheritance—*Res judicata*. See **MAHOMEDAN LAW (DOWER)**, No. 3, 19 O.C. 171.

(6) S. 7—*Pre-emption*—*Entry in wajib-ul-ars*—*Presumption as to custom of pre-emption*.

Where at the time of preparation of the *wajib-ul-ars* of a village the co-sharers stated that they had a right to transfer their respective shares whenever they liked and the *khewat* at the village showed that there had been several transfers of shares, from time to time, there was sufficient evidence to negative the existence of any custom of pre-emption(a).

The presumption raised by S. 7 of the Oudh Laws Act, is rebutted by an entry in the *wajib-ul-ars* negating the existence of the custom of pre-emption. Such an entry will be taken as evidence of a contract between the co-sharers of the village at the time of the *wajib-ul-ars* and may be enforced against their successors in interest (b).

Where it was shown that transfers of certain shares in the village were disputed and the

8.—Oudh Acts—(Continued).**Act XVIII of 1876 (Oudh Laws)—(Concluded).**

pre-emption suits filed in respect of such transfers were compromised, they would not establish a custom of pre-emption in the village. *Hira Lal v. Ganesha Prasad*, 36 Ind. Cas. 668.

KANHAIYA LAL, A.J.C.

References.—(a) 28 Ind. Cas. 943=17 O.C. 105=1 C.L.J. 152, R. (b) 28 Ind. Cas. 34=18 A.L.J. 236=19 O.W.N. 993=17 M.L.T. 193=37 A. 129=28 M.L.J. 556=2 L.W. 903=21 O. L.J. 237=17 Bom. L.R. 993=(1915) M.W.N. 581=42 I.A. 10 (P.C.), R.

(6-a) S. 7. See PRE-EMPTION, No. 22, 33 Ind. Cas. 775.

(7) S. 7. See PRE-EMPTION, No. 20, 19 O.C. 394.

(8) S. 9. See U.P. ACT IV OF 1912 (COURT OF WARDS), No. 1, 19 O.C. 306.

(9) S. 9—*Biba-bil-ewas*—Effect on right of pre-emption. See MAHOMEDAN LAW (DOWER), No. 1, 18 O.C. 367.

(9-a) S. 9, Chap. II—*Hindu widow's estate in a proprietary share—Sale by Hindu widow without legal necessity—Effect—Right of pre-emption.*

An estate held by a Hindu widow as a Hindu widow in a proprietary share is not a full proprietary estate and a sale of such an estate by a Hindu widow when the sale is made without legal necessity is not the sale of a proprietary tenure or the share of a proprietary tenure within the meaning of S. 9 of the Oudh Laws Act and no right of pre-emption under Chap. II of the Act arises on the occasion of such a sale. *Rampal Singh v. Ganesha*, 32 Ind. Cas. 225.

STUART, A.J.C.

(10) S. 9 (c)—*Pre-emption—Comparative claim between under-proprietor in a mahal and proprietor of another mahal in same village—Casting of lots.*

The under-proprietor in a mahal of a village and the proprietor of another mahal in the same village have got equal rights in the matter of asserting a right of pre-emption in respect of a sale of land in the village, as both of them are members of the village community within the meaning of the third clause of S. 9, Act XVIII of 1876. The question as to who is entitled to the property in suit has to be determined by drawing of lots according to the provisions of the said S. 9. *Gajodhar v. Raja Udit Narain Singh*, 34 Ind. Cas. 692.

STUART and KANHAIYA LAL, A.J.CS.

Act XIII of 1879 (Civil Courts).

S. 17—*Jurisdiction of Munsif officiating as Sub-Judge and reverting as Munsif and again officiating as Sub-Judge to hear certain kind of cases given on former occasion.*

The notification that was issued when a Munsif officiated as Subordinate Judge giving him jurisdiction to hear a particular sort of cases during such time as the said Munsif held the post of a Subordinate Judge, held to give him authority to try such particular sort of

8.—Oudh Acts—(Continued).**Act XIII of 1879 (Civil Courts)—(Concluded).**

cases when he was made a Subordinate Judge once again after his reverting as Munsif from the original appointment of Officiating Subordinate Judge. *Gur Prasad Singh v. Sant Baksh Singh*, 35 Ind. Cas. 759.

STUART and KANHAIYA LAL, A.J.CS.

Act XXII of 1886 (Rent).

(1) *Suit to contest notice of ejectment, dismissal of—Suit for declaration of status as under-proprietor before actual ejectment, maintainability of—Jurisdiction of Civil Court—Oudh Rent Act, S. 108, cls. (8) and (10).*

Where a suit to contest a notice of ejectment was dismissed by the Revenue Court, but the plaintiff before being actually ejected from the land instituted a suit in the Civil Court for a declaration of his status as an under-proprietor.

Held, that the fact of his being in possession of the land at the date of suit would not take his case out of the general rule and the suit could not be entertained until he had exhausted his remedy in the Revenue Court under S. 108, cl. 10, Oudh Rent Act. *Ram Phare and another v. Rameshwar and another*, 19 O.C. 67=36 Ind. Cas. 623.

LINDSAY, J.C.

(2) See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 8, 33 Ind. Cas. 250.

(3) See LANDLORD AND TENANT, No. 40, 33 Ind. Cas. 214.

(4) See LANDLORD AND TENANT, No. 45, 33 Ind. Cas. 247.

(5) See LANDLORD AND TENANT, No. 48, 33 Ind. Cas. 266.

(6) See LANDLORD AND TENANT, No. 58, 33 Ind. Cas. 770.

(7) Tenant-at-will, transferability of the rights of. See TENANT-AT-WILL, No. 1, 19 O.C. 117.

(8) S. 3—*Landlord and tenant—Thakedar, position of.*

As between the Government and the *thakedar* the latter is a tenant under S. 3 (10) of Oudh Rent Act but as between the *thakedar* and the cultivating tenants the former is landlord under S. 3 (11) of the Act and the latter a tenant (not a sub-tenant) under the former. *Mathura Prasad v. Ganga*, 34 Ind. Cas. 861.

CAMPBELL, J.M.

(9) S. 5. See LEASE, No. 11, 33 Ind. Cas. 170.

(9-a) Ss. 5, 39—*Land held by way of Kabzadari—Occupancy rights—Enhancement of rent.*

Where before the Settlement Court there was a claim to Sir and it was found that the claimants were former proprietors who had parted their proprietary rights and retained land which was formerly their Sir, at what is called a low rent (*naram lagan*) and it was decided that they should hold this land by way of *Kabzadari*, (being 'a right something between Sir and

S.—Oudh Acts—(Continued).**Act XXII of 1886 (Rent)—(Continued).**

Kabsadari 'y) at the former low rent. *Held* that the rights of occupancy which were decreed were not rights of occupancy corresponding to those under S. 5 of the Rent Act and that S. 33 of the Act applied and the rent was liable to enhancement. *Bunyard Husain v. Ram Sahai Singh*, 32 Ind. Cas. 415.

HOLMS, S.M., and CAMPBELL, J.M.

References:—Selected Decisions 3 of 1893; 11 of 1912; 23 of 1899, considered.

(10) *S. 33—Non-occupancy tenant—Enhancement of rent fixed by judicial decision.*

A tenant having no right of occupancy but holding at a rent fixed by a judicial decision is not liable to have his rent enhanced under S. 33 of the Oudh Rent Act. His rent can be altered only at settlement. *Lutf Ali v. Ram Lal*, 33 Ind. Cas. 786.

CAMPBELL, J.M.

(11) *S. 33, sub-S. 2—Agreement between landlord and tenant—Rate of rent fixed—Liability to ejectment in default of payment—No period fixed for tenure—Enhancement of rent—Not possible.*

Where, under an agreement made in 1872, it was agreed that the tenant should pay a rent of Re. 1 per bigha and should be liable to ejectment in the event of default and no period was fixed in the agreement, after which the tenant was liable to enhancement of rent. *Held* that the agreement brought the tenant within sub-S. (2), S. 33 of the Oudh Rent Act and that his rent cannot be enhanced. *Chhedil Tewari v. Shah Hayt Ahmad*, 33 Ind. Cas. 157.

HOLMS, S.M. and CAMPBELL, J.M.

References:—Sel. Dec. No. 11 of 1912, R.

(11-a) *S. 33. See No. 9-a, supra.*

(12) *Ss. 33, 35. See U.P. ACT III OF 1901 (U.P. LAND REVENUE), No. 8, 33 Ind. Cas. 186.*

(13) *S. 35. See No. 12, supra.*

(14) *S. 47—Tenant re-admitted after ejectment, right of.*

Where a tenant who had been ejected from his holding was re-admitted to a holding with an increased area on an enhanced rental, *held*, that S. 47 of the Oudh Rent Act did not apply to the case and the contract for increased rent could not be challenged on the ground of its being against the provisions of that section. *Lachhman Singh v. Thakorain Sarfaraz Kunwar*, 18 O.C. 361=33 Ind. Cas. 560.

LINDSAY, J.O.

(15) *S. 47—Unprivileged tenant—Rent, enhancement of—Change of cash rent to grain rent, effect of, on landlord's power of enhancement. Mahadeo v. Jagan Nath*, 18 O.C. 134=30 Ind. Cas. 261. See Final Part, 1915, Col. 282.

(16) *Ss. 52, 108—Lease under Oudh Circular 16 of 1874—Nature and incidents of—Ejectment.*

Leases granted under the Oudh Chief Commissioner's Circular No. 16/2384 of 1874 are

S.—Oudh Acts—(Continued).**Act XXII of 1886 (Rent)—(Continued).**

heritable leases and a tenant of holding under such a lease cannot be ejected under S. 108 of the Oudh Rent Act. *Mahadeo Prasad v. Ajodhya Prasad*, 34 Ind. Cas. 760.

CAMPBELL, J.M.

(17) *Ss. 55, 60—Zamindar and tenant—Ejectment proceedings declared null and void—Tenant not trespasser—Fresh application under S. 60, maintainable.*

A tenant not legally ejected is not a trespasser. A tenant who defying the notice served on him under S. 55 of the Oudh Rent Act by the zamindar continued in possession even subsequent to an application by the zamindar under S. 60 of the said Act was prosecuted criminally and his defence that he was never legally ejected and that he treated the action taken by the zamindar as null and void was allowed. *Held* that the previous proceedings having been found to be null and void a second application by the zamindar under S. 60 of the Oudh Rent Act was maintainable. *Bhagwan Baksh Singh v. Ambar Singh*, 31 Ind. Cas. 472.

HOLMS, S.M., and CAMPBELL, J.M.

(18) *Ss. 55 and 127—Ejectment of trespasser through Revenue Court—Jurisdiction of Revenue Court.*

As the relation of landlord and tenant does not exist in the case of a trespasser, he can be ejected by the Revenue Court under S. 127 of the Act, by means of a notice issued under S. 55. *Ham Nath v. Baldeo Singh*, 30 Ind. Cas. 257.

TWEEDY, J.M.

(19) *S. 60—Ejectment—Co-sharers—Right of one co-sharer to apply for ejectment of tenant.*

Where two co-sharers together issued a notice of ejectment against their tenant and subsequently one of them compromised with the tenant.

Held that the other co-sharer alone cannot apply for ejectment of the tenant under S. 60 of the Oudh Rent Act. *Musat. Bitto v. Ram Nidh*, 34 Ind. Cas. 693.

CAMPBELL, J.M.

(20) *S. 60. See No. 17, supra.*

(20-a) *S. 69 (2)—Land held under lease—Variable rent—Tenant—Ejectment.*

The respondents were given certain land on a perpetual lease which made their rental variable with the land revenue on that land. *Held* that they were tenants within the meaning of the Oudh Rent Act and could be ejected as such under S. 69 (2). *Muneshwar Bux Singh v. Ganga Bux*, 14 A.L.J. 1 (Rev.)=33 Ind. Cas. 729.

HOLMS, S.M. and CAMPBELL, J.M.

(21) *S. 107-B—Decision by settlement officer—Effect—Judicial decision.*

A decision of the Settlement Officer holding a certain person to be a 'sirdar hukmi bila lagan' comes within S. 107-B. Oudh Rent

8.—Oudh Acts—(Continued).**Act XXII of 1886 (Rent)—(Continued).**

Act and is a judicial decision. **Udit Narayan Singh v. Musummat Indar Kuar**, 33 Ind. Cas. 145.

CAMPBELL, J.M.

(22) S. 107-B—*Settlement Court's decree based on admission—Judicial decision.*

The order and decree of a Settlement Court passed in 1870 directing the entry of certain lands in *muafi* in the settlement papers on the admission of the claim without contest is nevertheless a judicial decision within the meaning of S. 107-B (b) of the Oudh Rent Act. **Bhaiya Kandha Prasad v. Babu Suraj Ball Das**, 34 Ind. Cas. 755.

HOLMS, S.M.

References:—11 A.L.J. 277=18 Ind. Cas. 734, D.

(23) S. 107-B—*Land—Grant under a former decree—Claims made subsequent thereto—Fresh order in ignorance of former one—Cancellation of later order—No possession under judicial decision.*

Where the claimants who were certain *olosa* relations of a *taluqdar* were given in 1866 under a decree of the Assistant Settlement Officer certain lands rent free in perpetuity and where in spite of the said decree, certain claims were put forward in 1867 and in ignorance of the decree of 1869 certain other lands were granted under the orders of the Financial Commissioner passed in 1869 based on an award of the arbitrators to whom the claims were referred and where the Financial Commissioner subsequently discovered the mistake and passed a fresh order that the decree of 1866 must be carried out.

Held that the order amounted to a review and cancellation of the order passed in 1869 and that the claimants cannot claim to be in possession of the land on the basis of a judicial decision of 1869. **Manager, Court of Wards of Rampur. Muttra Estate v. Mirtanji Bux Singh** 33 Ind. Cas. 89.

HOLMS, S.M. and CAMPBELL, J.M.

(24) S. 107 (E)—*Rent free lands—Local custom—Entry in wajib-ul-ars—Absence of Muasfiars' attestation.*

An entry in the *wajib-ul-ars* which was not attested by the *muasfiars* is no more than a statement of the witnesses of the wishes of a *taluqdar* and is in itself not sufficient to establish a local custom. **Bhairoo v. Shankar Sahi**, 30 Ind. Cas. 203.

TWEDDY, S.M., and HOLMS, J.M.

Reference:—3 Rev. L.J. 103, R.

(25) S. 107-G. See SETTLEMENT DECREE, No. 4, 33 Ind. Cas. 254.

(26) S. 107-G and S. 107-H—*Muafi, grantee of—Joint succession by two sons on grantee's death—Death of elder son—Status of younger son—Tenant without right of occupancy.*

Where an original grantee of a *muafi* dies, leaving two sons, the sons must be held to have succeeded jointly to the *muafi*; and on the

8.—Oudh Acts—(Continued).**Act XXII of 1886 (Rent)—(Continued).**

death of the elder son, the status of the younger is that of a tenant without a right of occupancy whose rent should be fixed under S. 107 (G) and not S. 107 (H) of the Oudh Rent Act (XXII of 1886). **Ram Singh v. Bisheshwar Dayal**, 33 Ind. Cas. 166.

HOLMS, S.M., and CAMPBELL, J.M.

(27) S. 107-H—*Grove—Trees cut and land brought under cultivation—Neglect of landlord to sue for resumption of the muafi—Effect—Acquisition of under-proprietary rights.*

Where a landlord neglected to sue for resumption of the *muafi* when the groves were cut by the tenant. Held that the landlord had tacitly admitted the tenant's tenure was not that of a grove-holder but that of an ordinary *muasfi* and that as such the tenant has established a title to under-proprietary right under S. 107 H, Oudh Rent Act. **Raja Rameshar Baksh Singh v. Sada Sheo**, 33 Ind. Cas. 137.

CAMPBELL, J.M.

(28) S. 107-H—*Land—Whether includes groves.* See LANDLORD AND TENANT, No. 36, 33 Ind. Cas. 147.

(29) S. 107-H. See MORTGAGE—GENERAL, No. 42, 33 Ind. Cas. 203.

(30) S. 107-H. See No. 26, *supra*.

(30-a) S. 107-H—*Rent-free grantee planting grove—Resumption.*

When a man, originally a rent-free grantee, plants a grove in the land, there seems to be no reason why the period under which the land was under grove should be excluded from the 50 years period in S. 107-H of the Oudh Rent Act, XXII of 1886. **Abu Jafar v. Sat Narain Goshan**, 32 Ind. Cas. 769.

HOLMS, S.M.

(31) S. 107-I—*Favourable rate of rent—Deliberate concession—Tenant not liable to ejectment by notice.*

If the rate of rent paid by a tenant, is favourable by deliberate concession within the meaning of S. 107-I of the Oudh Rent Act (XXII of 1886), such tenant cannot be ejected by notice. **Musummat Lachmin v. Behara Estate**, 33 Ind. Cas. 257.

HOLMS, S.M. and CAMPBELL, J.M.

Reference:—S.D. No. 5 of 1909, F.

(32) Chap. VII-A, S. 107-I—*Favourable rate by deliberate concession.*

It is necessary for the rent to be at a favourable rate by deliberate concession and not by mere accident to come within the scope of the Resumption Chap. VII-A of the Oudh Rent Act (XXII of 1886) (a).

So far as grants are concerned S. 107-I defines the words "favourable rate of rent" but it does not define them when there is no grant of land at a favourable rate of rent, and there are reasons against extending the definition of land held not under a grant but in which the rate

8.—Oudh Acts—(Continued).**Act XXII of 1886 (Rent)—(Continued).**

of rent may be accidentally favourable to the tenant. *Raghubar v. Thakurdin*, 33 Ind. Cas. 204.

HOLMS, S.M.

References:—(a) S.D. No. 5 of 1909; 3 R.L. J. 112, F.; S.D. No. 3 of 1911, D.

(33) S. 107 (k)—*Resumption suit*—*Ex parte decree, order setting aside—If appealable—Civ. Pro. Code (1903), O. XLIII.*

An order setting aside an *ex parte* decree passed in a resumption suit is appealable under S. 107 (k) of the Oudh Rent Act though not under the provisions of the Code of the Civil Procedure, O. XLIII, r. 1. *Muhammad Ali Muhammad Khan Bahadur v. Shaikat Ali*, 34 Ind. Cas. 702.

HOLMS, S.M.

(34) S. 108 (9) (c)—*Suit for compensation for illegal ejectment—Parties—Limitation.*

A person has every right to sue the landholder alone for compensation for illegal ejectment under S. 108 (9) (c).

Dispossession following on illegal ejectment is a continuous wrong and a plaintiff may bring a suit for compensation under S. 108 (9) (c) between any time from the date of the illegal ejectment up to a year after the date of the recovery of possession, but he can only get compensation in respect of the time during the year preceding the bringing of the suit in which he was out of possession (a). *Mata Din Singh v. Dwarka Kurmi*, 31 Ind. Cas. 447.

HOLMS, S.M., and CAMPBELL, J.M.

Reference:—(a) S.D. No. 16 of 1892, F.

(34-a) S. 108. See No. 16, *supra*.

(35) S. 108 (10). See RES JUDICATA, No. 28, 34 Ind. Cas. 640.

(36) S. 108, cl. 8 and S. 127—*Co-sharer—Adverse possession.*

A co-sharer in a village cultivated some land in a *patti* in which he was not a co-sharer. In a suit to contest a notice of ejectment from this land he claimed to have acquired a title to hold as proprietor by reason of adverse possession because he had cultivated the land for a period of more than 12 years without paying any rent.

Held, that, in the absence of any evidence that he had set up a claim to proprietary rights during his period of cultivation his possession was not *prima facie* adverse proprietary possession. *Bhagwan Din v. Shadkar Prasad*, 14 A. L.J. 3 (Rev.).

HOLMS, SENIOR MEMBER.

(37) S. 108-A—*Suit against Ziladar and Mukhtar for rent collected—Limitation prescribed by Oudh Rent Act, applicability of, to suits in Civil Courts. See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 4, 19 O.C. 314.*

(37-a) S. 118. See No. 47, *infra*.

(38) S. 126 (2)—*Any one of two lambardars alone entitled to eject tenant when.*

S. 126 (2) gives extensive powers to a *lambardar*.

8.—Oudh Acts—(Continued).**Act XXII of 1886 (Rent)—(Continued).**

Any one of two *lambardars* in a village between whom there is no sub-division of land, is the only person entitled to eject the tenants of the village. *Rikhi v. Badri Singh*, 35 Ind. Cas. 760.

TWERDY, J.M.

(39) S. 126, cl. (3). See LANDLORD AND TENANT, No. 41, 33 Ind. Cas. 215.

(40) S. 127—*Suit for rent by tenant against trespasser treating him as sub-tenant, maintainability of—Tenant and sub-tenant, nature of their relationship.*

As between an ordinary tenant and a person whom he is willing to treat as a sub-tenant, the relationship is of the same nature as that between a proprietor of the land and the tenant thereof; and if an ordinary tenant is entitled to claim rent from a sub-tenant he must be treated, in the absence of anything in the subject or context to the contrary, as a landlord for the purposes of the Oudh Rent Act.

Held further, that there is nothing in the subject or context of S. 127 of the Oudh Rent Act to exclude the case of an ordinary tenant, claiming the rent of his land from a person who had trespassed on his tenancy, from its purview. *Sheodat Singh v. Kall*, 19 O.C. 370.

STUART, J.C., and KANHAIYA LAL, A.J.C.

(41) S. 127, *Applicability of—Sale of proprietary rights to land—Vendor continuing in occupation of such land after sale—His status.*

S. 127 of the Oudh Rent Act (XXII of 1886) covers cases in which a person who formerly had a right to the land, maintains his occupation though his right to hold it has expired. *Jageshar Bakhsh Singh v. Hanmanta Singh*, 33 Ind. Cas. 252.

HOLMS, S.M. and CAMPBELL, J.M.

Reference:—S.D. No. 8 of 1903, F.

(42) S. 127—*Right of tenant-in-chief to eject trespasser as sub-tenant.*

A tenant-in-chief cannot eject a trespasser as his sub-tenant under S. 127 of the Rent Act. It is only the *zamindar* who can do so. *Bhagwan Dat v. Ram Dhan*, 20 Ind. Cas. 206.

TWERDY, S.M., and HOLMS, J.M.

Reference:—4 O.C. 24, R.

(43) S. 127—*Suit for rent on allegation of tenant's holding under agreement—No proof of agreement—Power of Court to award rent on basis of rates of neighbouring lands.*

Where the plaintiff in a suit for arrears of rent definitely alleged that the lands were held by the defendant under an agreement to pay rent, but failed to prove the agreement set up by him, in the absence of an allegation in the plaint that the defendant was in occupation without the consent of the plaintiff, the Court should not deal with the case as one falling under S. 127 of the Act but must award to the plaintiff an occupation rent on the basis of the rates prevailing in respect of the neighbouring lands.

8.—Oudh Acts—(Continued).**Act XXII of 1886 (Rent)—(Continued).**

Where the plaintiff put up a definite case of a grain rent, he was bound to show how much grain had been raised in the years in suit and how much of that grain was due to him and was further bound to show what the market rate of the grain was in each of the years in suit. The plaintiff cannot rely upon the statistics of other years and induce the Court to strike a *مند* rate, so as arrive at the amount claimed by the plaintiff. **Bhadeswari Prasad Singh v. Bhaheshwar Singh**, 30 Ind. Cas. 499.

LINDSAY, J. C.

(43-a) S. 127—Suit for ejectment through Revenue Court—Recognition of trespassers as tenants.

It is not competent to a landlord to recognise trespassers as tenants for the purpose of ejectment through the Revenue Court. S. 127 of the Act merely enables a landlord to recognise trespassers as tenants for the purpose of payment of rent. **Doodoo Singh v. Sheo Narain Singh**, 36 Ind. Cas. 770.

STUART, J. C.

(44) S. 127—Trespasser in occupation—Right of owner to sue for possession and damages—Necessity to recognise trespasser as tenant.

S. 127 of the Act does not compel a person to recognise a trespasser as a tenant and sue him for arrears of rent at such rate as the Revenue Court may consider fair and equitable. A person, who finds his land in the wrongful occupation of another, has the option of either going to the Civil Court and suing him for possession and damages in the manner laid down in O. II, rr. 2 and 4, Civ. Pro. Code, or to acquiesce in his occupation and sue him for rent at a fair and equitable rate under S. 127 of the Act(a). The Court which gives the owner a decree for possession against the trespasser is bound to go into the question of damages and give a decree to the plaintiff for such compensation for the wrongful use and occupation of the land to which he is found entitled and cannot refer the plaintiff to the Revenue Court for that purpose. **Indar Dat v. Balgovind**, 30 Ind. Cas. 361.

KANHAIYA LAL, A.J.C.

References:—(a) 26 Ind. Cas. 242=17 O.C. 343=1 O.L.J. 571, R.

(45) S. 127. See Nos. 18, 36, *supra*.

(46) S. 135. See PRACTICE AND PROCEDURE, No. 6, 34 Ind. Cas. 705.

(47) Ss. 138, 118—*Appeal by intervenor when tenant does not appeal, maintainability of—Joinder of third party as defendant, conditions of—Period to which inquiry about receipt of rent in good faith should relate.*

Held, that an intervenor who has not received rent in good faith cannot be joined as a defendant under S. 118, Oudh Rent Act.

Held further, that an intervenor under S. 138 cannot appeal against a decree passed against the tenant, if the tenant judgment-debtor does not appeal.

Held also, that the inquiry under S. 138 of the Oudh Rent Act relates to the period prior

8.—Oudh Acts—(Concluded).**Act XXII of 1886 (Rent)—(Concluded).**

to that for which the rent is claimed by the plaintiff. **Chandrawati Kunwar (Ranti) v. Bhagwanta Musammat**, 19 O.C. 82=35 Ind. Cas. 444.

STUART, A.J.C.

9.—Punjab Acts.**Act XXIII of 1865 (Punjab Chief Courts).**

S. 1. See LEGAL PRACTITIONERS, No. 1, 24 O.L.J. 382.

Act IV of 1872 (Punjab Laws).

(1) S. 9—*Transaction partly sale and partly exchange—Transaction inseparable—Right of pre-emption—Parties whether can effectuate their common intentions so as to preclude pre-emptors from interfering.* **Gul Muhammad v. Tota Ram**, 82 P.R. 1915=172 P.W.R. 1915=31 Ind. Cas. 221. See Final Part, 1915, Col. 239.

(2) Ss. 12 and 15—*Pre-emption—Compound interest on money awarded to vendee—Plaintiff claiming for benefit of another—Burden of proof—"Land"—Vendee—Owning small bit of cultivable land used as building site.* **Sham Sunder v. Sodhi Harbans Singh**, 109 P.L.R. 1903=78 P.W.R. 1908=109 P.W.R. 1915=13 P.L.R. 1916=30 Ind. Cas. 517. See Final Part, 1908, Col. 135.

(3) S. 15. See No. 2, *supra*.

Act XVI of 1887 (Punjab Tenancy).

(1) Ss. 4 (15), 5 (1) (d)—*Position of assignee enjoying a muafi granted for maintenance of a khangah.* **Sohna v. Khawajah**, 4 P.R. 1915 (Rev.)=31 Ind. Cas. 238. See Final Part, 1915, Col. 241.

(2) S. 5 (1) (a), (2)—*Tenant occupying land for more than two generations—Entry in the Revenue record as such—Effect of—Facts showing that tenant did not pay anything except land revenue, rates and cesses.* **Kanwan v. Nathu Singh**, 2 P.W.R. 1915 (Rev.)=30 Ind. Cas. 845. See Final Part, 1915, Col. 241.

(3) S. 5 (1) (c)—*Tenant—Settlement 'by the founder' and 'along with the founder,' meaning.*

Settlement along with the founder, for the purposes of S. 5 (1) (c) of the Tenancy Act, doubtless means settlement contemporaneously or in association with the original founder during the initial stages of the foundation and development of the village (a).

Settlement by the founder might take place after those stages had been reached. Where a cultivator is shown to have commenced to reside in and to cultivate *shamilat* land in a village during the lifetime of a founder thereof, such founder being at the time a *lambardar* or otherwise directly concerned with the management of the *shamilat*, the cultivator in question settled in the village 'by the founder thereof as a cultivator therein' within the meaning of S. 5 (1) (c) of the Tenancy Act.

9.—Punjab Acts—(Continued).

Act XVI of 1887 (Punjab Tenancy)—(Ctd.).

Held that as in the present case it was not satisfactorily proved that the father of the plaintiff was settled in the village by one of the founders, the plaintiffs have no claim to occupancy rights under S. 5 (1) (c). **Lakhi v. Amar Singh**, 9 P.R. 1916 (Rev.).

FAGAN, F.C.

Reference :—(a) 94 P.R. 1880, R.

(4) S. 5 (1) (d). See No. 1, *supra*.

(5) Ss. 5, 6, 8. See PRE-EMPTION, No. 19, 116 P.R. 1916.

(6) S. 6. See No. 5, *supra*.

(7) S. 8. See No. 5, *supra*.

(8) Ss. 58, 74, 77 (3) (b), 60—*Landlord and tenant—Lease—Term of—Sub-tenant is a tenant of landlord—Occupancy tenant—Extinguishment of tenancy—Compensation for improvements by a tenant—Landlord bound to pay—Suit for ejectment—Planting trees is an improvement—Executing Court bound to award, under S. 74, compensation even after ejectment—Revision.*

Held, that, under S. 58 (2) of the Punjab Tenancy Act, the sub-letting by an occupancy tenant creates a relationship of landlord and tenant between the landlord and the sub-tenant.

Held, also, that a suit for dispossessing a sub-tenant brought by the landlord must be regarded, notwithstanding an averment in the plaint to the contrary, as an ejectment suit in which the tenant's claim to compensation for improvements should be dealt with. Even if a tenant has been ejected in execution of the decree for ejectment, the Court executing the decree is bound to award compensation for improvements.

Held, further, that planting trees by a tenant is an improvement and the tenant or sub-tenant is entitled to compensation at the time of his ejectment. **Waswa Singh v. Mahana Singh**, 1 P.W.R. 1916 (Rev.)=34 Ind. Cas. 248.

FENTON, F.C.

(9) S. 60. See No. 8, *supra*.

(10) Ss. 70, (2), 74, 84 (5)—*Notice of ejectment—Landlord and tenant—Compensation for improvement—Court-fee for the amount claimed—Revision.* **Wasaya v. Isa**, 4 P.W.R. 1915 (Rev.)=30 Ind. Cas. 848. See Final Part, 1915, Col. 243.

(11) S. 74. See Nos. 8, 10, *supra*.

(12) S. 77 (3)—*Jurisdiction—Civil or Revenue Court—Suit for injunction restraining defendant from building on occupancy land*

Held, that a suit falling within the purview of S. 77 (3) of the Punjab Tenancy Act must be heard by a Revenue Court, whether or not, so far as the form of the suit or the particular remedy prayed for is concerned, it also comes within any of the provisions of the Specific Relief Act (a).

Therefore a suit for a perpetual injunction that the defendants, being plaintiff's occupancy

9.—Punjab Acts—(Continued).

Act XVI of 1887 (Punjab Tenancy)—(Ctd.).

tenants, be prohibited from building houses on land forming part of the occupancy tenancy is cognizable by a Revenue Court only. **Ibrahim v. Akbar**, 104 P.W.R. 1916=84 Ind. Cas. 409.

JOHNSTONE, C.J., CHEVIS and SHADI LAL, JJ.

References :—(a) 78 P.R. 1910=103 P.W.R. 1910=7 Ind. Cas. 717, *Diss.*; 89 P.R. 1895; 2 P.R. 1913 (Rev.)=3 P.W.R. 1913 (Rev.)=18 Ind. Cas. 796, R.

(13) S. 77 (3)—*Mortgage with possession—Suit for redemption—Plea of occupancy right by defendant—Civil Court not competent to entertain the plea.*

The plaintiff mortgaged the land in suit, with possession, to the defendants, who were then recorded as tenants-at-will of the said land. The plaintiff now sued for redemption. The defendants, without contesting his right to redeem, set up a plea that their real position was that of occupancy tenants and that consequently the plaintiff was not entitled to a decree for physical possession of the property.

Held that the plea of the defendants could not be entertained by a Civil Court (*Vide* S. 77 (3) of the Punjab Tenancy Act). **Jhanda v. Data Ram**, 59 P.R. 1916=93 P.L.R. 1916=35 Ind. Cas. 597.

CHEVIS and LESLIE-JONES, JJ.

Reference :—76 P.R. 1909 (F.B.), R.

(14) S. 77 (3), *proviso—Punjab Act III of 1912—Civil suit—Question relating to matter triable by Revenue Court, involved—Procedure—Proper course—Effect of proviso to S. 77 (3).*

Where, in a civil suit cognizable by a Civil Court, the question arose whether the defendants were occupancy tenants or not of the land on which the trees in dispute stood.

Held that the proviso to sub-S (3) of S. 77 of the Punjab Tenancy Act applied and that the Court should have proceeded in accordance with the directions contained in the first paragraph of the said proviso (a).

The enactment of the proviso to sub-S. (3) to S. 77 has rendered obsolete the law laid down by the rulings in 24 P.R. 1907 and 76 P.R. 1909. **Mihan Singh v. Mussammatt Bhagwan Kaur**, 111 P.R. 1916.

SHAH DIN, J.

References :—(a) 24 P.R. 1907; 76 P.R. 1909, *Ref. to*.

(15) S. 77 (3) (h)—*Suit by landlord to dispossess alienee of occupancy rights—Limitation.* See LIMITATION ACT (1908), No. 217, 1 P.R. 1916 (Rev.).

(16) S. 77 (3). See No. 8, *supra*.

(17) Ss. 77 (3) (1), 99—*Declaratory suit by person aggrieved by entry in record of rights—Jurisdiction.* See JURISDICTION OF CIVIL OR REVENUE COURTS, No. 2, 2 P.W.R. 1916 (N.W.F.P.).

(18) S. 84—*Exchange of holding—Relation of landlord and tenant—Suit to contest*

9.—*Punjab Acts—(Continued).*

Act XVI of 1887 (Punjab Tenancy)—(Cld.).

notice of ejectment—Grounds of appeal urged but not disposed of by the appellate Court—Judgment disposing of the appeal very short, not giving the facts is defective and good ground for revision—No finding on the pleas of the defendant—Judgment based on farfetched theories.

Held, that a judgment of the appellate Court which does not deal with the points raised in the memorandum of appeal must be regarded as defective and irregular.

Held, also that a judgment which does not dispose of the pleas raised by the defendant but is based on conjectures and farfetched theories is a defective judgment. **Hanwants v. Ram Sukh**, 4 P.W.R. 1916 (Rev.).

FENTON, F.C.

(19) S. 84. See No. 10, *supra*.

(20) S. 99. See No. 17, *supra*.

(21) S. 100. See JURISDICTION OF CIVIL OR REVENUE COURTS, No. 1, 64 P.W.R. 1916.

(22) Ss. 102, 103. See RECORD OF RIGHTS, No. 1, 34 Ind. Cas. 857.

(23) S. 103. See No. 22, *supra*.

Act XVII of 1887 (Punjab Land Revenue).

(1) S. 37 (b). See PUN. ACT XIII OF 1900 (PUNJAB ALIENATION OF LAND), No. 10, 79 P.L.R. 1916.

(2) S. 45—*Declaratory suit by person aggrieved by an entry in record of rights—Jurisdiction. See JURISDICTION OF CIVIL OR REVENUE COURTS*, No. 2, 2 P.W.R. 1916 (N.W.F.P.).

(3) Ss. 115, 116—*Shamilat—Wajib-ul-azr prohibiting partition—Partition whether can be sanctioned—Powers of Revenue officers. Lakhi v. Malik Dost Mahommed Khan*, 1 P.R. 1915 (Rev.)=29 Ind. Cas. 498=32 P.L.R. 1916. See Final Part, 1915, Col. 245.

(4) S. 116. See No. 3, *supra*.

(5) S. 168. See AWARD, No. 9, 107 P.W.R. 1916.

Act III of 1893 (Government Tenants, Punjab).

(1) *Grant of land—Death of grantee before acquisition of occupancy rights—Widow acquiring full proprietary rights after his death—Interest taken by her—Gift to her daughter, validity—Husband's collaterals—No right to question gift.*

In 1896 Government granted to one U abadkar rights in certain lands, apparently under Act III of 1893. Before U had acquired any occupancy rights in the land, he died in 1898 leaving him surviving a widow B and a daughter N. Mutation was effected in 1899 in favour of the widow B and in 1903 she was granted occupancy rights in the holding. In 1912 she paid the necessary money and acquired full proprietary rights in the land and made it over to her daughter N.

Held, that the widow acquired the property in her own right and not as representing her deceased husband and that her husband's

9.—*Punjab Acts—(Continued).*

Act III of 1893 (Government Tenants, Punjab)—(Concluded).

collaterals cannot challenge the gift made by her to her daughter (a). **Sewa Singh v. Mussammat Bholl**, 129 P.R. 1916=36 Ind. Cas. 382.

SCOTT-SMITH and BROADWAY, JJ.

Reference:—(a) 8 P.R. 1915, R.

(2) *Lapsed occupancy tenancy under—Regrant by Revenue authorities—Jurisdiction of Civil Courts to interfere with arrangements made by the Revenue authorities. Kesar Singh v. Mussammat Dayal*, 38 P.R. 1915=102 P.W.R. 1915=29 Ind. Cas. 570=3 P.L.R. 1916. See Final Part, 1915, Col. 246.

(3) S. 8—*Government tenant—Agreement to admit others to share in tenancy—Invalidity—Void—Contract Act*, S. 23. **Yir Singh and Samand Singh v. Kala Singh**, 3 P.R. 1915 (Rev.)=31 Ind. Cas. 400. See Final Part, 1915, Col. 246.

(4) S. 87—*Punjab Colonization Act, V of 1912, Ss. 14, 15, 19—Passing of proprietary rights to tenants on the payment of the first instalment—Small balance no hindrance to possession—Sale—Sanction of—Mutation—Sanction of Financial Commissioner—Vendor tenant of Government.*

Held, that where a tenant under the Government Tenants Act, 1893, paid the purchase-money by instalments for the acquisition of proprietary rights, under the terms of cl. 17 of the statement of conditions applicable, proprietary rights pass to the tenant on the payment of the first instalment.

Held, further, that S. 14 of the Colonization Act, 1912, prevents S. 15 of that Act to operate with retrospective effect and the latter section does not deprive the instalment purchaser of a right of property already acquired because there was a small balance of interest still due from the ex-tenant to Government. **Guru Dutt v. Doctor Kartar Singh**, 2 P.W.R. 1916 (Rev.)=32 P.L.R. 1917 (Rev.)=36 Ind. Cas. 125.

FENTON, F.C.

Act I of 1900 (Punjab Limitation Ancestral Land Alienation).

(1) *Applicability of—Sale in 1893 by father—Suit by son to contest it in 1911—Limitation. See CUSTOMS (PUNJAB—ALIENATION)*, No. 2, 15 P.W.R. 1916.

(2) *Applicability of, to alienations by female proprietors. See LIMITATION ACT (1908)*, No. 213, 15 P.R. 1916.

(3) *Art. 1—Applicability to declaratory suit instituted after the alimor's death—Custom—Gujars of Gujar Khan Tahsil, District Rawalpindi—Will in favour of mother and maternal uncle in presence of near collaterals—Validity—Custom how to be proved.*

This case was brought by the near collaterals of A, a Gujar of Gujar Khan Tahsil in the Rawalpindi district, for a declaration that the will by which the said A, on the 24th December, 1899, bequeathed the whole of his property to

9.—Punjab Acts—(Continued).

Act I of 1900 (Punjab Limitation Ancestral Land Alienation)—(Concluded).

to his mother K and to his maternal uncle G was invalid and would not affect the plaintiff's rights on the death or re-marriage of K. A died shortly after making this will and mutation was granted in accordance with the provisions of the will in spite of the objections of the collaterals on the 26th February 1901. *Held* that Art. 1 of the Punjab Limitation Act (I of 1900) applied to this declaratory suit, notwithstanding that it was brought *after* the alienor's death, and it was not barred by limitation (a).

Held also that, among Gujars of Gujar Khan Tahsil, a childless proprietor cannot alienate his properties to his mother and maternal uncle in the presence of near collaterals.

Custom is a fact which must be proved by authoritative pronouncement or by instances in which it has been followed; it cannot be established by dialectics. *Gulab Khan v. Musammat Chiragh Bibi*, 43 P.R. 1916=191 P.W.R. 1916=31 Ind. Cas. 909

CHEVIS and LE ROSSIGNOL, JJ.

Reference:—(a) 64 P.R. 1909, *Appr.*

Act XIII of 1900 (Punjab Alienation of Land).

- (1) *Mortgage of land in favour of agriculturist who undertakes to pay debt due from an agriculturist to a non-agriculturist—Consideration—Transfer of Property Act, S. 58.*

Held, that it is not the object of the Alienation of Land Act to prevent a non-agriculturist from recovering money due to him from an agriculturist by any legal means in his power and that if such a person can induce an agriculturist to pay off a debt due to him and to take a mortgage of land from his debtor as security for himself, there is nothing in this Act to prohibit such a course. It is immaterial whether the mortgagee pays in cash or gives his bond (a).

Held, also, that the said mortgagee has nothing to do with the correctness of the account or real amount due beyond what the debtor himself admits and asks the mortgagee to pay for him (b). *Halidar v. Fattah Khan*, 114 P.W.R. 1916=119 P.L.R. 1916.

BROADWAY, J.

References:—(a) 142 P.R. 1907=86 P.W.R. 1907, *F.* (b) 53 P.R. 1916 (Cr.)=5 P.W.R. 1916 (Cr.), *R.*

- (2) *Ss. 2 (3), 16—Money decree against mortgagees—Transfer of mortgage rights after decree—Subsequent attachment of mortgage rights in execution—Fraud on decree-holder—Suit by transferee to declare that mortgage rights could not be attached and sold—Maintainability.*

M mortgaged certain land to A (2nd defendant). On 19-2-1914, G (1st defendant) obtained a money decree against A. On 5-3-1914, A mortgaged his mortgagee rights to plaintiff who was A's brother. On 27-4-1914, G got A's mortgagee rights attached in execution of his

9.—Punjab Acts—(Continued).

Act XIII of 1900 (Punjab Alienation of Land)—(Continued).

decree. Plaintiff brought this suit for declaration that G (1st defendant) had not by law the right to attach the aforesaid property.

Held that A's mortgagee rights were 'land' within the meaning of Ss. 2 (3) and 16, Punjab Alienation of Land Act, and could not be sold in execution of the decree (a).

Held also that the mortgage by A was made six weeks before the attachment, and according to law A (judgment-debtor) was not bound to keep his property in a shape convenient for his creditors to proceed against, and the mortgage to plaintiff, though it may have been sharp practice, was not fraudulent in law.

Held further that, as G (1st defendant) so acted towards A (2nd defendant) as to injure plaintiff's interests, plaintiff was certainly entitled to object to the action taken against the 2nd defendant. *Karam Ilaht v. Gulab Rai*, 39 P.R. 1916=102 P.W.R. 1916=33 Ind. Cas. 960.

JOHNSTONE, C.J.

Reference:—(a) 12 P.R. 1911, *F.*

- (3) *Ss. 3 (2), 4, 14, 17 (3)—Purchase of land—Person not member of agricultural tribe qua a district—Buying land—Necessity to obtain Deputy Commissioner's sanction for the purchase—Contract to sell—Stipulation to complete execution and registration of sale-deed before a particular date—Damages—Non-liability accrued upon in the event of legal obstacle—Effect.*

T, a Jat of the Lyallpur District, promised to sell land in dispute situate in tahsil Jaranwala, district Lyallpur, to P, a Jat of the Hoshiarpur district. On 5-1-1914, T executed an agreement containing *inter alia* the stipulations that the sale-deed would be executed and registered by 21-2-1914, that the party committing a breach of the contract would pay Rs. 1,000 as damages to the other and that if there was any legal obstacle to the execution and registration of the sale-deed, neither party would be entitled to pay damages. T refused to execute and register the sale-deed by the prescribed date. P instituted on 24-2-1914 the present suit for the specific performance of the contract and for the possession of the land. No sanction for the sale was obtained by P from the Deputy Commissioner before the 21st February 1916 though he applied for, and obtained such sanction during the pendency of the suit.

Held that, as plaintiff was neither a holder of land nor a resident in Lyallpur district, he was not a member of an agricultural tribe qua the Lyallpur district and was not entitled to purchase land situate therein without the sanction of the Deputy Commissioner.

Held also, that because S. 17, sub S. 2, Punjab Alienation of Land Act, 1900, provides that an instrument requiring the sanction of the Deputy Commissioner shall not be admitted to registration unless a certified copy of the order granting such action is presented to the registering officer and because no such sanction

9.—*Punjab Acts—(Continued).***Act XIII of 1900 (Punjab Alienation of Land)**
—(Continued).

was obtained nor even applied for on 21-2-1914, there was a legal obstacle which prevented the registration of the document on or before that date, the defendant was at liberty to put an end to the contract and was not therefore liable to pay damages. *Pal Singh v. Thakar Singh*, 120 P.R. 1916.

SHADI LAL and LE ROSSIGNOL, JJ.

(4) Ss. 3 (2), 5, 21 (2). See PUN. ACT I OF 1913 (PRE-EMPTION), No. 2, 124 P.R. 1916.

(5) S. 4. See No. 3, *supra*.

(6) S. 5. See No. 4, *supra*.

(7) Ss. 6 and 9—*Consideration—Bond executed in favour of mortgagee-non-agriculturist by an agriculturist in lieu of a mortgage bond which the latter took from another agriculturist who owed money to the non-agriculturist.* *Muzuffar Khan v. Walsakhi Ram*, 105 P.W.R. 1915=4 P.L.R. 1916=30 Ind.Cas. 509. See Final Part, 1916, Col. 247.

(8) S. 9. See No. 7, *supra*.

(9) S. 9 (3)—*Mortgage—Reference by Civil Court under S. 9 (3) to the Deputy Commissioner—Proposal by latter officer—Refusal to accept—Further proceedings—No jurisdiction to Civil Courts.*

Where, after a reference by the Civil Court under S. 9 (3), Punjab Land Alienation Act, to the Deputy Commissioner for such action as he might think fit, the Deputy Commissioner took action under S. 9 and made certain offers to the mortgagees which they did not accept.

Held, that the Civil Courts became *functi officio*, and had no further jurisdiction in the case. *Mussammat Bakhtawari v. Shihban Lal*, 55 P.R. 1916=155 P.W.R. 1916=157 P.L.R. 1916=35 Ind. Cas. 532.

JOHNSTONE, C.J., and RATTIGAN, J.

(10) Ss. 9 (3), 19 and 23—*Mortgage by way of conditional sale—Surrender of condition as to conditional sale—Mutation of names—Punjab Land Revenue Act (XVII of 1887), S. 37 (b).*

The parties to a mortgage by way of conditional sale, entered into before the Punjab Alienation of Land Act came into force, agreed that possession should remain with the mortgagees (who were not agriculturists), and the mortgagors should occupy the land as tenants. They applied for mutation of names.

Held, that, since the case was such that the position of the parties was not in accordance with the policy of the Punjab Alienation of Land Act, mutation of names should not be sanctioned. In such a case effect may be given to the transfer when the mortgagees agree that the conditions intended to operate by way of conditional sale be struck out of the deed.

Held, also that the period of a mortgage by way of a conditional sale made before the Act came into force and still subsisting is not to be altered if the mortgagees agree that the sale

9.—*Punjab Acts—(Continued).***Act XIII of 1900 (Punjab Alienation of Land)**
—(Continued).

condition shall be exercised. *Harjas v. Harditta*, 79 P.L.R. 1916=35 Ind. Cas. 709.

TUPPER, F.C.

(11) S. 14. See No. 3, *supra*.

(12) S. 16. See No. 2, *supra*.

(13) S. 17. See No. 3, *supra*.

(14) S. 19. See No. 10, *supra*.

(15) S. 21. See No. 4, *supra*.

(16) S. 21-A (2) (as amended by Act I of 1907) —*Declaratory decrees contrary to the provisions of the Act—Validity—Reference by Deputy Commissioner to have the decree altered so as to make it consistent with the Act—Powers of Chief Court—When to be exercised.*

On the death of one J, a Rajput of the Hoshiarpur district, his property was mutated by mutual agreement, half in the name of his widow W, and half in the name of F, M and A, who claimed to be the legitimate sons of the deceased by another lady B, a Natni by caste, who was not a member of an agricultural tribe.

Objection was taken to the said mutation by certain reversioners of J and they preferred an appeal to the settlement collector who held that F, M and A were not the legitimate sons of J and directed mutation in the name of W alone.

Thereupon F, M and A instituted a suit against W in the District Court at Hoshiarpur for declaration that they were the sons and heirs of J and entitled to hold half his estate. An application by the reversioners to be made parties to the suit was rejected, and on confession of judgment by W, the plaintiffs obtained a decree. An application for revision of that decree was filed by the Deputy Commissioner under S. 21-A (2) of the Alienation of Land Act (1900), as amended by Punjab Act I of 1907, on the ground that the decrees of the District Judge was contrary to the provisions of that Act, and he prayed that the decree be altered so as to make it consistent with the Act, *viz.*, that the declaration be limited to granting the said three sons a half-share in the said estate during the lifetime of W. *Held* that a decree, even though it be only declaratory, which has the effect of conferring a legal title where no such title would otherwise exist, may very well be contrary to the provisions of the Act, but it was open to question whether, if the decree was contrary to the Act, the relief for which the Deputy Commissioner prayed would be any more consistent with it.

Held also that the decree, being *in personam* against W, would not enable the decree-holders to hold after her death, if the reversioners choose to sue and obtain a favourable finding on the question of legitimacy.

Held, further that the intention of the Legislature in framing S. 21-A was merely to enable the correction of decrees which on the face of the record infringe the provisions of the

9.—Punjab Acts—(Continued).

Act XIII of 1900 (Punjab Alienation of Land) —(Concluded).

Act, e.g., if a Court has granted a decree for the possession of land against a Jat Sikh to a person who is described in the plaint as a Banya of Lahore city.

Held also that the Chief Court has power to order a remand where such an order is necessary. *Feroz Din v. Mussamat Baari*, 52 P.R. 1916=72 P.W.R. 1916=35 P.L.R. 1917=32 Ind. Cas. 446 (F.B.).

RATTIGAN, SHADI LAL and LESLIE JONES, JJ.

(17) S. 23. See No. 10, *supra*.

Act II of 1908 (Punjab Court of Wards).

(1) Ss. 11, 12. See MAHOMEDAN LAW (WAKF), No. 2, 14 A.L.J. 554.

(2) S. 12. See No. 1, *supra*.

Act I of 1904 (Punjab Loans Limitation).

(1) Sch. I, Ss. 3 and 7. See LIMITATION ACT (1908), No. 131, 148 P.W.R. 1916.

(2) S. 7. See No. 1, *supra*.

Act II of 1905 (Punjab Pre-emption).

(1) Ss. 10, 19—*Money deposited in Court by pre-emptor—Attachment and withdrawal by creditor of pre-emptor—Legality—Right of vendee to have loss made good by pre-emptor.* *Pauna Lal v. Natha Singh*, 27 P.R. 1915=29 Ind. Cas. 354=27 P.L.R. 1916. See Final Part, 1915, Col. 249.

(2) S. 11, proviso—'Recorded'—Meaning of the term.

The word 'recorded' in the proviso to S. 11 of the Pre-emption Act means entered in the record of rights, and nothing is clearer than that a person cannot be properly said to be entered in the record of rights as the owner of land if only his name has been entered in the register of mutations by the patwari and a report has been put up in his favour in the appropriate column of the register. *Jagat Ram v. Mehr Din*, 9 P.R. 1916=32 Ind. Cas. 528.

RATTIGAN and SHAH DIN, JJ.

Reference:—17 P.R. 1915, D.

(3) S. 11, proviso—*Question whether persons belong to the same tribe, how to be decided, where real facts impossible to ascertain—Darsi Mir and Darsi Mughal, whether members of the same tribe—Rawalpindi District.*

Where the question is whether persons belong to the same tribe, and the real facts are impossible to ascertain, names used are the only data left and should be dealt with in a liberal spirit.

Held that, in the absence of evidence to the contrary, *Darsi Mir* and *Darsi Mughal* were sub-divisions of a tribe of *Darsis*, for the purposes of the proviso to S. 11 of the Punjab Pre-emption Act. *Girdari Lal v. Attar*, 37 P.R. 1916=101 P.W.R. 1916=33 Ind. Cas. 967.

JOHNSTONE, C.J.

References:—(a) 112 P.R. 1908; 62 P.R. 1909, R.

9.—Punjab Acts—(Continued).

Act II of 1905 (Punjab Pre-emption)—(Ctd.).

(4) S. 11, proviso—*Pre-emption suit—Plaintiffs proprietors at time of sale and at date of suit—Suit whether maintainable.* See WILL, No. 7, 35 P.W.R. 1916.

(5) S. 12—*Landowner—Ownership of plot of land under building.*

It is not the intention of law to allow a party, simply because he owns a minute plot of land under building to pose for pre-emption purposes as a landowner in the village within the meaning of S. 12 of the Act. *Sham Sundar v. Harbans Singh*, 30 Ind. Cas. 517.

JOHNSTONE and SHAH DIN, JJ.

References:—158 P.R. 1888; 96 P.R. 1898, F.; 77 P.R. 1896, N.F.

(6) S. 12 — *Pre-emption — Pre-emptor co-sharer in shamilat land.* *Jawala Singh v. Ladha*, 173 P.L.R. 1915=114 P.W.R. 1915=31 Ind. Cas. 272. See Final Part, 1915, Col. 250.

(7) S. 12 (c) 'secondly'—*Nature of right of pre-emption—Extension of time for payment by pre-emptor when may be granted—Pattis in chak No. 224, Lyallpur District—Foundation of the chak—Right of pre-emption.* *Waryam Singh v. Mahtab Singh*, 21 P.R. 1915=26 Ind. Cas. 433=31 P.L.R. 1916. See Final Part, 1915, Col. 251.

(8) S. 16—*Right of vendee to compensation for litigation in connection with pre-empted property—Consideration of equitable circumstances.*

S. 16 of the Act does not expressly allow a Court to award to vendees more than the market value or what they paid in good faith for the bargain; or to mortgagees, who have foreclosed more than the doubled sum due on the footing of the mortgage or the market value. The section is not exhaustive and was not, intended to exclude equities. A party who asks for equity must show that he has consistently done equity and has acted throughout fairly and honestly. Except under special circumstances, a vendee will not be entitled to get compensation for litigation in connection with pre-empted property. *Sham Sundar v. Harbans Singh*, 30 Ind. Cas. 517.

JOHNSTONE and SHAH DIN, JJ.

(9) S. 16—*Proceedings under S. 8, Act XIII of 1900 (Punjab Alienation of Land)—Notice by Naib Tahsildar—Validity—Waiver of right of pre-emption.* *Karam Chand v. Ghulam Hassan*, 74 P.R. 1915=159 P.W.R. 1915=31 Ind. Cas. 199. See Final Part, 1915, Col. 252.

(10) S. 19. See No. 1, *supra*.

(11) S. 20—*Issues specified by the section—Duty of Court to decide them suo motu.*

S. 20 of the Pre-emption Act has imposed upon the Court the duty of investigating and deciding the issues specified by that section. The Court has to perform this duty *suo motu* and cannot in the discharge of its functions be guided by the admissions of the parties. The omission of the parties to adduce evidence necessary for the decision of these issues does

9.—Punjab Acts—(Continued).

Act II of 1905 (Punjab Pre-emption)—(Ctd.).

not relieve the Court from the obligation created by law. *Waisanda Mal v. Ganesha Mal*, 14 P.R. 1916=33 Ind. Cas. 813.

CHEVIS and SHADI LAL, JJ.

Act III of 1911 (Punjab Municipality).

- (1) S. 3 (13) (b)—*Limited access of public to a private place—Presumption of dedication of road to public.*

A limited access by the public to a private place does not operate to convert it into a public street (a).

In the case of a private *serai* (in which there are no shops) occupied by tenants of the proprietors there can be no presumption of dedication of a high-way to the public. *Municipal Committee, Karnal v. Nawazada Muhammad Umar Daraz Ali Khan*, 109 P.R. 1916=136 P.L.R. 1916=145 P.W.R. 1916=35 Ind. Cas. 355.

JOHNSTONE, C.J. and SCOTT-SMITH, J.

Reference:—(a) 6 B. 686; 20 B. 146, F.

- (2) S. 3 (13) (b)—*Vacant space—User by public—Presumption of dedication—“Street,” “Public street” defined.*

In this case the predecessors of the plaintiffs, built a market of shops. There was an open space lying between the shops which opened into thoroughfares at various points. The shops were leased out to grain dealers. The vacant space or part of it had been ever since used by all members of the public who came in to buy and sell grain and by carts bringing in grain without interruption of any kind. It was accessible to the public, and any member of the public who wished to buy or sell grain or to make any enquiries of the shopkeepers or to go there for any purpose whatsoever could go in. There was no evidence that anybody had ever been prevented or that any one wishing to enter was asked what his business was.

Held, that (1) under the circumstances stated above there arose a presumption that the plaintiffs' predecessors intended the members of the public to make use of the space left vacant or a part of it as a high-way (2) that the *onus* was on the plaintiffs to show that the user was only permissive or that the dedication was limited to a particular class of persons (a).

Terms “street” and “public street” defined. *Municipal Committee, Karnal v. Muhammad Runam Ali Khan*, 109 P.R. 1916=146 P.W.R. 1916=35 Ind. Cas. 458.

JOHNSTONE, C.J. and SCOTT-SMITH, J.

References:—(a) 62 P.R. 1898, and reference therein made to the dictum of Chamber, J., 5 Taunt 12; 6 C.L.R. 282; 30 B. 558 (567, 568); 39 M. 537; 8 Ind. Cas. 175; 33 O. 1290 (1296), R.; 6 B. 686; 20 B. 146; 25 W.R. 233, D.

- (3) S. 175—*Remedy of persons dissatisfied with any act of Municipal Committee—Power of Committee to direct removal of verandah projecting on public street on payment of compensation.*

9.—Punjab Acts—(Continued).

Act III of 1911 (Punjab Municipality)—(Ctd.).

Persons dissatisfied with any act of a Municipal Committee have a right of appeal, but not to a Civil Court, which will interfere only when the act complained of is in excess of the powers of the Committee.

S. 175 of the Punjab Municipal Act empowers the Committee to remove any encroachment or projection on payment of compensation.

When it is found that though the material of the *chaubutra* on which a verandah has been erected is the property of the plaintiff, the site is not his property but part of a street and the property of the Municipal Committee, and, that consequently the verandah overhangs the street, its demolition falls within the purview of S. 175 of the Act. The Municipal Committee would be justified in requiring its demolition on payment of reasonable compensation. *Municipal Committee, Ambala v. Madan Lal*, 104 P.R. 1916=36 Ind. Cas. 599. SHADI LAL and LE ROSSIGNOL, JJ.

Reference:—52 P.R. 1900, D.

- (4) Ss. 189 (3), 193, 195—*Municipal Committee—Application to erect building—Conditional sanction—Condition requiring open space to be left—Question whether the Committee acted bona fide or otherwise—Question of fact—No second appeal—Nature of condition—Reasonableness.*

In a written sanction issued under S. 193, Punjab Municipal Act, by the Municipal Committee to the plaintiff, who wanted to build a two storied house, a condition was attached to the effect that he must leave vacant seven feet of his land towards the west. On the western side there was already an open space about 5 feet 4 inches in width. According to the condition, it was understood that the plaintiff should not build his wall within 2 feet of this open space. The plaintiff built his house in disregard of this condition and the Committee issued a notice under S. 195, requiring the plaintiff to demolish the upper storey of the building. Plaintiff instituted the present suit and prayed for an injunction restraining the Municipal Committee from interfering with the upper storey of the house which has been built. Both the lower Courts dismissed the suit holding that the condition was not *ultra vires* and that the action of the Committee was not *mala fide*.

Held, that the question whether the Committee acted in good faith or *mala fide* in imposing the condition on which alone it granted a sanction to build a two storied house is one of fact and the decision thereon could not be questioned in second appeal.

Prima facie there is nothing illegal, wanton, capricious, or oppressive in a condition, such as this, which is aimed at restraining the building of erections consisting of more than one storey on a narrow open space. On the contrary it would seem to be eminently reasonable and conducive to sanitation, free circulation of air and ventilation, within the meaning and for the purposes of S. 189 (3) (i) and (iii) of the

9.—Punjab Acts—(Continued).**Act III of 1911 (Punjab Municipality)—(Old.).**

Punjab Municipal Act read with S. 198 thereof.
Abdul Samad v. Municipal Committee of Delhi, 75 P.R. 1916=140 P.L.R. 1916=164 P.W.R. 1916=35 Ind. Cas. 377.

RATTIGAN and SHAH DIN, JJ.

(5) S. 198. See No. 4, *supra*.

(6) S. 195. See No. 4, *supra*.

Act I of 1912 (Punjab Courts Amendment).

S. 70—Leave to sue as pauper—Duty of Court—Revision—Civil cases—Right to produce evidence—Effect of not considering evidence on record.

Held, that, in petitions for leave to sue *in forma pauperis*, full inquiry ought to be made as to the circumstances of the petitioner.

Held, also, that, where statements of witnesses on the record have not been noticed by Court, it is a good ground for revision.

Held, further, that, if a party has not been allowed to produce his evidence, the case must be remanded for the purpose of recording evidence. **Musammatt Tara Devi v. Wasti Ram**, 25 P.L.R. 1916.

SHAH DIN, J.

Act Y of 1912 (Punjab Colonization).

(1) Ss. 14, 15, 19—Passing of proprietary rights to tenants on the payment of the first instalment—Small balance no hindrance to possession—Sale—Sanction of—Mutation—Sanction of Financial Commissioner—Vendor tenant of Government. See **PUNJAB ACT III OF 1893 (GOVERNMENT TENANTS)**, No. 4, 2 P.W.R. 1916 (Rev.).

(2) S. 15. See No. 1, *supra*.

(3) S. 18—Decree against tenant—Crops grown by heir of deceased tenant whether property of deceased and liable to attachment and sale. See **CIV. PRO. CODE (1908)**, No. 123, 84 P.W.R. 1916.

(4) S. 19. See No. 1, *supra*.

Act I of 1913 (Punjab Pre-emption).

(1) Ss. 2 (3), 22 (5) (a)—S. 22 (5) (a) *whether retrospective—Deposit by plaintiff in pre-emption-suit—Withdrawal before the new Act came into force—Effect—Dismissal of appeal by pre-emptor—S. 11, proviso, Act II of 1905 (Punjab Pre-emption)—Applicability—20 years continuous record of ownership, calculation of*. **Prithumi Chand v. Safa Chand**, 75 P.R. 1915=157 P.W.R. 1915=31 Ind. Cas. 202. See Final Part, 1915, Col. 255.

(2) Ss. 9 and 21—Sale by an agriculturist to non-agriculturist—Sanction of Deputy Commissioner—Sanction not properly given—Civil Court not entitled to go into the question—Sale in contravention of Land Alienation Act—Invalid sanction—Suit for pre-emption, dismissal of—**Punjab Act XIII of 1900 (Alienation of Land)**, Ss. 3 (2), 5, 21 (2)—Effect of S. 9 of Pre-emption Act upon S. 5, Alienation of Land Act.

9.—Punjab Acts—(Continued).**Act I of 1913 (Punjab Pre-emption)—(Old.).**

S. 9 of the Pre-emption Act repeals by implication so much of S. 5 of the Land Alienation Act as conflicts with itself.

Where it is alleged that the Deputy Commissioner did not make proper inquiry as required by S. 8 (3) of the Land Alienation Act.

Held that a Civil Court cannot go into that question; for S. 21 (2) of the same Act debars all Civil Courts from taking cognizance of the manner in which the Deputy Commissioner exercised his powers under the Act.

If there is no valid sanction the sale in question is opposed to the provisions of the Land Alienation Act, and in this case S. 24 of the Pre-emption Act requires that the suit for pre-emption shall be dismissed. **Ganga Ram v. Raje Ram**, 124 P.R. 1916.

JOHNSTONE, C.J., and CHEVIS, J.

(3) S. 22, Cls. (1) and (4)—Security put in after date fixed by Court—Acceptance of security by Court—Extension of time by implication—Rejection of plaint.

The mere fact that a Court receives, attests and places on the record a security-bond filed after the date fixed by the Court for putting it in, does not by implication extend the time within which the security was to be furnished, and in such a case the plaint should be rejected under S. 22 (4) of the Punjab Pre-emption Act. **Mahammad Hayat v. Raghbar Dial**, 67 P.W.R. 1916=33 Ind. Cas. 487.

SHAH DIN and CHEVIS, JJ.

(4) S. 22. See No. 1, *supra*.

(5) S. 24. See No. 2, *supra*.

Act III of 1914 (Punjab Courts).

(1) See **APPEAL—SECOND APPEAL**, No. 6, 115 P.W.R. 1916.

(2) District Judge appointed under, having no jurisdiction to hear appeal—Power of Chief Court to transfer appeal to its own file. See **CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION)**, No. 6, 26 P.W.R. 1916.

(3) Law of appeal—Effect of change brought by the. See **LIMITATION ACT (1908)**, No. 26, 18 P.W.R. 1916.

(4) S. 4 (3)—Question as to validity or existence of custom—No certificate—Second appeal.

This was a suit for declaration that a gift of ancestral land should not affect the right of the plaintiffs who were collaterals of K, the last male holder. The gift was effected by G, the widow of K, in favour of the donee who was alleged to have been adopted by K. On K's death, however, mutation was made in favour of his widow and not in favour of the appointed heir.

The defence was simply that the donee was the appointed heir, and that, in the circumstances, the widow was entitled to rectify the erroneous mutation made at her husband's death, by making the gift.

9.—*Punjab Acts—(Continued).*

Act III of 1914 (Punjab Courts)—(Continued).

Both the Courts below found that the donee was not appointed his heir by K, but the Divisional Judge found that the gift was justified by the fact that the donee had rendered services to the widow, and dismissed the suit. In second appeal plaintiffs contended that the Divisional Judge decided the case on a point entirely outside the pleadings.

Held that the question raised in the second appeal was not the validity or existence of a custom, but whether the validity or existence of a custom was a question properly before the lower appellate Court, and that, therefore, the second appeal was maintainable without a certificate. *Nur Ali v. Bahawal*, 34 P.R. 1916 = 54 P.W.R. 1916 = 31 Ind. Cas. 386.

CHEVIS and LE ROSSIGNOL, JJ.

Reference :—19 P.R. 1915, F.

(5) S. 10—Civ. Pro. Code (Act V of 1908), S. 98, Rules and Orders of the Chief Court, Vol V, R. 10—Difference between those two sections—Judges of Division Bench differing on a question of Law—Course to be adopted—Reference to Full Bench illegal—Reference to one or more of the Judges other than composing the Bench—Change between S. 576 of the old Civ. Pro. Code and S. 98 of the new Civ. Pro. Code.

Held, that :—

(1) The provisions of S. 98 of the Civ. Pro. Code, 1908, and not those of S. 10 of the Punjab Courts Act III of 1914, are to be followed when an appeal is heard by a Bench of two Judges and they differ in opinion on a point of Law only, because, S. 10 of the said Act comes into operation only when any given contingency is not provided for by any other enactment in force.

(2) S. 10 (2) (a) of the said Punjab Courts Act deals with cases in which the Bench in which there is no majority is a Full Bench or Bench exercising Original Civil Jurisdiction. S. 10 (2) (b) of the same Act provides for a case in which the Appellate Judges are agreed that the decree of the Court below cannot stand, but are in disagreement as to the decree which should be substituted and this disagreement need not be based on a point of Law.

(3) Where the Judges differ in their opinion the main difference between these two sections is that :—

(a) Under S. 98, Civ. Pro. Code—reference is optional and the decree may be confirmed.

(b) Under S. 10—reference is compulsory.

(c) Under S. 98—reference is to be made to one or more of the Judges excluding the referring Judges.

(d) Under S. 10—reference can be made to the Judges including the referring Judges.

(e) Under S. 98—only the point of Law can be referred.

(f) Under S. 10—the whole case may be referred.

Per Rattigan, J., (18th April 1916).—(Hearing the case under S. 98 (2) proviso, Civ. Pro. Code). The Judge or Judges to whom reference is

9.—*Punjab Acts—(Continued).*

Act III of 1914 (Punjab Courts)—(Continued).

made under S. 98, Civ. Pro. Code, can have no jurisdiction to consider and determine anything but question of Law referred to, as the present Code has made a radical alteration. S. 595 of the old Code (Act XIV of 1882) provided that in event of a difference of opinion, the appeal should be referred to one or more of the other Judges whereas the proviso to S. 98 (2) of the new Code restricts the reference to the point of Law only. *Gokal Chand v. Hukam Chand*, 109 P.W.R. 1916 = 154 P.L.R. 1916 = 84 Ind. Cas. 714.

RATTIGAN, SHAH DIN and LE ROSSIGNOL, JJ.

(6) S. 41—Question whether a building should or should not be held to be a shop within the meaning of S. 13, Punjab Pre-emption Act—Question of law—Second appeal—Property used for more than one purpose—Ratio decidendi. *Bhamba Ram v. Allah Bakhsh*, 69 P.R. 1915 = 156 P.W.R. 1915 = 31 Ind. Cas. 191. See Final Part, 1915, Col. 256.

(7) S. 41. See APPEAL (SECOND APPEAL), No. 1, 28 P.W.R. 1916.

(8) S. 41. See GUARDIANS AND WARDS ACT, No. 16, 24 P.W.R. 1916.

(9) S. 41—Finding that money was borrowed for family purposes—Interference in second appeal. See HINDU LAW (DEBTS), No. 2, 39 P.W.R. 1916.

(10) S. 41—Appeal filed out of time—Finding as to sufficient cause—Finding of fact—Second appeal. See LIMITATION ACT (1908), No. 8, 43 P.W.R. 1916.

(11) S. 41 (1)—Question involving construction of document—Decision thereon—When open to second appeal. See APPEAL (SECOND APPEAL), No. 5, 68 P.R. 1916.

(12) S. 41, cl. (c)—Error in weighing evidence—No ground for second appeal.

A mere alleged error in weighing evidence is no ground for second appeal. *Ramji Das v. Mussammat Thakar Devi*, 73 P.R. 1916 = 138 P.L.R. 1916 = 119 P.W.R. 1916 = 35 Ind. Cas. 366.

JOHNSTONE, C.J. and RATTIGAN, J.

(13) S. 41 (1), (3)—Scope—Second appeal—Absence of certificate—Jurisdiction to interfere on point of custom.

S. 41 (1) and (3), Punjab Courts Act, means that, though the Chief Court has no jurisdiction, in the absence of a certificate, to decide the existence or validity of a custom, it is not debarred from remitting a case for decision of a point of custom which has been overlooked or deliberately neglected by the lower appellate Court. *Sohna Mal v. Nanak Chand*, 22 P.R. 1916 = 84 Ind. Cas. 304.

SHADI LAL and LE ROSSIGNOL, JJ.

(14) S. 41 (3)—Point of custom—Second appeal—Certificate when to be granted—Certificate when not to be acted upon.

9.—Punjab Acts—(Concluded).

Act III of 1915 (Punjab Courts)—(Concluded).

S. 41 (3) of the Punjab Courts Act lays down, as a condition precedent to the granting of a certificate, that the Judge of the lower appellate Court must certify that the evidence regarding custom is so conflicting or uncertain that there is such substantial doubt regarding its existence as to justify a second appeal.

The Chief Court will decline to act upon a certificate which could not have been granted under S. 41 (3) of the Act. *Bani Singh v. Surat Singh*, 82 P.R. 1916—129 P.W.R. 1916—38 P.L.R. 1917—35 Ind. Cas. 884.

SHADI LAL and LESLIE JONES, JJ.

(15) S. 41 (3)—Question whether parties follow Mahomedan Law or custom—One of fact—Second appeal—Maintainability. See *APPEAL (SECOND APPEAL)*, No. 2, 106 P.W.R. 1916.

(16) S. 44. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 60, 21 P.W.R. 1916.

Actionable Claim.

(1) Transfer of Property Act (IV of 1882), S. 130—Gift of, whether governed by S. 129. See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), No. 1, 4 L.W. 339.

(2) What does not amount to purchase of an. See *CONTRACT ACT*, No. 18, 19 O.C. 60.

(3) Transfer of—Notice. See *TRANSFER OF PROPERTY ACT*, No. 153, 8 Bur. L.T. 266.

Act of State.

Act of State—Cession of territory—Rights enjoyed under former Sovereign if subsist—Contract with new Sovereign—Implied acceptance of contract with old Sovereign—Lease for a term—No express provision for re-entry or renewal at end of term—Claim by lessee that lease renewable—Onus—Act VI of 1862 and Act VI of 1888 (Bombay Council), effect of, on Kasbati leases—“Right of occupancy” meaning of. The Secretary of State v. Bal Rajbal, 19 C.W.N. 1087—(1915) M.W.N. 563—13 A.L.J. 953—29 M.L.J. 242—18 M.L.T. 179—2 L.W. 731—17 Bom. L.R. 730—39 B. 625—30 Ind. Cas. 303—23 O.L.J. 1 (P.C.). See Final Part, 1915, Col. 10.

Additional Evidence.

(1) See *CIV. PRO. CODE* (1908), No. 660, 35 Ind. Cas. 239.

(2) Appeal—, produced after arguments heard—Admission of such evidence by the appellate Court, if proper—Reasons not recorded for admission of the evidence, effect of. See *CIV. PRO. CODE* (1908), No. 666, 24 C.L.J. 457.

(3) In appeal—Admissibility of. See *CIV. PRO. CODE* (1908), No. 665, 1 Pat. L.J. 435.

Adhjar.

(a) Adhjar, status of—If tenant or labourer—Specific Relief Act, S. 9—Possession as Adhjar, if protected under S. 9—*Civ. Pro. Code* (1908), S. 115. *Deb Nath Das Baidagi v. Ram Sunder Barman*, 19 C.W.N. 1205—31 Ind. Cas. 579. See Final Part, 1915, Col. 257.

Adjournment.

(1) Question of granting time—Discretion of Court—Duty of party applying for time—Delay in filing process fee—Effect.

The question of granting time is one always of discretion and that discretion cannot be properly exercised until the general conduct of the party applying for time has been scrutinised throughout the case.

When a date is fixed for a case, it is the business of a litigant to see that the processes for the attendance of witnesses are placed in the hands of the Court within reasonable time for the securing of their attendance upon the date fixed. If he chooses to file a process fee only two days before the date fixed for hearing, any order passed by the Court for the issue of those processes must be understood to have been issued at the risk of the party in fault, and it is not for the Court to grant an adjournment when the case comes on for hearing. *Jagabandhu Chowdhry v. Gorey Lal Chowdhry*, 1 Pat. L.J. 173.

SHARFUDDIN and ROE, JJ.

(2) Opportunity to produce further evidence whether to be given after close of case. See *CIV. PRO. CODE* (1908), No. 396, 91 P.L.R. 1916.

(3) Granted on payment of costs—Effect of not paying costs. See *CUSTOMS (PUNJAB—ALIENATION)*, No. 10, 90 P.W.R. 1916.

(4) Application to set aside *ex parte* decree—Commencement of period of limitation. See *EX PARTE DECREE*, No. 4, 111 P.L.R. 1916.

(5) Application for—When saves limitation—Step-in-aid of execution. See *LIMITATION ACT* (1908), No. 289, 33 Ind. Cas. 79.

(6) See *PRACTICE AND PROCEDURE*, No. 8, 35 Ind. Cas. 464.

Adjudication.

(1) Date of presentation of insolvency petition to an incompetent Court, if can be treated as date of adjudication—Date of presentation to proper Court, whether date of. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 21, 36 Ind. Cas. 828—5 L.W. 123.

(2) Insolvency—Absence of available assets no ground either for refusing or annulling—Appeal. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 51, 171 P.W.R. 1916.

(3) Petition by debtor for inequitable and collateral purposes—Court's power to refuse. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 12, 10 S.L.R. 28.

Administration Bond.

See *CONTRACT ACT*, No. 119, 36 Ind. Cas. 1000.

Administration of Law.

Duty of Courts in administering law. See *INAM ESTATE*, No. 1, 12 N.L.R. 150.

Administration (Probate) Act.

See ACT V OF 1881.

Administration Suit.

- (1) *Form of decrees—Execution—Civ. Pro. Code, Sch. I, App. D. No. 17.*

The correct form to be used for a decree in an administration suit and such other suits is that indicated by No. 17, App. D of the First Schedule of the Civ. Pro. Code.

The correct method of execution in such cases indicated. *Po Win v. Ma Tin*, 8 L.B.R. 338—36 Ind. Cas. 385.

FOX, O.J. and HARTNOLL, J.

(2) Suit by one executor against another to take account—Jurisdiction—Procedure if questions relating to charitable bequests should arise. See CIV. PRO. CODE (1908), No. 164, 18 Bom. L.R. 335.

(3) Court Fees Act, S. 7 (iv) (f), nature of—Valuation for jurisdiction. See COURT-FEES, No. 2, 24 C.L.J. 448.

Administrative Proceeding.

(1) Position of District Judge in proceedings under the Lunacy Act, partly judicial and partly administrative—Inquiry under the Act, nature of. See ACT IV OF 1912 (LUNACY), No. 4, 19 O.C. 353.

Administrator.

(1) Administrator's powers of alienation—Effect of alienation by administrators and some of the heirs. See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 8, 9 Bur. L.T. 286.

(2) His powers to bind the estate—Nature and extent thereof. See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 17, 34 Ind. Cas. 128.

(3) Administrator *pendente lite*—Position of—Suit by—Limitation. See STRAITS SETTLEMENTS LIMITATION ORDINANCE, No. 1, 20 O.W.N. 893.

Admiralty Jurisdiction.

Admiralty jurisdiction—Collision case—Decision of trial Judge, weight to be attached to—Trial with aid of Nautical Assessors.

In collision cases, no rule is better established than this, that, when questions of fact alone arise, a Court of appeal should be most chary of interfering with the decision of a trial Judge who has seen the witnesses and had the opportunity of forming his estimate of them by their demeanour. Only in exceptional cases and for special reasons should a Court which has not had this advantage reverse the judgment of the trial Judge on questions of fact. *The Rivers Steam Navigation Co., Ltd. v. The Hathor Steamship Co., Ltd.*, 20 O.W.N. 1022—(1916) M.W.N. 448—31 M.L.J. 159—4 L.W. 176—35 Ind. Cas. 193 (P.C.).

LORD SHAW, LORD SUMNER, LORD PARMOOR, SIR JOHN EDGE and MR. AMBER ALI.

Admissibility of Document.

See APPEAL—(SECOND APPEAL), No. 9, 34 Ind. Cas. 71.

Admission.

- (1) *Statement as to an admission in judgment of Court of First Instance—Absence of affidavit denying the same by vakil who appeared in Court below—Statement not to be lightly treated by appellate Court.*

A statement in a judgment as to an admission made before the Court of First Instance should not be doubted lightly by the appellate Court especially in the absence of an affidavit by the vakil who appeared in the Court of First Instance. *Nellayadivu Ammal v. Subramanya Pillai*, 31 M.L.J. 269.

OLDFIELD and SADASIVA Aiyar, JJ.

(2) *Judgment, not inter partes, admissibility of—Judgment, if can prove admission of a party—Admission, how to be proved.* *Debendra Nath Haldar v. Bireswar Haldar*, 22 C.L.J. 270—20 C.W.N. 648—30 Ind. Cas. 821. See Final Part, 1916, Col. 261.

(3) Admission by attorney if binds client. See ACT III OF 1909 (PRESIDENCY TOWNS INSOLVENCY), No. 5, 20 C.W.N. 995.

(4) Settlement Court's decrees based on—Judicial decision. See OUDH ACT XXII OF 1886 (RENT), No. 22, 34 Ind. Cas. 755.

(5) Admissions when conclusive. See AWARD, No. 10, 9 S.L.R. 183.

(6) In pleadings—Necessity for investigation. See CIV. PRO. CODE (1908), No. 694, 30 Ind. Cas. 204.

(7) Title to land if passes by admission. See CONTRACT, No. 2, 23 C.L.J. 26.

(8) Admission of one defendant when evidence against others. See EVIDENCE ACT, No. 9, 20 C.W.N. 1217.

(9) Admission of a person in his own favour—Effect. See GUARDIANS AND WARDS ACT, No. 19, 24 P.W.R. 1916.

(9-a) By minor—Effect. See MINOR, No. 9, 32 Ind. Cas. 368.

(10) Registrar—Re-signing of blank sheets only—Effect. See MORTGAGE (GENERAL), No. 49, 35 Ind. Cas. 56.

Adna Malike.

See WASTE LANDS, No. 1, 36 Ind. Cas. 684—2 P.R. 1917.

Adoption.

(1) Chinese Buddhist Law—Inheritance—Family house. See BUDDHIST LAW (INHERITANCE), No. 5, 8 L.B.R. 404.

(2) See CUSTOMS (PUNJAB—SUCCESSION), No. 1, 116 P.L.R. 1916.

(3) See PROBATE PROCEEDINGS, No. 1, 35 Ind. Cas. 416.

Adultery.

(1) Wife's—Decree nisi not granted on account of proved adultery of husband—Delay. See ACT IV OF 1869 (DIVORCE), No. 5, 18 Bom. L. R. 818.

(2) Evidence of. See BUDDHIST LAW (DIVORCE), No. 1, 9 Bur. L.T. 74.

Advancement.

(1) English principle of, not applicable to India. See *BENAMI TRANSACTIONS*, No. 4, 9 Bur. L.T. 85.

(2) *Meher*—Conveyance of property in satisfaction of *meher*—Consideration not necessary. See *CONSIDERATION*, No. 1, 18 Bom. L.R. 810.

Advancement, presumption of.

Advancement, presumption of, if can be raised in India.

The presumption of advancement prevailing in England when a person purchases property in the name of another in whom he is interested, does not arise in India. Here the question in such a case is if the purchase was for the benefit of the person in whose name the purchase was made; one test being the source of the purchase money (a). *Rahman Beebi v. Khathoon Bee*, 4 L.W. 193=35 Ind. Cas. 569.

AYLING and NAPIER, JJ.

References:—(a) 13 M.I.A. 232 at 247; 25 I.A. 15=25 C. 478, F.

Adverse Possession.

(1) *Adverse possession—Transfer of registry—Payment of rent.*

Where in 1895 two widows who had an absolute interest in the property, gave away property to the daughter of one of them as *stridhanam*, effected transfer of registry in the Collector's Office and the donee executed in 1901 a power of attorney in favour of her husband authorising him to collect rents, and in 1901 the widows made a will in which the possession of the donee was acknowledged. *Held* that the donee, even if the gift was not proved, held adverse possession of the property against the widows, even though the rents collected were paid indiscriminately into the hands of these ladies. *Jeevarathnammal v. Yarada Pillai*, (1916) M.W.N. 26=32 Ind. Cas. 111.

COUTTS-TROTTER and SRINIVASA IYENGAR, JJ.

(2) *Purchaser of part of mortgaged property, competency of, to raise a plea of adverse possession—Limitation.*

The defendant purchased part of a mortgaged property from the mortgagor during the pendency of the suit filed by the mortgagee to enforce his mortgage. The mortgage was a simple one. Subsequently, the mortgagee got a decree for sale and in execution of it himself purchased the property and instituted the present suit for possession against the defendant.

Held, that the defendant was a representative of the mortgagor and as such was not competent to set up adverse possession against the plaintiff.

Held further, that the suit being brought within 12 years of the purchase was within time. *Mahesh Baksh Singh v. Manohar Lal*, 18 O.C. 869=39 Ind. Cas. 657.

PANDIT KANHAIYA LAL, A.J.C.

(3) *Vacant site—Possession follows title—Burden of proof—Limitation Act (1908), Art. 142.*

Held, that in the case of a vacant site possession follows title and it is for the party

Adverse Possession—(Continued).

alleging to have acquired title to prove that he acquired ownership thereof by adverse possession.

Held, also that Art. 142 of the Indian Limitation Act has no application to the facts of the case. *Chalm Sukh v. Gopi Ram*, 116 P.W.R. 1916=184 P.L.R. 1916=35 Ind. Cas. 120.

SHADI LAL, J.

(4) *Adverse possession, acts necessary to constitute—Adverse possession against putnidar previous to purchase by Zamindar of putnidar's interest, effect of, on purchaser.*

The plaintiffs sued for declaration of their title to and *khas* possession of a certain tank which the plaintiffs claimed they held under a lease granted to them in 1883 by some persons who were in possession as *putnidars* under the first defendant, whose case on the other hand was that the tank was included in a different *putni* held under him by different *putnidars* and that in 1899 he purchased the *putni* right of the latter and was consequently entitled to take possession of the tank. It was found that the tank in question was not included in the *putni* of the plaintiff's lessors but in the other *putni* as alleged by the defendant, but since the date of their lease the plaintiffs had been in occupation of the tank on the basis of their lease and had in assertion of their right let it out to sub-tenants from time to time, mortgaged it and re-excavated it:

Held—That the acts exercised by the plaintiffs in respect of the disputed tank constituted adverse possession and were sufficient to extinguish the title of the defendant's vendors on the date of the purchase by the defendant who consequently did not by his purchase acquire any title to the tank in dispute and could not successfully resist the claim of the plaintiffs for declaration of title and recovery of possession. *Bijay Chand Mahatap Bahadur v. Iswar Chandra Das*, 35 Ind. Cas. 60=21 C.W.N. 199.

SANDERSON, C.J., and MOOKERJEE, J.

(5) *Adverse possession—Derelict land—Abandonment, necessity of—Presumption in favour of title—Submersion of land temporarily by floods—Trespasser, position of.*

Held, that a presumption of ownership would exist in favour of the holder of a perfect title during the period that the land remained derelict. But no such presumption can be made for the benefit of a holder of an imperfect title. Thus a trespasser whose title has not become perfected by adverse possession cannot tack on to his period of possession the period during which the land has remained derelict.

Held further, that the requisite factor for the application of this principle is the factor of abandonment and the question to be asked is, did the land remain or did it not remain derelict. Such a principle cannot be applied to a case in which there has been no actual submersion of the land in the proper sense of the term and no abandonment but in which it has only been flooded in parts by temporary

Adverse Possession—(Continued).

floods which interfered for short periods with the use to which it could be put (a). *J.B. Hearsey v. Sardar Karm Singh*, 19 O.O. 374.

STUART and KANHAIYA LAL, A.J.O.S.

References:—(a) 29 C. 518 (P.O.) and 18 O.C. 43, *Expl. and Dist.*

(6) *Possession obtained by one member on behalf of whole family—Nature of possession of that member as against others.*

Where one member of a joint family obtained possession of a property on behalf of the whole family his possession enured for their benefit and he could not make it adverse to them. Therefore no question of limitation could arise between that member and the others in the family. *Hidayat Ali Khan Sahib v. Khadar Khan Sahib*, 30 Ind. Cas. 586.

WALLIS, C.J. and SRINIVASA AYYANGAR, J.

References:—1912 A.C. 230=81 L.J. P.C. 151=105 L.T. 836, *F.*

(7) *Character of possession and nature of right acquired thereby—Encroachment by neighbouring owner.*

Where a person in possession of land encroaches upon adjoining land and remains in adverse possession thereof, he acquires rights in the encroached land of the same nature as he had in the land which he was already in possession of. The character of the adverse possession must be held to be the same as that in respect of the land already in the person's enjoyment. *Thakur Sheo Narain Singh v. Bhal Singh*, 34 Ind. Cas. 416.

LINDSAY, J.C.

(8) *Possession by co-owner—Presumption as to continuance of possession lawful in its inception.*

The rule that the possession of a co-owner is to be presumed to be on behalf of all, is based on the principle that possession is in itself rightful and does not imply hostility as would be the possession of a mere stranger. The law will never construe a possession tortuous unless from necessity. The law will consider every possession lawful, the commencement and continuance of which is not proved to be wrongful, and this is based upon the principle that every man shall be presumed to act in obedience to his duty until the contrary appears (a).

The rule that the possession of a co-owner is to be presumed to be for the benefit of all co-owners until his possession is proved to be of such a character as to amount to a ouster or something equivalent to ouster of the other co-owners should apply with greater reason to the case of Muhammadan co-owners, some of whom are females. *Ram Parson Upadhia v. Sheikh Kalab Husain*, 36 Ind. Cas. 100.

RAFIQUE, J.

References:—(a) (1912) A.C. 230=81 L.J.P.C. 151=105 L.T. 836; 36 Ind. Cas. 922=37 A. 203=19 A.L.J. 204, *F.*

Adverse Possession—(Continued).

(8-a) *Acquisition of subordinate right with Taluqdar—Right in nature of franchise—Effect of such right on position of Taluqdar.*

Suit for possession of certain plots of land in a bazaar situated within a Taluka. Plaintiffs alleged that the bazaar had been established for many years ago by their ancestors, that ever since the members of their family had been carrying on a bazaar upon this area and that they had built shops and had received various bazaar dues and levied other imposts upon persons who carried on business in the bazaar. It was further alleged that several small plots included in the bazaar area, which were used as sitting places for people who came to sell their wares had been seized upon by some of taluqdar's tenants, who made erections on them. As the tenants pleaded the title of the taluqdar, the latter also was made a party and he was the real contesting defendant in the case. The taluqdar rested his defence chiefly upon the fact that he was the owner of the village in which the bazaar was situated and that he being the proprietor of the plots in question had the right to let them out to his own tenants. It was found that the plaintiffs and their co-sharers had established a subordinate right with regard to the plaintiff bazaar. *Held*, that the right of carrying on the bazaar and of levying dues upon the persons who used it was in the nature of a franchise and had been acquired as against the taluqdar by a long course of adverse possession. The right to carry on the bazaar had become a valuable property and the taluqdar could not be permitted to interfere with the exercise of this right. *Raja Shambhu Dayal v. Chandra Shekhar*, 36 Ind. Cas. 725.

LINDSAY, J.C.

(8-b) *Possession of co-owners living jointly—No ouster or repudiation of title—Entry in Revenue papers in name of one co-owner.*

In the case of joint co-owners like a son and his mother or a brother and sister, living jointly, and maintaining themselves out of the common fund derived from the joint property, the possession of one cannot become adverse to the other, unless there is an express ouster or a repudiation of the title of one by the other within the knowledge of the former (a).

Plaintiff sued for possession of a share of certain property. His allegation was that the said property belonged to a Mahomedan of the Shia sect and that he claimed to a share therein as the heir of one of the daughters of the deceased and a transferee from his widow. The defence was that the surviving son of the deceased had been in possession of the entire property to the exclusion of the widow and the daughters. It was found that the surviving son and the widow and daughters were all living together and an allowance was being paid by the said son to his mother in addition to a provision for her maintenance. *Held* that, in the absence of evidence to show the date on which the surviving son, if ever, asserted a title adverse to his mother and sisters the claim of the plaintiff as a successor-in-interest of the

Adverse Possession—(Continued).

widow and daughter could not be held to be barred by time. **Syed Asghar Husain v. Syed Akbar Husain**, 36 Ind. Cas. 743.

KANHAIYA LAL, A.J.C.

References :—(a) 28 Ind. Cas. 22=21 C.L.J. 192; 26 Ind. Cas. 922=13 A.L.J. 204=37 A. 203, R.

(9) *Admission—Encroachment by tenant—Effect of—Enhancement in respect of encroached land, claim for, if maintainable.* **Kadir Bux v. Maharaja Birendra Kishore Manikya Bahadur**, 22 C.L.J. 119=30 Ind. Cas. 914. See Final Part, 1915, Col. 264.

(10) *Termination of lease in 1865—Tenants continuing in possession and paying no rent—Unsuccessful attempt by tenants in 1881 to get the entries in Revenue Records amended in their favour—Effect.* **Dalip Singh v. Rannia**, 25 P.R. 1915=29 Ind. Cas. 348=20 P.L.R. 1916. See Final Part, 1915, Col. 264.

(11) *Tenant in possession—Additions made without permission of landlord—Agreement to retain rent in part-payment of amount spent—Abatement of appeal—Representative of the deceased respondent not added within six months—Sufficient cause—Pardnashin lady.* **Mussamut Nawab Begam v. Muhammad Mirajuddin**, 127 P.W.R. 1915=30 Ind. Cas. 28=47 P.L.R. 1916. See Final Part, 1915, Col. 265.

(12) *Disciple and Guru—Clear evidence—Patharakudi Mutt—History and succession—Acquisition of joint management by a community—Dedication to an idol—Adverse possession of office of Dharmakartha.* **Arunachellam Chetty v. Venkatchelapathi**, (1915) M.W.N. 650=38 Ind. Cas. 216. See Final Part, 1915, Col. 267.

(13) *Presumption—Rent-free grant—Long possession—No claim for rent—No rent paid—Plaintiff, if can put forward inconsistent case—Rent, assessment of—Adverse claim in settlement proceedings—Limitation.* **Kail Mohan Tripathi v. Maharaja Birendra Kishore Manikya Bahadur**, 22 C.L.J. 309=31 Ind. Cas. 891. See Final Part, 1915, Col. 268.

(14) *Landlord and tenant—Settlement Khattian, entry in—Possession before entry.* **Maharaja Birendra Kishore Manikya Bahadur v. Nabla Chandra Chakravarty**, 22 C.L.J. 306, =32 Ind. Cas. 851. See Final Part, 1915, Col. 268.

(15) *Rent-free title—Denial by landlord's agent—Settlement proceeding.* **Maharaja Birendra Kishore Manikya Bahadur v. Ram Kumar Chakravarti**, 22 C.L.J. 308=32 Ind. Cas. 856. See Final Part, 1915, Col. 268.

(16) *Vacant site—Neighbour tethering cattle—Possession whether adverse.* See **ABANDONMENT**, No. 2, 108 P.W.R. 1916.

(17) See **OUDE ACT XXII OF 1886 (OUDE RENT)**, No. 36, 14 A.L.J. 3 (Rev.).

(18) *Right acquired by—Admissibility of unregistered deed to prove nature of the right.* See **U.P. ACT II OF 1901 (AGRA TENANCY)**, No. 18, 38 Ind. Cas. 524.

Adverse Possession—(Continued).

(18-a) *Pleadings—Title by, not set up in plaint—General prayer.* See **BENAMI TRANSACTION**, No. 5-a, 32 Ind. Cas. 865.

(19) *Joint undivided ancestral property—Burden of proof.* See **BUDDHIST LAW—JOINT FAMILY**, No. 1, 9 Bur. L.T. 84.

(20) *Parties working lands in turns by mutual agreement—No adverse possession.* See **BUDDHIST LAW (PARTITION)**, No. 1, 9 Bur. L.T. 53.

(20-a) See **BURDEN OF PROOF**, No. 6-b, 32 Ind. Cas. 370.

(20-b) *Suit by talukdar—Plea of under-proprietary right—Decision of Revenue Court.* See **BURDEN OF PROOF**, No. 6-c, 32 Ind. Cas. 376.

(21) *Co-owner's possession when adverse.* See **CO-OWNERS**, No. 2, 24 C.L.J. 38.

(22) See **CO-SHAREE**, No. 3, 33 Ind. Cas. 161.

(23) *Contiguous estates—Adverse possession of portions thereof—Effect.* See **EJECTMENT**, No.-1, 23 C.L.J. 151.

(24) See **GAONTIA**, No. 1, 1 Pat. L.J. 293.

(25) See **JURISDICTION OF CIVIL AND REVENUE COURTS**, No. 8, 33 Ind. Cas. 250.

(26) *Acquisition of title by—Effect on right to compensation.* See **LAND ACQUISITION ACT (I OF 1894)**, No. 16, 20 C.W.N. 828.

(27) *Claim of under-proprietary right by lessee—Assertion of title by.* See **LANDLORD AND TENANT**, No. 34, 30 Ind. Cas. 218.

(28) *Title by—Lessee, if can acquire such title against his lessor—Non-payment of rent, if creates adverse possession.* See **LANDLORD AND TENANT**, No. 32, 24 C.L.J. 453.

(29) *Possession by lessee for over 12 years paying uniform rent—Perpetual tenancy, claim of.* See **LESSOR AND LESSEE**, No. 2, 30 Ind. Cas. 276.

(30) See **LIMITATION ACT (1877)**, No. 10, 20 M.L.T. 526.

(31) See **LIMITATION ACT (1908)**, No. 239, 35 Ind. Cas. 758.

(32) *Island arising in the sea within territorial limits—Title in Crown—Crown opposed by equatters—Crown if must prove that equatters had not acquired title by—Onus.* See **LIMITATION ACT (1908)**, No. 269, 31 M.L.J. 324.

(33) *Land—Possession by trespassers—Effect—Adverse ab initio to all persons.* See **LIMITATION ACT (1908)**, No. 260, 113 P.R. 1916.

(33-a) *Suit by landlord to recover possession from tenants—Denial of landlord's title more than 12 years before suit—Bar of suit by.* See **LIMITATION ACT (1908)**, No. 244, 36 Ind. Cas. 829.

(34) *Trespasser's right to tack period of possession of previous trespasser.* See **LIMITATION ACT (1908)**, No. 246, 18 O.C. 289.

Adverse Possession—(Concluded).

(35) Suit to establish ex-proprietary rights. See MORTGAGE—GENERAL, No. 43, 33 Ind. Cas. 483.

(35-a) Plea of, by mortgagee. See MORTGAGE—REDEMPTION, No. 21, 36 Ind. Cas. 969.

(36) What amounts to—Adverse possession of right to redeem. See MORTGAGE (USUFRUCTUARY), No. 2, 14 A.L.J. 498.

(37) Cause of action—Title and adverse possession—Decree on possessory title as against trespasser when to be given. See POSSESSION, No. 1, (1916) 2 M.W.N. 110.

(38) Disturbance of possession under decree of Court—Decree reversed in second appeal—Continuity of possession broken—Evidence Act, S. 114. See RES JUDICATA, No. 12, (1916) 2 M.W.N. 138.

(39) Sale for arrears of Government Revenue—Plea of—Limitation. See SALE FOR ARREARS OF REVENUE, No. 1, 43 O. 779.

(40) Landlord and Tenant—Tenant's possession if adverse by non-payment of rent. See SPECIFIC PERFORMANCE, No. 8, (1916) 2 M.W.N. 191.

(41) Specific performance, suit for—Strangers claiming to be in, of the property—If proper parties. See SPECIFIC PERFORMANCE, No. 8, (1916) 2 M.W.N. 191.

(42) For more than 12 years—Limitation Act S. 28 and Art. 144. See SPECIFIC RELIEF ACT, No. 31, 36 Ind. Cas. 11.

(43) Not pleaded, if may be allowed in the Court of appeal—Adverse possession against Municipality or the Crown. See TRESPASS, No. 1, 20 O.W.N. 773.

(44) Trustees—Adverse possession when commences. See TRUST, No. 2, (1916) 2 M.W.N. 87.

Advocate.

Authority to Court to fix daily fee to adversary's—Decree granting daily fee—Agreement by Advocate to receive lump sum—Advocate not to retain amount awarded in excess of the sum agreed to by him—Right of client to fee allowed. See LEGAL PRACTITIONERS ACT (XVIII OF 1879), No. 13, 33 Ind. Cas. 107.

Advocate-General.

(1) Suit relating to charity—Consent of, to institution of suit. See CIV. PRO. CODE (1908), No. 172, 36 Ind. Cas. 29.

(2) Suit re-public trust—Consent of—Right to worship idol. See CIV. PRO. CODE (1908), No. 179, 35 Ind. Cas. 846.

(3) Suit to declare the invalidity of the alienation—Suit against Committee and Archakas by two worshippers—Trustee not a party—No sanction of the Court or—Maintainability. See RELIGIOUS ENDOWMENTS ACT, No. 6, 31 M.L.J. 777.

Affidavit.

(1) Statement as to an admission in judgment of Court of First Instance—Absence of,

Affidavit—(Concluded).

denying the same by Vakil who appeared in Court below—Statement not to be lightly treated by Appellate Court. See ADMISSION, No. 1, 31 M.L.J. 269.

(2) Statements in affidavit uncontroverted—Plaintiff if bound to prove that it was made under the circumstances therein mentioned. See EVIDENCE ACT, No. 12, 3 L.W. 216.

After-born Son.

(1) Right, to impeach alienation by father. See CUSTOMS (PUNJAB—ALIENATION), No. 11, 106 P.R. 1916.

(2) Right of the, to impugn alienation by father. See HINDU LAW—ALIENATION, No. 23, 34 Ind. Cas. 447.

Age.

Certificate as to age to private patient—Former judgment—Relevancy. See EVIDENCE ACT, No. 7, 33 Ind. Cas. 142.

Agency.

(1) Agent for collection and for management of affairs—Termination of agency—Limitation Act (IX of 1908), Art. 97.

Where two persons by power-of-attorney appointed an agent to manage all their affairs and all their properties for the purpose of recovering moneys due to them and afterwards executed another power to the same agent, authorising him to manage their affairs and properties and to sign any deed or necessary papers on their behalf; and the agent, three days before being adjudged an insolvent, executed a release of his rights in certain immovable properties in satisfaction of the debts he had collected on his principal's behalf:

Held, that the agency under the first power-of-attorney terminated on the date of the release and not when the debts due to his principals were collected.

Held also, that Art. 97 of the Limitation Act applied to the case, that consideration must be deemed to have failed on the date when the release was declared to have no effect in law under S. 56 of the Presidency Towns Insolvency Act, and that the principals had three years from the date of failure within which to enforce their claim against the agent. *Rokhia Bi v. The Official Assignee, Madras*, (1916) 2 M.W.N. 264=4 L.W. 864.

ABDUR RAHIM, O.C.J. and SESHAGIRI IYER, J.

(2) Pleadings—Plea not raised in first Court or in appeal memo. See CONTRACT ACT, No. 35, 31 Ind. Cas. 632.

Agency Rules.

(1) Rr. 10, 18, 20—Agent's Court—Applicability of the provisions of the Civ. Pro. Code regarding re-hearing and review. See JURISDICTION OF CIVIL COURTS, No. 8, 31 M.L.J. 319.

(2) R. 18. See No. 1, *supra*.

(3) R. 20. See No. 1, *supra*.

Agency Rules—(Concluded).

(4) *Rr. 20 and 31—Order of remand by the Agent—If open to revision by the High Court.*

An order of remand passed by the Agent, though not a decree falling within r. 20, is an order falling within r. 31 and as such subject to the control of the High Court.

R. 31 is intended to provide for cases for which no previous provision had been made, including orders against which no appeal was allowed (a). *Sri Pedda Vikrama Deo Garu v. Maharaja of Jeypore*, (1916) 2 M.W.N. 269—4 L.W. 499—36 Ind. Cas. 801.

OLDFIELD and KRISHNAN, JJ.

References :—(a) 13 M.L.J. 151; 18 M. 227; 24 M. 345 and 27 M. 266, F.

(5) R. 31. See No. 4, *supra*.

Agency Rules (Vizagapatam).

Attachment—Claim allowed—Suit for declaration of judgment debtor's title to the property—Maintainability—Applicability of O. XXI, r. 63, Civ. Pro. Code. *Sri Sri Sri Vikromadeo Maharajulu Garu, Maharajah of Jeypore v. Hari Krishna Patro alias Raghunatha Patro*, 29 M.L.J. 730—32 Ind. Cas. 226. See Final Part, 1915, Col. 272.

Agent.

(1) *Agent of landlord recognising status of tenant—Agent withdrawing rent deposited—Onus.*

When a question arises as to the authority of an agent to bind the landlord, it must be decided on the particular facts as in every other case regarding the scope of the authority of an agent to bind his principal (a).

When the transferee of a non-transferable holding proved that he had deposited the rent of the disputed holding and that the deposit had been withdrawn by the landlord's agent, he had discharged such onus as lay upon him. It is for the landlord to show that the withdrawal was outside the scope of the agent's authority.

Acceptance of rent by the landlord's agent from the transferee of a non-transferable holding amounts to a recognition by the landlord of the tenancy set up by the transferee of a non-transferable holding since the landlord is bound by his agent's withdrawal especially when the landlord fails to show that in withdrawing the deposit the agent acted beyond the scope of his authority. *Motihari Concern Ltd. v. Lachmi Prosad Sah*, 35 Ind. Cas. 81.

KINGSFORD, J.

References :—(a) 15 C.W.N. 958, F.; 6 C.W.N. 923; 10 C.W.N. 216, Cons.

(2)—holding special power of attorney authorising him to conduct suit in any manner he may deem fit—Offer by agent to be bound by oath of other side—Effect. See ACT X OF 1873 (OATHS), No. 1, 14 A.L.J. 88.

(3) Order of remand by the—If open to revision by the High Court. See AGENCY RULES, No. 4, (1916) 2 M.W.N. 269.

Agent—(Concluded).

(4) Death of one of two joint agents—Contract of agency whether terminates. See BROKERAGE CONTRACT, No. 1, 20 O.W.N. 708.

(5) Plaintiff signed by authorised, Act II of 1901 (Agra Tenancy), S. 193 (a). See CIV. PRO. CODE (1908), No. 342, 31 Ind. Cas. 859.

(6) Presentation of documents for registration by an, of executant or claimant. See REGISTRATION ACT (1908), No. 30, 9 Bur. L.T. 197.

(7) Mortgage by, under power of attorney—Act done by agent fraudulently—Liability of principal—Burden of proving good faith. See TRANSFER OF PROPERTY ACT, No. 42, 36 Ind. Cas. 968.

Aggrieved Person.

See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 47-b, 36 Ind. Cas. 771.

Agra Rent Act.

See U.P. ACT XIV OF 1886.

Agra Tenancy Act.

See U.P. ACT II OF 1901.

Agreement.

(1) *Agreement to compound criminal case compoundable with leave of Court only if opposed to public policy—Offence not so compoundable alleged but no summons issued—Effect.*

In a criminal case the Magistrate after examining the complainant summoned the accused under S. 325, I.P.O., although allegations were made in the petition of complaint of an offence under S. 147, I.P.O., also. An agreement was entered into between the parties and with the leave of the Court the case was compromised.

Held—that a case under S. 325, I.P.O., being compoundable with the leave of the Court, and the Magistrate having given permission to compound the case, the contract was not opposed to public policy; the allegation in the petition of complaint of a non-compoundable offence under S. 147, I.P.O., which was not accepted by the Magistrate when issuing process, made no difference. *Moulvi Mohammad Ismail v. Samad Ali Bhulyan*, 20 C.W.N. 946—32 Ind. Cas. 227.

N. R. CHATTERJEE and NEWBOULD, JJ.

(2) *Agreement to convey land by gift to Sitambari Jain Society—Construction—Agreement whether void for remoteness—Hindu Law—Ss. 2 (d), 14, 40, 54, Transfer of Property Act—Specific performance of the covenant whether can be granted—S. 22, Specific Relief Act.*

The provisions of an ekramamah ran as follows :—“If the Sitambari Jain Society shall require any place on Parasnath Hill or below at Madhuban for erecting mandir or dharamsala and for doing repairs and making bricks for the said purpose, in that case I and my heirs shall give for making mandir, dharamsala and bricks, land, stones and timber from th

Agreement—(Continued).

hill free of cost, and if I and my heirs refuse to give, in that case the Sitambari Jain Society shall take the same of its own power (*apne ikhtiyar se*)."

Held per Chamier, C.J.—If the provision should be regarded as an attempt to create an interest in favour of future generations of Sitambaris, it is void for remoteness, whether the case is governed by general principles, or by S. 14 of the Transfer of Property Act, or by the Hindu Law (a).

The provision was not intended to create an interest in favour of the Sitambaris and, further, such a provision cannot in India be regarded as creating an interest in favour of the other party to the transaction.

A contract to give immoveable property does not of itself create any interest in the property (b).

It is doubtful whether the English doctrine of *Walsh v. Lansdale* (c) should be applied to any case in India except possibly in the Presidency Towns.

Per Jwala Prasad, J.—It is doubtful whether it would be a sound exercise of discretion under S. 22 of the Specific Relief Act to grant specific performance of the covenant in question, regard being had to the vague, indefinite and uncertain terms of the covenant (d). *Dahya Bhal v. Maharaj Bahadur Singh*, 1 Pat. L.J. 238=34 Ind. Cas. 482.

CHAMIER, C.J. and JWALA PRASAD, J.

References:—(a) 24 W.R. 321; 5 C.W.N. 343; 21 C. 180; 16 C. 71=15 I.A. 149; 14 C.W.N. 601; 4 M. 200; 28 Ind. Cas. 871; (1910) L.R. 1 Ch. 12; 20 Ch. D. 562, R. (b) 20 Ch. D. 562, 1 Ph. 774, R. (c) and (d) 21 Ch. D. 9; 2 C.L.J. 343; 11 C.L.J. 543; 19 C.L.J. 213, R.

(3) Prior to decree between one of the judgment-debtors and the decree-holder to enter up satisfaction of the decree—Application to enter up satisfaction, if maintainable. See CIV. PRO. CODE (1908), No. 431, 39 M. 541.

(4) Adding to the terms of a written agreement by oral evidence—Admissibility—Consideration. See EVIDENCE ACT, No. 55, 18 Bom. L.R. 90.

(5) Covenant not to raise plea of limitation—Effect. See LIMITATION ACT (1908), No. 34, 4 L.W. 48.

(6) To sell by him—Void—Contract Act, S. 14. See MINOR, No. 7, 33 Ind. Cas. 132.

(7) Collateral agreement in writing—Stipulation for interest—Promissory-note silent—Right to interest. See NEGOTIABLE INSTRUMENTS ACT, No. 20, 12 N.L.R. 9.

(8) Lease of coal mine—Half-share in lease and certain moveable property, etc., assigned by unregistered document for Rs. 12,500—Admissibility in evidence in regard to moveable property—Admissibility for collateral purposes. See REGISTRATION ACT (1908), No. 6, 49 P.R. 1916.

Agreement—(Concluded).

(9)—to assign a decree—Whether will be enforced after decree became barred. See SPECIFIC PERFORMANCE, No. 1, 14 A.L.J. 527.

(10) Attested, to deliver merchandise with a penal clause not bond. See STAMP ACT (1899) No. 4, 9 Bur. L.T. 111.

(11) Admissibility in evidence—Oral evidence of the terms of—Evidence Act (I of 1872), S. 91. See SUB-LEASE, No. 1, 24 C.L.J. 539.

Agricultural Cattle.

Meaning of. See LANDLORD AND TENANT, No. 20, 12 N.L.R. 83.

Agriculture.

Meaning of. See MAD. ACT I OF 1908 (MADRAS ESTATES LAND), No. 11, 3 I.W. 485.

Agriculturist.

(1) Insolvent an—Lease of occupancy holding ordered to be surrendered—House ordered to be sold—Order, if illegal. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 22, 14 A.L.J. 1031.

(2) Mortgage of land in favour of, who undertakes to pay debt due from an agriculturist to a non-agriculturist—Consideration—Transfer of Property Act, S. 58. See PUN. ACT XIII OF 1900 (PUNJAB ALIENATION OF LAND), No. 1, 114 P.W.R. 1916.

(3) House of, used for keeping implements of husbandry—Whether saleable. See CIV. PRO. CODE (1908), No. 132, 14 A.L.J. 240.

(4) Who is an—Exemption from attachment when can be claimed. See CIV. PRO. CODE (1908), No. 136, 20 C.W.N. 874.

Agriculturists Relief Act.

See BOM. ACT XVII OF 1879.

Althugal Account.

What is. See EVIDENCE ACT, No. 12, 3 L.W. 216.

Ala Mallis.

See WASTE LANDS, No. 1, 36 Ind. Cas. 634=2 P.R. 1917.

Alienation.

(1) *Acquiescence and necessity—Questions of fact—Proof of the same.*

Acquiescence is sometimes a pure question of fact, e.g., when the point is to be decided solely on the allegation that the party positively and in set terms gave consent; but it is a question of law when the point is whether conduct of the party, not amounting to direct consent, should be taken as waiver (a).

Similarly, "necessity" may be a pure question of fact, e.g., when the point is whether a sum of money was taken, to the knowledge of the alienor, to pay a previous genuine debt, or *per contra* merely as an act of wanton extravagance; but when the point raised is whether the Court below has infringed rules and maxims laid down by the Chief Court and has decided

Alienation—(Concluded).

on wrong principles as to the *quantum* of proof of "necessity" required, then the question is undoubtedly one of law (a).

Liberal allowance is to be made to alienees in the matter of *quantum* of proof of "necessity" where many years have elapsed since the events in question took place. *Nidhan v. Buta*, 107 P.R. 1916=36 Ind. Cas. 700.

JOHNSTONE, C.J. and SHADI LAL, J.

Reference:—(a) 61 P.L.R. 1901, R.

(2) Administrator's power of alienation—Effect of, by administrators and some of the heirs. See ACT V OF 1881 (PROBATE AND ADMINISTRATION ACT), No. 8, 9 Bur. L.T. 286.

(3) Mahomedan Law—*De facto* guardian—Settlement for minor's benefit, if void—Powers of *de facto* guardian. See MAHOMEDAN LAW (GUARDIANSHIP), No. 4, (1916) 2 M.W.N. 341.

(4) Religious office—Bungas attached to golden temple at Amritsar—Manager, office of, nature of—Alienation of office, if valid. See RELIGIOUS OFFICES, No. 1, 151 P.W.R. 1916.

Alienation (Ancestral Land), Limitation Act.

See PUN. ACT I OF 1900.

Alienation, Bundlekhand Land Act.

See U.P. ACT II OF 1903.

Alienation of Land Act.

See PUN. ACT XIII OF 1900.

Alien Enemy.

(1) *Suit against, if lies—Cause of action arising upon contract made after war—Internment, effect of.*

No matter whether the cause of action arose before or after war, an alien enemy can be sued in Courts in British India and would have every right to prosecute his case before the Courts in accordance with the laws of procedure (a).

The fact that the defendant has been interned does not make any difference as it does not out down his liabilities. *Abdul Khader Khalifa v. Fritz Kapp*, 20 O.W.N. 691=23 O.L.J. 493=43 O. 1140=85 Ind. Cas. 951.

D. CHATTERJEE and BEACHCROFT, JJ.

Reference:—(a) (1916) 1 K.B. 143, R.

(2) *License to trade—Suits, right to bring.*

An alien enemy, who has been licensed to trade in British India, has access to the Courts and may bring suits. *M. Meyer v. Mrs. G. Lea*, 9 Bur. L.T. 51=31 Ind. Cas. 888.

ORMOND and TWOMEY, JJ.

Reference:—(1915) T.L.R. 31, R.

(3) *Meaning of the term.*

The term alien enemy includes not only the subjects of a state at war with Great Britain but also British subjects and subjects of a neutral state who are voluntarily residing in a hostile country. *S. Greenberg v. A.S. Pinto*, 9 Bur. L.T. 176.

FOX, C.J.

Reference:—(a) 31 T.R. 163, F.

Alimony.

Wife living with co-respondent—Alimony—Discretion of Court. See ACT IV OF 1869 (DIVORCE), No. 11, 14 A.L.J. 786.

Aliyasantana Law.

Devolution of property of an individual member on his death.

On the death of an individual member of a family governed by the Aliyasantana Law, his property goes not merely to the nearest individual relation or relations, but to all the members of the nearest non-extinct branch. *Manjappa Ajri v. Marudevi Hengau*, 30 M.L.J. 204=39 M. 12=32 Ind. Cas. 165.

SADASIVA AIYAR and NAPIER, JJ.

References:—7 M. 575, *Expl.*; 38 M. 48=24 M.L.J. 240 (F.B.), R.

Alluvion and Diluvion.

(1) Diluvion—Total extinction of jote—Tenant if liable to pay rent. See LANDLORD AND TENANT, No. 17, 24 C.L.J. 162.

(2) Right to submerged land on re-appearance—Effect of *wajib-ul-ars*—Adverse possession. See SHAMILAT, No. 1, 92 P.L.R. 1916.

Alteration of Decree.

Construction of decree by executing Court—Absence of patent ambiguity under guise of interpretation. See CIV. PRO. CODE (1908), No. 116, 36 Ind. Cas. 500.

Alteration of Deed.

Instrument, alteration in, for carrying out original intention.

An alteration made in good faith to carry out the original intention of the parties does not vitiate the instrument. *Ananda Mohan Saha v. Ananda Chandra Saha*, 35 Ind. Cas. 182.

WOODROFFE and CHAUDHURI, JJ.

Alternative Cause of Action.

Relief against added defendants based on, not claimed in first suit—Second suit barred. See CIV. PRO. CODE (1908), No. 34, 10 S.L.R. 29.

Alternative Relief.

(1) See CONTRACT ACT, No. 108, 8 L.B.R. 367.

(2) One suit by different sets of plaintiffs claiming in the alternative—Legality. See PLEADINGS, No. 2, 10 P.R. 1916.

Alternative Remedy.

By way of review under S. 114, or O. XLVII, r. 1 when available. See CIV. PRO. CODE (1908), No. 378, 21 O.W.N. 80.

Amaldustak.

Whether requires stamp. See STAMP ACT (1899), No. 29, 20 C.W.N. 923.

Ambiguity.

Construction of decree by executing Court—Absence of patent—Alteration of decree under guise of interpretation. See CIV. PRO. CODE (1908), No. 116, 36 Ind. Cas. 500.

Ambiguous Decree.

Execution—Court's power of construction. See EXECUTION OF DECREE, No. 92, 93 Ind. Cas. 561.

Amendment of Decree.

- (1) *Decree against three defendants—One defendant dies—Petition for amendment of decree—Legal representative of the deceased defendant not brought in—Amendment impossible.*

The appellant filed a petition for amendment of the decree in the lower Courts which was against three defendants, by increasing costs and interest awarded to him. Failing in the lower Courts, he appealed to the High Court. Pending the appeal one of the defendants died and his legal representatives were not brought in time. Held that the amendment of the decree was impossible. A decree against all the defendants cannot be amended as against some, as thereby the rights of contribution *inter se* may be interfered with. **Ponnambala Moothan v. Maha Deva Pattar**, (1916) 2 M.W.N. 117 = 95 Ind. Cas. 697.

SPENCER and KRISHNAN, JJ.

- (2) *Amendment of judgment and decree—Error in judgment—Civ. Pro. Code (1908), Ss. 151 and 152.*

Held, that when by some oversight or otherwise a judge in writing his judgment commits, a mistake which injuriously affects either party to the case he can, and should exercise, his powers under Ss. 151 and 152 of the Civ. Pro. Code, 1908, to correct the mistake and amend the decree accordingly.

In a pre-emption case the first Court gave a decree to the effect that the plaintiff should get the site on payment of Rs. 300, that the defendant should remove his building thereon, within four months, that if he failed to do so, plaintiff should have the right to pay Rs. 3,600 to defendant within one month of the default and get possession of the site and the building.

This decree was reversed by the appellate Court and in second appeal it was restored but no provision was made as to the time of payment of the pre-emption money, etc. This defect was removed from this judgment on an application made by the plaintiff under Ss. 151, 152 of Act V of 1908. **Jhanda Mal v. Musamat Sardar Begam**, 169 P.W.R. 1916.

JOHNSTONE, C.J.

- (2-a) *Final decree by District Court in accordance with preliminary decree by High Court—Error in High Court decree—Correction by District Court if permissible—Civ. Pro. Code, O. XXXIV, r. 2—Interest.*

An error in the High Court's preliminary decree cannot be corrected by the District Court. The District Court is legally bound to draw up its final decree only in accordance with the High Court's preliminary decree.

There is nothing in O. XXXIV, r. 2 to prevent a Court from providing in its decree for interest on the total amount awarded because such

Amendment of Decree—(Continued).

total includes interest on the bond sued on. **Puchalapalli Adisehadri v. Mungamur Sivaramayya**, 31 Ind. Cas. 320.

SADASIYA AIYAR and TYABJI, JJ.

- (2-b) *Second appeal—Arbitration—Filing of award—Plaint not containing a part of the disputed property—Plaintiff not applying for amendment in any of the Courts below.* **Mehtab Ali Shah v. Imdad Ali Shah**, 91 P.W.R. 1915 = 80 Ind. Cas. 387 = 59 P.L.R. 1916. See Final Part, 1916, Col. 280.

- (3) *Addition of parties on appeal and amendment of plaint if justify remand.* See CIV. PRO. CODE (1908), No. 210, 20 C.W.N. 547.

- (4) *Decree in conformity with judgment—Courts if can amend decree Judgment patently erroneous in law, if affects power of amendment—Party if can apply in execution for amending or correcting judgment and decree—Amendment petition treated as review.* See CIV. PRO. CODE (1908), No. 288, 3 L.W. 499.

- (5) *Decree of Division Bench of two Judges of High Court—Jurisdiction of single Judge to amend decree.* See CIV. PRO. CODE (1908), No. 710, 20 C.W.N. 1165.

- (6) *Of plaint which would deprive defendant of plea of limitation if should be allowed.* See CIV. PRO. CODE (1908), No. 323, 20 C.W.N. 475.

- (7) *Of pleadings.* See CIV. PRO. CODE (1908), No. 355, 9 Bur. L.T. 150.

- (8) *Order refusing amendment of plaint—Not a 'Judgment'—No appeal.* See LETTERS PATENT (MADRAS), No. 4, 3 L.W. 107.

- (9) *Suit by a person without indicating in plaint that he was suing on behalf of a company—Plaint subsequently amended—Not a case of adding new plaintiff within S. 22, Limitation Act.* See LIMITATION ACT (1908), No. 82, 30 M.L.J. 57.

- (10) *Inherent power of Court to amend its decrees.* See MORTGAGE (GENERAL), No. 14, 14 A.L.J. 502.

- (11) *Power of amendment of plaint by the first Court as also by the appellate Court.* See PARTITION, No. 4, 20 C.W.N. 1276.

- (12) *Appeal against decree not substantially altered by amendment—Limitation.* See BUR. ACT VI OF 1900 (LOWER BURMA COURTS), No. 1, 35 Ind. Cas. 347.

- (13) *Decree amended—Execution of decree—Limitation.* See CIV. PRO. CODE (1908) No. 120, 34 Ind. Cas. 393.

- (14) *Decree confirmed in appeal—First Court, if can amend its own decree subsequently—Jurisdiction—Practice.* See CIV. PRO. CODE (1908), No. 232, 4 L.W. 225.

- (15) *Execution of amended decree—Date of order of amendment—Starting point of limitation.* See LIMITATION ACT (1908), No. 290 86 Ind. Cas. 533.

- (16) *Time for appeal—Extension of time—Whether time for appeal extended by such*

Amendment of Decree—(Concluded).

amendment. See **LIMITATION ACT** (1908), No. 11, 34 Ind. Cas. 556.

(17) Pending appeal. See **RULES OF PRACTICE**, No. 1, 32 Ind. Cas. 194.

Amendment of Petition.

Execution sale—Mere payment without application to set aside sale—Application if to be in writing—Revision. See **CIV. PRO. CODE** (1908), No. 256-a, 32 Ind. Cas. 45.

Amendment of Plaintiff.

(1) *Amendment setting up different title and cause of action, if permissible.*

A plaintiff cannot be permitted to be amended so as to set up a totally different title and cause of action. **Gadigeremula Sunkl Reddi v. Yengal Reddi**, 30 Ind. Cas. 891.

BAKEWELL and SPENCER, JJ.

(2) *Second appeal—No prayer for amendment in lower Court—Power of second appellate Court to order amendment.*

Where an appellant did not, either in the Court of first instance or in the Divisional Court, apply for the amendment of the plaintiff, a Court of the second appeal cannot accede to a request of that kind which was never made in the lower Courts and which if accepted, meant the trial of the case *de novo*. **Mehtab Ali Shah v. Imdad Ali Shah**, 30 Ind. Cas. 387.

SHADI LAL, J.

(3) *Suit to recover arrears of rent—Allegation of agreement to pay rent not proved—Amendment for grant of occupation rent.*

Where a suit is brought under the Oudh Rent Act to recover arrears of rent due under an agreement to pay rent, in the absence of proof of the alleged agreement, the plaintiff cannot be allowed to have the plaintiff amended embodying a prayer for grant of an occupation rent under the provisions of S. 127 of the Act, as such a course would be to raise a new case inconsistent with the case raised in the pleadings. **Bhindeewari Prasad Singh v. Bisheshwar Singh**, 30 Ind. Cas. 499.

LINDSAY, J.C.

(4) *Second appeal—in.* See **APPEAL—SECOND APPEAL**, No. 12, 35 Ind. Cas. 91.

(5) *Acquisition of substantial right by defendant—Power of appellate Court to order amendment.* See **CIV. PRO. CODE** (1908), No. 361, 30 Ind. Cas. 379.

(6) *Plaint, amendment of—Inconsistent claim set up by way of amendment.* See **CIV. PRO. CODE** (1908), No. 356, 34 Ind. Cas. 541.

(6-a) *Suit for ejectment—Error in the number of the plot.* See **CIV. PRO. CODE** (1908), No. 367, 32 Ind. Cas. 512.

(7) See **CONTRACT ACT**, No. 108, 8 L.B.R. 367.

(8) *Of formal nature—Claim of defendant to increased costs.* See **COSTS**, No. 7, 30 Ind. Cas. 323.

(9) *Prayer for new relief—If allowable.* See **DECLARATORY SUIT**, No. 3, 34 Ind. Cas. 775.

Amendment of Plaintiff—(Concluded).

(10) *When allowed.* See **HINDU LAW—JOINT FAMILY**, No. 26, 34 Ind. Cas. 757.

(11) *Partition—Joint family property—Suit for partial partition, if maintainable—Plaintiff to be given option of amending the plaintiff—Costs on part decreed.* See **PARTITION**, No. 9, 156 P.W.R. 1916.

(12) *Declaratory suit—Consequential relief—Plaintiff not in possession—Failure to amend plaintiff by adding claim for possession.* See **SPECIFIC RELIEF ACT**, No. 29, 9 Bur. L.T. 90.

(13) *Partition suit not to be dismissed because there is prayer of a declaration only and not for possession, proper.* See **SPECIFIC RELIEF ACT**, No. 1, 35 Ind. Cas. 792.

(14) *Right to claim, in appeal.* See **SPECIFIC RELIEF ACT**, No. 33, 36 Ind. Cas. 611.

Ancestral Land Alienation (Limitation) Act.

See **PUN. (ACT I OF 1900)**.

Ancestral Property.

(1) *Presumption of separation—Burden of proof.* See **BUDDHIST LAW—JOINT FAMILY**, No. 2, 9 Bur. L.T. 164.

(2) *What is.* See **CIV. PRO. CODE** (1908), No. 494, 14 A.L.J. 669.

(3) *Definition of.* See **HINDU LAW (DEBTS)**, No. 5, 74 P.W.R. 1916.

Ancient Documents.

(1) *Discretion of Court in presuming genuineness of.* See **HINDU LAW—(JOINT FAMILY)**, No. 7, 19 O.O. 92.

(2) *Bearing signature made by a person on behalf of another—Presumption on about authority to make the signature—Evidence Act, S. 90.* See **PEDIGREE**, No. 1, 19 O.C. 321.

Ancient Grant.

In favour of one member of the family—Presumption. See **HINDU LAW (JOINT FAMILY)**, No. 27, 34 Ind. Cas. 827.

Animal.

(1) *Suit for damages for injuries caused by—Negligence to be proved.* See **TORT**, No. 1, 8 L.B.R. 389.

Annuity.

Assets of deceased person, whether includes. See **MAHOMEDAN LAW (DOWER)**, No. 5, 33 Ind. Cas. 516.

Apostacy.

(1) *Restitution of conjugal rights.* See **MAHOMEDAN LAW (MARRIAGE)**, No. 1, 8 L.B.R. 461.

Appeal.

1.—GENERAL.

2.—SECOND APPEAL.

3.—TO PRIVY COUNCIL.

See **ABATEMENT OF APPEAL**.

See **APPEAL—TO PRIVY COUNCIL**.

Appeal—(Continued).

See CIV. PRO. CODE (1908), Ss. 96 to 110 and O. XLI to O. XLVI.

See PRACTICE AND PROCEDURE.

—1.—General.

- (1) *Limitation Act (1908), S. 5—Appeal presented 34 days out of time—Affidavit not accounting for major portion of delay—Appeal, liability of, for dismissal—Civ. Pro. Code (1908), O. XLI, r. 22—Memorandum of cross-objections filed in time—Appeal, dismissal of, as time-barred—Objections if can be heard—Costs, granting of, only discretionary—Order awarding costs, if can be interfered with in second appeal.*

Where an appeal was presented 34 days out of time and the affidavit filed in support of the application to excuse delay did not account for the major portion of it, held that the appeal ought to be dismissed.

The dismissal of an appeal on the ground that it is barred by limitation is not a bar to the hearing of a memorandum of cross-objections filed by the respondent within the period allowed by O. XLI, r. 22, Civ. Pro. Code.

The award of cost is in the discretion of the Court and the High Court will not interfere in second appeal with an order as to costs if it appears to have been made in the exercise of sound discretion. *Yenkanna v. Venkataramanayya*, 3 L.W. 109=19 M.L.T. 86=32 Ind. Cas. 579.

ABDUR RAHIM and AYLING, JJ.

- (2) *Question of proprietary title—Appeal—Res judicata—Decision of settlement officer—Amendment of jamabandi.*

Where a defendant in a suit for arrears of rent in the Court of first instance denies the plaintiff's title and claims to be proprietor of the land as his grove, and the same plea is raised in appeal, held that appeal lies to the District Judge, a question of proprietary title having been in issue in the Court of first instance and being also a matter in issue in appeal.

Held also that a decision of a settlement officer passed in a case relating to the amendment of *jamabandi* declaring the defendant's status as liable to pay rent is not *res judicata* either in the Revenue Court or in the Civil Court. *Sakhwat Ali v. Suraj Prasad*, 14 A. L.J. 140=38 Ind. Cas. 343.

BANERJI, J.

- (3) *Appeal filed in wrong Court—Bona fide mistake—Appellate Court, power of—Period to be allowed—Judicial discretion.*

Where under a *bona fide* mistake an appeal is filed in time in a wrong Court, the appellant, who might otherwise suffer loss of rights and injustice, ought to be allowed to put the mistake right, and to appeal unless there is some conduct disentitling him to do so, and in the absence of such conduct the just thing to do is to allow him from the date when his mistake is discovered a reasonable time, and no more than the period he would otherwise have

Appeal—(Continued).**—1.—General—(Continued).**

had from the original decree. Where an appellate Court sees that the Court to which an application was made to admit an appeal beyond time has exercised its discretion on the ground which is not really material, then no real judicial discretion has been exercised and the appellate Court can deal with the order with a free hand. *Maqbul Ahmad v. Muria*, 14 A.L.J. 212=33 Ind. Cas. 546.

WALSH, J.

- (4) *Findings of fact, reversal of, on appeal—Brokerage on sale within time limit, meaning of.*

Where the owner of an oil mill gave the following letter to a broker "I agree to allow you to sell my mill at Rs. 40,000 only. You will get brokerage 5 per cent. on the same when the mill will be sold through you. This condition is to be in force till a fortnight (15 days) from date."

Held, that the broker would be entitled to the commission if he introduced to the seller a purchaser within 15 days who was ready and willing to purchase the mill for Rs. 40,000.

Sanderson, C.J.—When the trial Judge has had to deal with conflicting verbal evidence on a question of fact and after seeing and hearing the witnesses has come to the conclusion that the truth lies on one side and not on the other, the Court of Appeal should not interfere unless it is clear that the Court below has come to a wrong conclusion, which in this case, his Lordship was not prepared to hold that the Court below had.

Woodroffe, J.—If, after argument, the Court of Appeal has a conviction that the judgment under appeal is erroneous, it should not be affirmed and this is not the less so because the judgment raised a question of fact.

Mookerjee, J., on review of authorities, held that the appellate Court was entitled to reverse the findings of fact and allow an appeal if it was convinced that the trial Judge came to an erroneous conclusion on the evidence, the burden lying on the appellant to satisfy the Court that the finding he assails is not supported by the evidence.

Woodroffe and Mookerjee, JJ., held on the evidence that the broker had not introduced a purchaser within the time limit of the agreement and was not entitled to recover brokerage thereunder. *Laljee Mahommed v. Dadabhai Jivanji Guzdar*, 20 C.W.N. 335=23 O.L.J. 190.=43 O. 833=34 Ind. Cas. 807.

SANDERSON, C.J. WOODROFFE and MOOKERJEE, JJ.

- (5) *Reference to arbitration without intervention of Court—Application for filing award—Objection dismissed—Code of Civil Procedure (1908), O. XLIII, r. 1—Appeal.*

An application under para 21 of the Second Schedule to the Code of Civil Procedure, asking a Court to file an award in a matter submitted to arbitration without the intervention of the Court, is a "case open to appeal" within the

Appeal—(Continued).**—1.—General—(Continued).**

meaning of O. XLIII, r. 1 (d) of the same Code. An appeal will therefore lie against an order rejecting an application to set aside a decree passed *ex parte* in such a matter. The question whether a particular decree "is open to appeal" is quite independent of the question whether an appeal could be successfully maintained. *Nehal Singh v. Khushal Singh*, 14 A.L.J. 332=38 A. 297=38 Ind. Cas. 80.

PIGGOTT and WALSH, JJ.

(6) *Appeal, infructuous—Order—Execution appeal, filing of—Stay of execution—Civ. Pro. Code (1908), O. XLI, r. 5, sub-r. (2)—Court of appeal, duty of—Event, subsequent.*

An order was passed on the 26th April, 1915, by the primary Court, granting leave to the receiver to settle a claim of the estate against a certain person for certain sum. A letter was sent to the receiver on the 1st May by the appellant saying that she was going to appeal from the order and asking him not to take any steps in respect of that order until the appeal was filed. On the following day, the receiver replied that he could not wait indefinitely for the proposed appeal and would proceed to carry out the order, unless an order for stay was obtained from the Court of appeal. The appellant took no steps to file an appeal or to obtain an order for stay of proceedings. The receiver carried out the order, the settlement with the debtor was duly effected, and the deed of release in his favour was executed and registered on the 10th June 1915. The present appeal was thereafter lodged on the 23rd June, 1915:

Held, that the appeal had become infructuous by reason of the laches of the appellant.

Per Mookerjee, J.—That there was nothing to prevent the appellant from obtaining an order for stay, even before the appeal was actually lodged.

That it was incumbent upon a Court of appeal to take note of events subsequent to the order under appeal. *Rameswarl Chaudhurani v. K. B. Dutt*, 23 O.L.J. 310=33 Ind. Cas. 685.

SANDERSON, C.J., WOODROFFE and MOOKERJEE, JJ.

References:—6 O.L.J. 92; 6 O.L.J. 102; 20 O.L.J. 107, R.

(7) *Decree against principal and agent—Principal withdrawing from contest—Agent's right to appeal.*

In a suit against a Municipal Committee, the committee described themselves as mere trustees or agents on behalf of Government and thereupon the Government was also impleaded as a defendant and a decree was given in favour of plaintiff against both the defendants. The Government (principal) acquiesced in the decree. *Held*, that the Municipal Committee alone were not competent to appeal against the decree, when their principal (Government) had withdrawn from the contest. *Abdul Samad v. Municipal Committee, Delhi*, 26 P.R. 1916=159 P.W.R. 1916=34 Ind. Cas. 866.

BATTIGAN and LE ROSSIGNOL, JJ.

Appeal—(Continued).**—1.—General—(Continued).**

(8) *Jurisdiction—Joint value of land and other village immovable property exceeding Rs. 250—Whether a further appeal would lie, on the order of the trial Court being reversed by Divisional Judge.*

Plaintiff sued for possession of certain property consisting of land and village *manias*. The value of land for purposes of jurisdiction was Rs. 221-4-0 and of the *manias* Rs. 184-6-6, the combined value being thus Rs. 405-10 6.

Held, that a suit of this kind remains a land suit, and the question whether a further appeal lies depends on the merits from the jurisdictional point of view of the suit considered in its aspect as land suit, and isolated from the rest of the claim. *Held*, accordingly that no further appeal lay in this case. *Malik Azam v. Mian Muhammad Jan*, 3 P.W.R. 1916 (N.W.F.P.).

BARTON, J.C.

References:—100 P.L.R. 1904; C.A. No. 32 of 1914 (N.W.F.P.), R.

(9) *Shamlat—Condition to partition it according to Revenue shares—Hasab, Rasad Khewat—Contention that regard should be paid to the shares fixed in 1858 settlement and not those of 1892 found untenable—Appeal returned for want of jurisdiction—S. 5, Limitation Act (1908)—Death of some of the appellants before institution of appeal—Right of others to proceed with appeal.*

1. In the absence of any express provision to the contrary in the previous settlements, the condition of the last settlement that the *shamlat* is to be divided among the proprietary body according to the Revenue shares (*Hasab, Rasad Khewat*) should be followed, and regard is to be had to the shares fixed and recorded in the said settlement or at the time of partition; as it is inevitable that changes in the proportionate revenue should occur from time to time.

2. Where an appeal is returned though erroneously by an appellate Court on the ground that it has no jurisdiction to hear it and that it should be presented to another competent Court, its limitation can be extended under S. 5 of Act IX of 1908 if it has been re-presented with due diligence.

3. Where some of the appellants who were included in the appeal had died before its institution, the appeal can proceed if the remaining appellants are competent to appeal on ground common to all of them. *Nawab v. Muhammad Hayat*, 29 P.W.R. 1916=33 Ind. Cas. 1006.

SHADI LAL and LESLIE JONES, JJ.

(10) *Stamp not obtainable on last day—Next day a holiday—Appeal filed on third day whether in time—Delay of two days—S. 5, Limitation Act (1908).*

Where the appellant filed an affidavit in the appellate Court stating that he could not get a stamp on the last day for filing his appeal, and the next day was a holiday, *held* that the delay of two days in filing the appeal ought to have been excused under S. 5, Limitation Act,

Appeal—(Continued).**—1.—General—(Continued).**

and the appeal was in time. **Maharajah Kesho Prasad Singh Bahadur v. Harbans Raut**, 1 Pat. L.J. 163.

MULLICK, J.

Reference :—3 C.W.N. 55, R.

- (11) *Rent suit not exceeding Rs. 100 in value—Decree, execution of—Order passed in execution proceedings by the District Judge, if appealable—Bengal Tenancy Act (VIII of 1885), S. 153.*

No appeal lies to the High Court against an order passed by a District Judge in execution of a decree passed in a suit instituted by a landlord for the recovery of rent, where the amount claimed in the suit did not exceed one hundred rupees, and the order did not decide any of the special questions referred to in S. 153 of the Bengal Tenancy Act (a). **Prafulla v. Nosalbanessa**, 24 C.L.J. 331 (S.B.).

SANDERSON, C.J., MOOKERJEE, CHITTY, FLETCHER, TEUNON, CHAUDHURI and WALMSLEY, JJ.

Reference :—(a) 27 C. 484, Appr.

- (12) *Presentation of—On last day of limitation—Negligence—Inability to get stamps—Unforeseen contingency—If proper ground for extension of time—Limitation Act, S. 5.*

Inability to get stamps, on the last day allowed by law for instituting a suit, is not one of the conditions under which the time allowed by the Limitation Law can be extended (a).

An appellant, who wilfully leaves the preparation and presentation of his appeal to the last day of the period of limitation prescribed therefor is guilty of negligence, and is not entitled to an extension of time, if some unexpected or unforeseen contingency prevents him from filing the appeal within time.

S. 5, Indian Limitation Act, 1908, was not provided to encourage negligence, procrastination and laxity (b). **Kedarnath v. Zumberlal**, 12 N.L.R. 171.

STANYON, A.J.C.

References :—(a) (1880) Digest of Civil Rulings of the Court of the J.C., O.P., Part IV, Ruling No. (9), F. (b) 5 N.L.R. 25, F.

- (13) *Grounds of appeal—Argument by appellant differing from grounds.*

Where an allegation as to the production of a document in the lower Court was not made in the grounds of appeal, the appellant could not be permitted to go beyond his grounds and change his story at the time of arguing the appeal. **Muhammad Khan v. Bechan Khan**, 30 Ind. Cas. 374.

HOLMS, J.M.

- (14) *Court-fee—Payment on valuation by lower Court.*

* The Court-fee payable for an appeal must be calculated upon the valuation of the subject-matter of the suit arrived at by the lower Court. **Surendra Narain Sinha v. Hufjur Rahaman**, 13 Ind. Cas. 379.

SHARFUDDIN and MULLICK, JJ.

Appeal—(Continued).**—1.—General—(Continued).**

- (15) *Order refusing to appoint receiver—Appealable order—Civ. Pro. Code (Act V of 1908), O. XL, r. 1.*

An order refusing to appoint a Receiver during the pendency of a suit is appealable. **Muni Lal v. Jagannath**, 33 Ind. Cas. 735.

PIGGOTT and WALSH, JJ.

Reference :—17 C. 680 ; 31 C. 495, F.

- (16) *Final decree passed before filing appeal against preliminary decree—Preliminary decree, whether appealable. Sadhu Charan Datt v. Hara Nath Datta*, 27 Ind. Cas. 135=20 C.W.N. 231. See Final Part, 1915, Col. 284.

- (17) *Appeal—Suit for partition—Preliminary decree, appeal against, competency of—Final decree pending appeal—Civ. Pro. Code (1908), S. 97. Atul Chandra Singh v. Kunja Behari Singha*, 22 C.L.J. 90=30 Ind. Cas. 321. See Final Part, 1915, Col. 284.

- (18) *Memo. of objections—Appeal out of time—Right to hear memo. Bidadugadda Yenkada v. Receiver of Nidadavole*, (1915) M.W.N. 792=30 Ind. Cas. 832. See Final Part, 1915, Col. 285.

- (19) *Discretion—Decree payable by instalments—Dates fixed for payment of instalments—Date varied by Order of Court of appeal as regards some instalments—Court refusing to extend time for payment of further instalments—Appeal. Ahmed Musaji Saleji v. Mamooji Musaji*, 22 C.L.J. 293=31 Ind. Cas. 315. See Final Part, 1915, Col. 285.

- (20) *Death of one of the respondents pending appeal—Right of respondents' joint—Representative not brought on record in time—Abatement of whole suit—Ignorance of law no excuse. See ABATEMENT, No. 1, 3 P.R. 1916.*

- (20-a) *Adverse order against creditor—Right of creditor to, against order. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 61, 36 Ind. Cas. 771.*

- (21) *Decision of Subordinate Judge on the Small Cause side—Revision—Procedure. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 55, 31 Ind. Cas. 15=5 L.W. 220.*

- (22) *Insolvency—Absence of available assets no ground either for refusing or annulling adjudication—Appeal. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 51, 171 P.W.R. 1916.*

- (23) *Order under S. 43 (2) and S. 46 (2), (3), Provincial Insolvency Act—Appeal. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 57, 23 C.L.J. 553.*

- (24) *Proceedings in Insolvency—Release of property seized as that of the insolvent—, from order of release—Need for leave of Court—Practice. See ACT III OF 1907 (PROVINCIAL INSOLVENCY). No. 19, 33 Ind. Cas. 773.*

- (25) *Decision on question of amount of rent payable. See BEN. ACT VIII OF 1669 (LANDLORD AND TENANT PROCEDURE), Nos. 2 and 3, 30 Ind. Cas. 277.*

Appeal—(Continued).**—1.—General—(Continued).**

(36) Right to enhance or vary rent—Determination of amount of rent. See BEN. ACT VIII OF 1869 LANDLORD AND TENANT PROCEDURE), Nos. 2 and 3, 30 Ind. Cas. 277.

(37) Basis of enhancement of rent discussed—Decree of special Judge determining amount of enhancement. See BEN. ACT VIII OF 1885 (TENANCY), No. 22, 1 Pat. L.J. 409.

(38) Concurrent findings of fact of Courts below, dismissal of appeal for. See BEN. ACT VIII OF 1885 (TENANCY), No. 67, 20 C.W. N. 1352.

(39) Order of remand—Whether maintainable. See BEN. ACT VIII OF 1885 (TENANCY), No. 69, 34 Ind. Cas. 301.

(30) Question of abatement of rent, decision regarding. See BEN. ACT VIII OF 1885 (TENANCY), No. 68, 34 Ind. Cas. 851.

(31) Against decree not substantially altered by amendment—Limitation. See BUR. ACT VI OF 1900 (LOWER BURMA COURTS), No. 1, 35 Ind. Cas. 347.

(32) See C. P. ACT XVIII OF 1881 (LAND REVENUE), No. 4, 1 Pat. L.J. 290.

(33) Commutation suit—No definite order for commutation—No appeal and second, where no decree was passed. See MAD. ACT I OF 1908 (ESTATES LAND), No. 27, 34 Ind. Cas. 460.

(34) Resumption suit — *Ex-parte* decree, order setting aside—If appealable. See OUDH ACT XXII OF 1886 (RENT), No. 33, 34 Ind. Cas. 702.

(35) Judgment disposing of the, very short, not giving the facts is defective and good ground for revision—No finding on the pleas of the defendant—Judgment based on far-fetched theories. See PUN. ACT XVI OF 1887 (TENANCY), No. 18, 4 P.W.R. 1916 (Rev.).

(36 & 37) See U.P. ACT II OF 1901 (AGRA TENANCY), No. 52, 35 Ind. Cas. 105.

(38) In ejectment suit, question of proprietary title when arises. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 51, 31 Ind. Cas. 853.

(39) Review rejected—Civ. Pro. Code (1908), O. XLVII, r. 7. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 49, 31 Ind. Cas. 912.

(40) Suit for ejectment—Defendant pleading that he holds as tenant from a third person—Question of proprietary title—Appeal—Jurisdiction. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 33, 14 A.L.J. 666.

(41) Suit for ejectment—Proprietary title—Acquiescence. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 50, 31 Ind. Cas. 857.

(42) Suit for rent—Second appeal to District Judge—Order of remand—No appeal to High Court. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 53, 14 A.L.J. 84.

(43) See U.P. ACT III OF 1901 (LAND REVENUE), No. 16, 33 Ind. Cas. 262.

Appeal—(Continued).**—1.—General—(Continued).**

(44) First appeal how differs from a revision or a second appeal. See APPEAL (SECOND APPEAL), No. 1, 28 P.W.R. 1916.

(45) Decree based on invalid award—No appeal. See ARBITRATION, No. 5, 1 Pat. L.J. 306.

(46) Review—Objection not taken in original Court—Invalidity of arbitrator's appointment—Objection disallowed on appeal—Order on review allowing the objection—Appeal—Whether lies. See ARBITRATION, No. 4, 115 P.R. 1916.

(47) Award becoming null—Decree in accordance with award—Appeal, whether lies. See AWARD, No. 2, 11 P.W.R. 1916.

(48) Order recording award—No appeal lies. See AWARD, No. 6, 1 Pat. L.J. 90.

(49) Order rejecting award for misconduct—Appeal. See AWARD, No. 9, 107 P.W.R. 1916.

(50) New plea not to be raised in appeal inconsistent with the original plea in lower Court. See BUDDHIST LAW (PARTITION), No. 1, 9 Bur. L.T. 63.

(51) See CIV. PRO. CODE (1908), No. 689, 31 M.L.J. 827.

(52) See CIV. PRO. CODE (1908), No. 709, 31 M.L.J. 509.

(53) See CIV. PRO. CODE (1908), No. 100, 33 Ind. Cas. 71.

(54) See CIV. PRO. CODE (1908), No. 5, 35 Ind. Cas. 65.

(55) Additional evidence in—Admissibility of. See CIV. PRO. CODE (1908), No. 665, 1 Pat. L.J. 435.

(56) Adjudication directing abatement of suit on account of plaintiff's death, whether decrees. See CIV. PRO. CODE (1908), No. 6, 111 P.W.R. 1916.

(57) Appeal Court if may remand cases otherwise than under O. LXI, rr. 23 and 25—Addition of parties on appeal and amendment of plaint if justify remand. See CIV. PRO. CODE (1908), No. 210, 20 C.W.N. 547.

(58) Appeal, memorandum of—Not stamped—Presentation along with application for leave to appeal as pauper—Later application dismissed—Time given for payment of Court-fee on appeal memo—Court-fee paid within time—Effect—No bar of limitation—Power of Court to grant time. See CIV. PRO. CODE (1908), No. 690, 31 M.L.J. 269.

(59) Appellate Court—Admission of new evidence—No application made—No reasons recorded—Legality. See CIV. PRO. CODE (1908), No. 664, 3 L.W. 163.

(59-a) Application for restoration of appeal rejected—Review—Order refusing to set aside order rejecting appeal—Review rejected—Revision. See CIV. PRO. CODE (1908), No. 257-a, 34 Ind. Cas. 86.

(60) Application for review after filing of appeal. See CIV. PRO. CODE (1908), No. 700, 35 Ind. Cas. 867.

Appeal—(Continued).**—1.—General—(Continued).**

(61) Application to set aside sale in execution—Dismissal for default—Application for restoration rejected—Order if appealable. See CIV. PRO. CODE (1908), No. 380, 20 C.W.N. 1208.

(61-a) Application to set aside *ex parte* decree—Dismissal of application for default. See CIV. PRO. CODE (1908), No. 388, 36 Ind. Cas. 798.

(61-b) Application to set aside sale—Non-payment by judgment-debtor within time agreed upon—Power of Court to extend time. See CIV. PRO. CODE (1908), No. 512, 36 Ind. Cas. 809.

(62) Arbitration—Award—Decree—Revision. See CIV. PRO. CODE (1908), No. 728, 35 Ind. Cas. 914.

(63) Assignee's application for execution opposed by attaching creditor of decree—Matter if appealable. See CIV. PRO. CODE (1908), No. 117, 20 C.W.N. 679.

(64) *See* 55, 47, 145, 115, Civ. Pro. Code—Judgment-debtor released on security in order to enable him to apply to be adjudged insolvent—Failure of judgment-debtor to so apply—Application by decree-holder to forfeit security bond refused—Appeal whether lies—Revision. See CIV. PRO. CODE (1908), No. 130, U.B.R. (1916), 1st Qr., 103.

(65) Civ. Pro. Code, S. 96 (2), O. XLI, r. 27—Construction—*Ex parte* decree—Appeal—Power of appellate Court to direct production of additional evidence wrongly excluded by lower Court. See CIV. PRO. CODE (1908), No. 184, 9 S.L.R. 191.

(66) Civ. Pro. Code, O. XLI, rr. 4 and 33—Scope—Powers of Court—Appeal by one of two defendants—Grounds common to all the defendants—Effect against the other defendants. See CIV. PRO. CODE (1908), No. 642, 1 Pat. L.J. 143.

(67) Consent decree under O. XXIII, r. (3), Civ. Pro. Code, when may be passed—Compromise not recorded—Effect—Appeal. See CIV. PRO. CODE (1908), No. 569, 43 C. 85.

(68) Contents of judgment—Duty of appellate Court. See CIV. PRO. CODE (1908), No. 671, 9 Bur. L.T. 59.

(69) Contract of sale—Suit for specific performance—Time fixed for payment of the price—Appeal—Decree of first Court confirmed—Subsequent application to appellate Court to extend time for payment of price—Power of appellate Court. See CIV. PRO. CODE (1908), No. 294, 3 L.W. 29.

(70) Death of respondent—Application to substitute heirs after six months—Ignorance of death—Whether 'sufficient cause'. See CIV. PRO. CODE (1908), No. 544, 118 P.R. 1916.

(71) Decision on question as to legality of arrest, whether a "decree"—Appeal. See CIV. PRO. CODE (1908), No. 1-a, 3 L.W. 35.

(72) Decree based on arbitration award, from, and revision of. See CIV. PRO. CODE (1908), No. 259, 31 Ind. Cas. 458.

'Appeal—(Continued).**—1.—General—(Continued).**

(73) Decree *ex parte*—Application for rehearing rejected—No appeal preferred—Appeal against decree. See CIV. PRO. CODE (1908), No. 390, 14 A.L.J. 1226.

(74) Dismissal of, against both sets of defendants, discretion regarding. See CIV. PRO. CODE (1908), No. 641, 31 Ind. Cas. 886.

(75) Dismissal of application for attachment before judgment on defendant showing cause—Appeal whether lies. See CIV. PRO. CODE (1908), No. 623, 23 C.L.J. 392.

(76) Duty of appellate Court to consider grounds of appeal and write a full judgment—Nature of discretion given by O. XLI, r. 11. See CIV. PRO. CODE (1909), No. 647, U.B.R. (1915), 4th Qr., p. 92.

(77) Evidence, admission of, in—Discretion. See CIV. PRO. CODE (1908), No. 667, 31 Ind. Cas. 873.

(78) Execution sale—Objection by judgment-debtor and by third party—Order—Appealability. See CIV. PRO. CODE (1908), No. 113, 31 Ind. Cas. 102.

(79) Execution sale set aside—Order to refund purchase-money to purchaser—Appealability—Conversion of civil miscellaneous appeal into a revision petition—Practice. See CIV. PRO. CODE (1908), No. 97, 3 L.W. 105.

(80) *Ex parte* decree—Order setting aside—Appealability. See CIV. PRO. CODE (1908), No. 204, 34 Ind. Cas. 713.

(81) Judgment of appellate Court not dealing with a point of limitation—Whether a material irregularity—Revision. See CIV. PRO. CODE (1908), No. 229, 3 L.W. 176.

(82) Legal representative brought on record after death of judgment-debtor setting up title of third person—Order, appealability of. See CIV. PRO. CODE (1908), No. 102, 31 Ind. Cas. 393.

(83) Money-decrees against the same judgment-debtor in two suits by two separate creditors—Execution sale in one suit and attachment of immoveable properties in the second—Auction-purchaser in the first suit claiming properties attached in second suit—Purchaser whether legal representative of judgment-debtor—Appeal—Second appeal. See CIV. PRO. CODE (1908), No. 87, 3 L.W. 377.

(84) No appeal from orders under O. XXI, r. 66 (4), Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 206, 3 L.B.R. 350.

(84-a) Omission to specify date of hearing in notice of appeal—*Ex parte* decrees—Right of rehearing. See CIV. PRO. CODE (1908), No. 649, 36 Ind. Cas. 624.

(85) Order granting review whether appealable. See CIV. PRO. CODE (1908), No. 688, 1 Pat. L.J. 193.

(86) Order granting review whether appealable. See CIV. PRO. CODE (1908), No. 702, 48 P.W.R. 1916.

Appeal—(Continued).**—1.—General—(Continued).**

(87) Order of abatement—Whether decree—Appeal. See CIV. PRO. CODE (1908), No. 3, 14 A.L.J. 8.

(88) Order of remand—Suit of Small Cause nature—, from order. See CIV. PRO. CODE (1908), No. 198, 36 Ind. Cas. 396.

(89) Order overruling preliminary objection against maintainability of suit—Not a decree—No appeal lies. See CIV. PRO. CODE (1908), No. 2, 8 L.B.R. 213.

(90) Order refusing to set aside *ex parte* decree—Appeal—Sufficiency of substituted service. See CIV. PRO. CODE (1908), No. 349, 20 C.W.N. 178.

(91) Order setting aside *ex parte* decree—Whether appeal lies. See CIV. PRO. CODE (1908), No. 208, 40 P.R. 1916.

(92) Pendency of, against an order refusing to set aside *ex parte* decree—Stay of proceedings in execution—Discretion of Court. See CIV. PRO. CODE (1908), No. 498, 35 Ind. Cas. 448.

(93) Power of appellate Court to expunge remarks. See CIV. PRO. CODE (1908), No. 51, 8 L.W. 289.

(94) Powers of Courts in striking off and adding parties—Dismissing suit for non-prosecution, when plaintiffs compromise with only some of the defendants—Court if bound to pass a decree embodying the terms of the compromise under O. XXIII, r. 3—Appeal if lies, when no decree passed—Alternative remedy by way of revision if lies. See CIV. PRO. CODE (1908), No. 254, 20 C.W.N. 754.

(95) Preliminary decree—Final decree—Appeal against preliminary decree only although final decree could be appealed against in time—Avoidance of payment of Court-fees—Effect. See CIV. PRO. CODE (1908), No. 185, 18 Bom. L.R. 76.

(96) Preliminary decree—Final decree—Combined, against both—Legality. See CIV. PRO. CODE (1908), No. 186, 33 Ind. Cas. 137.

(97) Proceedings in connection with sale proclamation—Objections of judgment-debtor rejected—Question whether market value of property is correct relates to execution—Appeal. See CIV. PRO. CODE (1908), No. 104, 14 A.L.J. 363.

(98) Remand by appellate Court for framing new issues and fresh decision—Remand order whether valid—Power of appellate Court. See CIV. PRO. CODE (1908), No. 654, 18 Bom. L.R. 27.

(99) Remand on preliminary point—Lower appellate Court—Powers of reversal and remand. See CIV. PRO. CODE (1908), No. 211, 43 C. 148.

(100) Suit by Hindu widow—Adoption pending suit—Widow allowed to prosecute suit, though divested, on strength of ante-adoption agreement—Order if appealable. See CIV. PRO. CODE (1908), No. 553, 20 C.W.N. 552.

Appeal—(Continued).**—1.—General—(Continued).**

(101) Suit dismissed for default of plaintiff—Summons not served—Appeal whether lies. See CIV. PRO. CODE (1908), No. 371, 14 A.L.J. 347.

(102) Suit for malicious prosecution against manager of joint Hindu family—Abatement—Cause of action—Survival—Legal representative applying for setting aside abatement—Refusal. See CIV. PRO. CODE (1908), No. 549, 31 Ind. Cas. 4.

(103) Suit for rent—Proceeding on. See CIV. PRO. CODE (1908), No. 16, 24 C.L.J. 514.

(104) Temporary injunction—Breach—Refusal to commit—Appeal. See CIV. PRO. CODE (1908), No. 630, 3 L.W. 430.

(105) Appeal against orders made in winding-up proceedings—Limitation—Extension of time—Principles—Special circumstances. See COMPANIES ACT (1882), No. 12, 5 P.W.R. 1916.

(106) Case under Companies Act—Refusal to adjudicate upon claim—Appeal—O. XXI, rr. 68, 63, Civ. Pro. Code. See COMPANIES ACT (1882), No. 13, 14 A.L.J. 722.

(107) Company wound up—Against order appointing official liquidator—Managing director, if competent to appeal on Company's behalf—Practice. See COMPANIES ACT (1882), No. 7, 4 L.W. 226.

(108) Rectification of Register—Power of Court—Director's power to refuse to register a share-holder—Courts power to interfere with the discretion—Appeal to High Court. See COMPANIES ACT (1913), No. 3, 18 Bom. L.R. 982.

(109) Appeal by defendant against decree of ejectment—Court in allowing appeal if may decree it in favour of non appealing defendants. See CONTRACT, No. 13, 30 C.W.N. 1054.

(110) One respondent if can urge cross-objections against another respondent. See CONTRACT, No. 2, 23 C.L.J. 26.

(111) Agency—Pleadings—Plea not raised in first Court or in, memo. See CONTRACT ACT, No. 35, 31 Ind. Cas. 632.

(112) Suit on joint promise against joint promissors—Dismissal—Death of one defendant pending appeal—Non-joinder of his representatives—Non-maintainability of appeal. See CONTRACT ACT, No. 45, 34 Ind. Cas. 138.

(113) Decree creating charge over property—Appeal—Prayer for releasing property from the charge—*Ad valorem* Court-fee payable. See COURT-FEES, No. 1, 11 P.R. 1916.

(114) Redemption of mortgage—Appeal from decree of lower Court—Stamp duty payable on memorandum of appeal. See COURT-FEES, No. 4, 30 Ind. Cas. 322.

(115) Case remanded on appeal as against some respondents—Refund of fee. See COURT FEES ACT, No. 16, 14 A.L.J. 671.

(116) Decree against a firm—Order refusing execution as against an alleged partner—Appeal—Court-fee. See COURT FEES ACT, No. 26, 8 L.B.R. 300.

Appeal—(Continued).**—1.—General—(Continued).**

(117) Suit for accounts—Preliminary decree—Appeal by defendant against the whole decree—Defendant whether bound by valuation in plaint. See COURT FEES ACT, No. 4, 30 M. L.J. 402.

(118) Pleadings—New defence whether can be raised in appeal. See CUSTOMS (PUNJAB—ADOPTION), No. 1, 8 P.W.R. 1916.

(119) See DAMAGES, SUIT FOR, No. 1, 20 M.L.T. 303.

(120) See EXECUTION OF DECREE, No. 14, U.B.R. (1916), 2nd Qr., p. 119.

(121) Execution of decree in suit valued at over Rs. 5,000 but decreed for less—Act XII of 1887. See EXECUTION OF DECREE, No. 24, 31 Ind. Cas. 496.

(122) Small Cause Court decrees—Transfer to Court of Munsif for execution—Order in execution—Appeal. See EXECUTION OF DECREE, No. 4, 14 A.L.J. 415.

(123) Small Cause suit—Execution on Small Cause side—Order—Appeal—Competency of revision when there is no appeal. See EXECUTION OF DECREE, No. 1, 3 L.W. 34.

(124) Execution sale—Purchase by decree-holder—Delivery of possession—Order whether appealable. See EXECUTION SALE, No. 4, 20 C.W.N. 829.

(125) Whether notice of appeal negatives *bona fides*. See EXECUTION SALE, No. 2, 30 M.L.J. 497.

(126) Decree—When decision becomes final—Appeal—Expiry of time for filing the same. See FINAL DECREE, No. 1, 34 Ind. Cas. 204.

(127) Order accepting security furnished by guardian whether appealable. See GUARDIANS AND WARDS ACT, No. 7, 30 M.L.J. 509.

(128) Objection to secondary evidence of registered will admitted without demur—Whether can be taken in. See HINDU-LAW (INHERITANCE), No. 5, 31 Ind. Cas. 600.

(129) Estate of Maharaja of Chota Nagpur—Custom of impartibility and primogeniture—Court of, duty of—Conclusion of fact by Trial Court. See IMPARTIBLE ESTATES, No. 1, 35 Ind. Cas. 394.

(130) Godowns necessary as residence for servants—Whether can be acquired—Order directing their acquisition whether appealable. See LAND ACQUISITION ACT (I OF 1894), No. 23, 43 C. 665.

(131) Order granting sanction. See LETTERS PATENT (ALLAHABAD), No. 1, 14 A.L.J. 1230.

(132) Judge on leave—Delivery of judgment—Dissenting judgments—Appeal. See LETTERS PATENT (CALCUTTA), No. 4, 23 C.L.J. 592.

(133) Order by Judge on the original side of the High Court refusing to restore case dismissed for default, if a judgment and if appealable. See LETTERS PATENT (CALCUTTA), No. 3, 20 C.W.N. 594.

Appeal—(Continued).**—1.—General—(Continued).**

(134) Appeal—Expiry of time on a holiday—Application to obtain copies of decrees, etc., after the holiday—Effect. See LIMITATION ACT (1908), No. 24, 55 P.W.R. 1916.

(135) Appeal filed out of time under advice of pleader—Pleader misled by change in law—Sufficient cause. See LIMITATION ACT (1908), No. 7, 37 P.W.R. 1916.

(136) Appeal—Time requisite for obtaining a copy of the decrees—Calculation—Portions of days whether can be taken into account. See LIMITATION ACT (1908), No. 42, 12 N.L.R. 66.

(137) Decree—Appeal against one portion or by one defendant, if saves limitation as regards the other portion or against other defendants—Rule, if different when the decree of First Court consists of two independent decrees—Limitation periods to be laid down with clearness and certainty—Subtle distinctions not to be introduced, if not warranted by language—Final decrees, if two, can exist—Imperilling decree, theory of, limitation, if can be made to depend on. See LIMITATION ACT (1908), No. 284, 3 L.W. 521.

(138) Exclusion of time requisite for obtaining copy of decree—Duty of appellant—Delay in preparing decree due to laches of the officers of Court—Effect—Court directing postponement of preparation of decree—Effect. See LIMITATION ACT (1908), No. 41, 9 S.L.R. 183.

(139) Letters Patent, cl. 10—Point not argued before single Judge if may be urged in. See LIMITATION ACT (1908), No. 25, 20 C.W.N. 1303.

(140) New case, if can be set up in. See LIMITATION ACT (1908), No. 242, 34 Ind. Cas. 897.

(141) Order of Munsif dated 8-6-1914—Appeal presented on 1-8-1914, whether barred. See LIMITATION ACT (1908), No. 8, 43 P.W. R. 1916.

(142) Power of appellate Court to transfer defendants to category of plaintiffs. See LIMITATION ACT (1908), No. 43, 20 C.W.N. 522.

(143) Presentation after time prescribed—Review of judgment—Time spent in application for—When may be deducted—'Sufficient Cause'. See LIMITATION ACT (1908), No. 13, 34 Ind. Cas. 44.

(144) Presentation of, beyond time—Death of defendant after argument but before judgment—Appeal by defendant's heirs after prescribed period—Sufficient cause. See LIMITATION ACT (1908), No. 10, 18 Bom. L.R. 751.

(145) Presentation of, to wrong Court—*Bona fide* mistake—Delay in filing appeal—Saving of limitation. See LIMITATION ACT (1908), No. 12, 30 Ind. Cas. 211.

(146) Sufficient cause under S. 5, Limitation Act—Discretion used by lower appellate Court—Not to be interfered with in second appeal—Law of appeal—Effect of change brought by

Appeal—(Continued).**—1.—General—(Continued).**

Punjab Courts Act (III of 1914). See LIMITATION ACT (1908), No. 26, 18 P.W.R. 1916.

(147) Time for—Extension of time—Amendment of decree—Whether time for appeal extended by such amendment. See LIMITATION ACT (1908), No. 11, 34 Ind. Cas. 556.

(148) Power of appellate Court to take cognizance of matters happening subsequent to the institution of the suit. See MORTGAGE (GENERAL), No. 9, 19 M.L.T. 360.

(149) Question of notice decided without an issue thereon—Objection, if can be raised in—Practice. See MORTGAGE (GENERAL), No. 26, 4 L.W. 502.

(150) Partition suit—Appeal against preliminary decree—Final decree passed pending such appeal—No appeal filed against final decree—Whether appeal against preliminary decree can proceed. See PARTITION, No. 5, 20 C.W.N. 1174.

(151) Disposal of, on ground not urged. See PRACTICE AND PROCEDURE, No. 9, 35 Ind. Cas. 638.

(152) Notification taking away right of pre-emption pending appeal against decree granting pre-emption—Decree-holder's right not affected. See PRE-EMPTION, No. 18, 130 P.R. 1916.

(153) Order refusing to remove a Receiver—Appeal if lies. See RECEIVER, No. 2, 23 C.L.J. 217.

(154) See RENT, No. 3, 1 Pat. L.J. 459.

(155) Judgment of lower Court whether operates as *res judicata* during pendency of appeal. See RES JUDICATA, No. 3, (1916) M.W.N. 223.

(156) S. 153, Bengal Tenancy Act—Question of title raised but not decided by Munsif exercising final jurisdiction—Appeal to District Judge if lies—District Judge deciding question of title in appeal—Second appeal if lies. See REVIEW, No. 3, 20 C.W.N. 967.

(157) Decrees of the appellate Court, effect of—Appeal by some of the parties, effect of. See REVIEW, No. 4, 24 C.L.J. 517.

(158) Letters Patent appeal—Review of judgment if competent. See REVIEW, No. 1, 3 L.W. 172.

(158-a) Amendment of decree pending. See RULES OF PRACTICE, No. 1, 32 Ind. Cas. 194.

(159) Small Cause Court suit tried on original side—, to District Judge—Jurisdiction—High Court to set aside decree. See SETTING ASIDE DECREE, No. 1, 14 A.L.J. 984.

(160) See SETTING ASIDE SALE, No. 2, 33 Ind. Cas. 574.

(161) Document not stamped or insufficiently stamped admitted in evidence—Duty of appellate Court. See STAMP ACT (1899), No. 13, 8 Bur. L.T. 290.

(162) Mortgage—Preliminary decree—Decree absolute for sale—First decree not appealed

Appeal—(Continued).**—1.—General—(Concluded).**

from—First decree cannot be attacked in appeal against the second. See TRANSFER OF PROPERTY ACT, No. 119, 18 Bom. L.R. 38.

—2.—Second Appeal.

(1) *Second appeal—Defective finding a good ground—Phrases leading to such conclusions—Second appeal and duty of the Judge of the appellate Court explained—Jurisdictional value of two reliefs for restitution of conjugal rights and injunction—Chadar andazi with brother-in-law among Jats—Decree for conjugal rights discretionary—Suits Valuation Rates—S. 41 of Act III of 1914.*

1. The jurisdictional value of the following two reliefs combined does not exceed of Rs. 1,000.

(a) The restitution of conjugal rights.

(b) An injunction restraining any relative or other person connected with a woman, from preventing the re-union of the alleged husband and wife.

2. A finding of fact is liable to be set aside even in second appeal, where it is difficult to ascertain from the judgment of the lower appellate Court, whether its Judge has applied his mind to a proper consideration, and what his real opinion is of the value, of the evidence in the case.

Phrases like the following lead to this conclusion.

(a) "I do not think that any very cogent reason for thinking the lower Court wrong has been adduced."

(b) "I have simply to say that I think that the finding of the *Munsif* and Commissioner that the *Karewa* took place must finally prevail."

(c) "I can here but repeat that the impression left by the evidence is of an actual occurrence."

(d) "Simply the lower Court which had the witnesses before it believed them to be speaking the truth."

3. A first appeal differs from a revision and a second appeal in this important respect, that appellant has a right to ask that the appellate Court shall read and appraise the evidence in the case and shall come to its own finding on that evidence on the points in issue.

The appellate Court is not doing its duty if, instead of fortifying its independent opinion based on the evidence with the conclusions of the first Court, it merely shelters itself behind the decision arrived at by that first Court.

4. Where, as in this case, the liberty of a woman is at stake and the idea of the people of her class is that a brother's widow is regarded as a chattel to be inherited on a *par* with the other property of her deceased husband, a decree for conjugal rights is not justifiable when the evidence is not sufficiently strong in support of the claim.

5. The restitution of conjugal rights is a matter entirely within the discretion of the Courts. Therefore the husband's claim should

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

not be decreed where a widow, who may have been surprised into a *chadar andasi* ceremony with her brother-in-law, without delay repudiates the relationship and goes off to her own family. *Mussammât Bhanî v. Bansî*, 28 P.W.R. 1916=38 Ind. Cas. 1002.

LE ROSSIGNOL, J.

- (3) *Question whether parties follow Muhammadan Law or custom, one of fact—Appeal, whether maintainable.*

Held, that the question whether the parties to a case follow Muhammadan Law or custom is a question of fact and cannot be agitated in second appeal. Therefore, is the absence of a certificate under S. 41 (3) of the Punjab Courts Act (III of 1914), the Chief Court cannot even go into this abstract question. *Ishî Baksh v. Rahim Baksh*, 106 P.W.R. 1916=34 Ind. Cas. 219.

JOHNSTONE, C.J. and CHEVIS, J.

References:—31 A. 557 at p. 570 (P.C.)=10 C.L.J. 297=11 Bom. L.R. 1210=14 C.W.N. 59=36 I.A. 210=4 Ind. Cas. 457, F.

- (3) *Civ. Pro. Code (1882), S. 584—Second appeal—High Court, if may remit case for re-hearing on a new case not raised in the pleadings, when decree as made correct on the issues raised and decided—Procedure, if competent, to be adopted in exceptional cases—Surprise, discovery of new facts—Costs, partly at whose instance new issues raised to pay costs—Suit to eject "Paik" from tenure held for service—Chowkidari chakran—Police duties performed under supervision of Government—Control of Government over private chakran, if exists.*

In 1801, the predecessor of the plaintiff executed a *kabulyat* in favour of Government in respect of a newly-settled Pargunnah, under which the proprietor of the Pargunnah was bound "to maintain and keep the same Sardars and Paiks who had all along existed in the Pargunnah and to carry out whatever order might be passed by the Magistrate on the Paiks, and was precluded from dismissing the Sardars or Paiks, and bound to depute the Paiks to watch and take care of the boundaries of the Pargunnah, and see that no theft or dacoity and no riot occurred anywhere." The plaintiff's suit to eject a Paik was opposed by Government, which relying only on the *kabulyat* urged that the Paik in question was one whose tenure services involved the performance of police duties, whilst the plaintiff urged that he held on tenure services personal to himself and having no connection with the local police. The Subordinate Judge, the District Judge and the High Court all agreed in upholding this contention, but whilst the two former upon that finding decreed the suit, the High Court in second appeal permitted the Government to raise a fresh issue, viz., whether the lands comprised in the jaghir in question were *Chowkidari Chakran* lands, that is, lands which at or before the settlement

'Appeal—(Continued).**—3.—Second Appeal—(Continued).**

had been appropriated or assigned for the maintenance of the police force, and by reason of such appropriation excluded from the Zemindari assessment (*vide* Regs. I of 1793 and XIII of 1805), discharged the decree of the District Judge and remitted the action for rehearing—ordering at the same time that all the costs already incurred would abide the result of the rehearing:

Held—That the Government ought not to have been allowed to raise a new issue not raised in the pleadings, although they appeared to have had full knowledge of it when they preferred their defence; and that therefore the order of High Court should be discharged and the decree of the District Judge restored.

That even if it was competent to the High Court to remit a case for hearing on an issue not raised by the defendant in the pleadings or suggested in the lower Courts, this might be done only in exceptional cases for good cause shown and on payment of all costs thrown away.

That in this case the Government had shown no ground whatever for the indulgence they claimed, as they did not suggest that they had been in any way taken by surprise or had discovered fresh facts of which they were unaware when the case was before the lower Courts.

That the order that all costs already incurred should abide the result of the rehearing was bad, inasmuch as the plaintiff if he had failed on a new case raised by the defendants for the first time in second appeal, would have to pay the whole costs of the issues on which he had succeeded in the two Courts below. *Maharajah Sri Ram Chandra Banji Deo v. The Secretary of State*, 20 C.W.N. 1245=24 C.L.J. 296=31 M.L.J. 745=18 Bom. L.R. 838=14 A.L.J. 1009=4 L.W. 251=20 M.L.T. 235=(1916) 2 M.W.N. 175=43 C. 1104 (P.C.).

LORD ATKINSON, LORD PARKER OF WADDINGTON, SIR JOHN EDGE and MR. AMMER ALI.

- (4) *Misreading of evidence whether ground for second appeal.*

Misreading of evidence affords sufficient reason for the Chief Court to interfere on second appeal. *Jowala Singh v. Lakha Singh*, 81 P. R. 1916=126 P.W.R. 1916=89 P.L.R. 1917=35 Ind. Cas. 892.

JOHNSTONE, C.J.

- (5) *Document—Question involving interpretation of—When question of law—Bare question of fact—No second appeal—Punjab Courts Act III of 1914, S. 41 (1).*

Where the only question to be decided in a case is 'whether the donor made a gift of *shamilat patti* to D or not?' the mere circumstance that, in deciding the question, one has to interpret a document, will not alter the question into one of law. The question in such a case is one of fact and no second appeal lies.

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

As to when a question involving construction of a document is one of law, discussed. *Diwan Chand v. Sundar*, 68 P.R. 1916=36 Ind. Cas. 199.

JOHNSTONE, C.J.

- (6) *Construction of deed whether a document is deed of mortgage or sale—Whether it is a ground of second appeal—Finding that a certain amount of the consideration money was returned after—Registration is question of fact—S. 41 of the Punjab Courts Act III of 1914.*

Held, that:—

A finding whether a certain document is a deed of mortgage or sale based simply on the construction of the deed is a good ground for a second appeal.

But such a finding cannot be disturbed in second appeal if it is based on the construction of deed combined with the surrounding circumstances and other evidence. *Ahmad Khan v. Alam Khan*, 115 P.W.R. 1916=120 P.L.R. 1916.

JOHNSTONE, C.J.

*References:—*16 C.W.N. 1033; C.A. 163 of 1896 decided on the 11th May, 1897, by Mr. Justice Chatterjee and Mr. Justice Clark; 36 P.R. 1909; 16 P.R. 1907=127 P.W.R. 1907; 68 P.R. 1916; 14 Ind. Cas. 391=190 P.W.R. 1913.

- (7) *Raising mixed question of law and fact—Second appeal.*

Where a mixed question of law and fact was not challenged in the lower appellate Court the Chief Court would not allow the same point to be raised again in second appeal. *Gehimal v. Karmulal*, 10 S.L.R. 89=35 Ind. Cas. 561.

PRATT, J.O. and CROUCH, A.J.C.

- (8) *No definite finding by first Court on issue of fact—Definite finding by first appellate Court—Effect of such finding in second appeal.*

Where the Court of first instance came to no definite finding upon a particular issue of fact and the first appellate Court, after the examination of the evidence, came to a definite conclusion on that question of fact, the second appellate Court was concluded by the finding of the lower Court. *Tilak Ram v. Sita Ram*, 80 Ind. Cas. 503.

LINDSAY, J.O.

- (9) *Suit to set aside agreement—Document, admitted in Court of first instance without objection—Question of admissibility—Not to be raised in second appeal.*

Where in a suit to set aside an agreement, the plaintiff herself came into Court mentioning the agreement and alleging that it was not binding upon her because it was brought about by fraud and the documents were all admitted in the Court of first instance without objection on the part of the plaintiff.

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

Held that the plaintiff cannot in second appeal question as to the admissibility of documents which were received in evidence by the Court below. *Musammatt Kirpla v. Hardeo*, 34 Ind. Cas. 57.

RICHARDS, C.J., TUDBALL and WALSH, JJ.

- (10) *Right to question finding of fact—Finding not supported by evidence on record.*

In a second appeal a finding on a question of fact may be made a ground of appeal, if there is no evidence to support the finding. *Sarfara v. Babu Ram Pande*, 80 Ind. Cas. 375.

HOLMS, J.M.

- (11) *Finding of fact—Absence of definite finding by lower Court—No evidence to support finding.*

Where the Court of first instance came to no definite finding on a point of fact and there was no evidence to support any such finding, the second appellate Court can interfere with a finding of fact upheld by the lower appellate Court. *Beehu Singh v. Beni Singh*, 80 Ind. Cas. 380.

HOLMS, J.M.

- (12) *Appeal (Second appeal), amendment of plaint n.*

A suit to set aside a decree as based on fraud having been dismissed by the lower appellate Court for the reason that no fraud was committed by the defendant but that errors in the decree were due to mistakes of all parties, it would be straining the law a bit if the High Court were to allow the plaintiff to amend the plaint in second appeal and litigate the suit as a suit for rectification of a decree founded on mistake. *Shyama Sundari Ghose v. Aswini Kumar Chakravarti*, 35 Ind. Cas. 91.

CHATTERJEE and NEWBOULD, JJ.

- (12-a) *Order under O. XXI, r. 89, Civ. Pro. Code, appealability of.*

Where an order is made under O. XXI, r. 89, Civ. Pro. Code, there is only a first appeal to the District Judge and no further appeal lies to the High Court. *Moulvi Salyid Razid-din Hossain v. Bendeshri Prasad Singh*, 36 Ind. Cas. 769.

MULLICK, J.

- (13) *Appellate Court not omitting to consider evidence on record—S. 41 of Act III of 1914. Musammatt Sharaf Noor v. Ahmad*, 97 P.W.R. 1915=240 P.L.R. 1916=80 Ind. Cas. 505. See Final Part, 1915, Col. 303.

- (14) *Suit for rent or in the alternative for damages—Amount claimed less than Rs. 100—Bengal Tenancy Act, S. 153—Civ. Pro. Code (1908), S. 102, 115—Error in law. Mohim Chunder Pal Chowdhry v. Mirza Ahmad Ali Khan*, 22 C.L.J. 564=38 Ind. Cas. 346. See Final Part, 1915, Col. 303.

- (15) *Finding of fact—Adverse possession—Abandonment of land—Misunderstanding of facts—Interference in second appeal. See ABANDONMENT, No. 1, 99 P.L.R. 1916.*

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

(16) Rights of fishery—Small Cause suit—Second appeal. See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 28, 31 Ind. Cas. 797.

(17) Suit for enhanced Kattubadi—Second appeal. See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURT), No. 22, 31 Ind. Cas. 871.

(17-a) See BEN. ACT VIII OF 1885 (BENGAL TENANCY), No. 44 a, 32 Ind. Cas. 355.

(18) No appeal maintainable from primary Court to first appellate Court—No second appeal from latter Court to High Court. See BEN. ACT VIII OF 1885 (BENGAL TENANCY), No. 72, 23 C.L.J. 235.

(19) Proceedings under S. 105, Bengal Tenancy Act—Order of settlement officer—Decision of special Judge in appeal—Second appeal if lies to High Court. See BEN. ACT VIII OF 1885 (BENGAL TENANCY), No. 58, 20 C.W.N. 428.

(20) Rent suit valued at less than Rs. 100—Tenant allowed *masi*—Whether second appeal lies by landlord. See BEN. ACT VIII OF 1885 (BENGAL TENANCY), No. 66, 20 C.W.N. 1207.

(21) Rent suit, valued below Rs. 100—Whether, lies. See BEN. ACT VIII OF 1885 (BENGAL TENANCY), No. 67, 20 C.W.N. 1352.

(22) Suit claiming rent and damages for breach of contract—Second appeal. See BEN. ACT VIII OF 1885 (BENGAL TENANCY), No. 65, 23 C.L.J. 557.

(22-a) Suit for rent—Conflicting claims to landlord's right—Second appeal. See BEN. ACT VIII OF 1885 (BENGAL TENANCY), No. 69-a, 32 Ind. Cas. 695.

(23) Insufficiency or invalidity of notice, if can be pleaded for the first time in. See MAD. ACT I OF 1908 (MADRAS ESTATES LAND), No. 20, 4 L.W. 163.

(24) Question whether Municipal Committee acted *bona fide* or not—Question of fact. See PUN. ACT III OF 1911 (MUNICIPAL), No. 4, 75 P.R. 1916.

(25) Error in weighing evidence—No ground for second appeal. See PUN. ACT III OF 1914 (PUNJAB COURTS), No. 12, 72 P.R. 1916.

(26) See AMENDMENT OF PLAINT, No. 2, 30 Ind. Cas. 387.

(27) See CIV. PRO. CODE (1908), No. 189, 118 P.L.R. 1916.

(28) See CIV. PRO. CODE (1908), No. 699, 156 P.L.R. 1916.

(29) See CIV. PRO. CODE (1908), No. 195, 34 Ind. Cas. 909.

(30) Case closed—Application for adjournment for producing further evidence refused—Second appeal whether competent. See CIV. PRO. CODE (1908), No. 396, 91 P.L.R. 1916.

(31) Finding of fact binding in. See CIV. PRO. CODE (1908), No. 192, 14 A.L.J. 1066.

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

(32) Findings of fact—Duty of Chief Court—Conclusions of lower appellate Court not to be disturbed if not perverse. See CIV. PRO. CODE (1908), No. 56, 112 P.R. 1916.

(33) Insolvency—Sale after adjudication—Receiver not a party—Application to set aside the sale—Applicability of S. 47, Civ. Pro. Code—Second appeal. See CIV. PRO. CODE (1908), No. 107, 19 M.L.T. 357.

(34) Judgment of appellate Court, contents of—Second appeal, grounds of—Findings of fact—Consideration of evidence on record—Disposal of all grounds of appeal. See CIV. PRO. CODE (1908), No. 672, 108 P.L.R. 1916.

(35) Practice—Taking up big original suits after 5-30 P.M.—Prejudice—Interference in second appeal. See CIV. PRO. CODE (1908), No. 191, 3 L.W. 368.

(36) Substantial error or defect of procedure—Deciding a case upon part only of the evidence—Rejection of Commissioner's report—Second appeal. See CIV. PRO. CODE (1908), No. 193, 23 C.L.J. 600.

(37) Suit for damages for cutting trees—Small Cause nature. See CIV. PRO. CODE (1908), No. 194, 20 M.L.T. 281.

(38) Suit for contribution—Second appeal if lies. See CONTRACT ACT, No. 69, 23 C.L.J. 125.

(39) Question whether property is ancestral or self-acquired—Interference in second appeal. See CUSTOMS (PUNJAB—ALIENATION), No. 8, 94 P.L.R. 1916.

(40) Cross-appeals decided by one judgment—Second appeal—Omission to file copy of decree in rival appeal—Effect—Costs. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 13, 85 P.W.R. 1916.

(41) Certificate for, filed after 90 days—Practice. See CUSTOMS (PUNJAB—SUCCESSION), No. 3, 143 P.W.R. 1916.

(42) Consent of brothers of widow's husband—*Bona fides* of—Question of fact—Not open to attack in second appeal. See DECLARATORY SUIT, No. 2, 63 P.R. 1916.

(43) Practice—Appellate Court—Judgment—Contents of—Second appeal—Findings of fact—Interference. See EVIDENCE, No. 5, 34 Ind. Cas. 942.

(44) Evidence taken before a party is added as defendant is admissible against him—Objection taken for first time in second appeal. See EVIDENCE ACT, No. 20, 31 M.L.J. 472.

(45) Finding of fact without any legal evidence—Interference in second appeal. See GUARDIANS AND WARDS ACT, No. 15, 24 P.W.R. 1916.

(46) Case raised in first Court but not urged in appeal, if should be allowed to be raised on further appeal. See HINDU LAW (ADOPTION), No. 6, 20 C.W.N. 650.

Appeal—(Continued).**—2.—Second Appeal—(Continued).**

(47) See HINDU LAW—JOINT FAMILY, No. 10, 19 O.C. 159.

(48) See HINDU LAW—JOINT FAMILY, No. 29, 35 Ind. Cas. 655.

(49) Claim to grazing rights under village custom—Claim to interest in immoveable property—Not of Small Cause nature—Second appeal lies. See LANDLORD AND TENANT, No. 20, 12 N.L.R. 83.

(50) Discretionary power of Appellate Court to grant or refuse extension of time—When interfered with in. See LIMITATION ACT (1908), No. 9, 92 P.R. 1916.

(51) Execution opposed by judgment-debtor alleging payment and asking for certification thereof—Plea successful in first Court, but reversed on appeal—Second appeal by judgment-debtor—Limitation, if suspended during pendency of second appeal. See LIMITATION ACT (1908), No. 293, 20 C.W.N. 686.

(52) Remand—Finding of fact—Lower Appellate Court—Incompetency to disturb such finding. See LIMITATION ACT (1908), No. 105, 31 M.L.J. 257.

(53) Interference with findings of fact when justifiable. See MAHOMEDAN LAW (GUARDIANSHIP), No. 1, 9 S.L.R. 196.

(53-a) Mortgage—Parties—Person claiming title paramount impleaded—Objection raised first in second appeal—Costs. See MORTGAGE—GENERAL, No. 53, 32 Ind. Cas. 358.

(54) Failure to deposit redemption money within fixed time—No bar to hearing of. See MORTGAGE—REDEMPTION, No. 15, 99 P.R. 1916.

(55) Point not raised in trial Court—Issue thereon not asked for in Appellate Court—Point whether can be urged in final Court of appeal. See PLEADINGS, No. 6, 86 P.W.R. 1916.

(56) See PRACTICE AND PROCEDURE, No. 8, 31 M.L.J. 429.

(57) Revenue Court—Second appeal—Practice—First Court's judgment, not filed—Dismissal of appeal—Validity of. See PRACTICE AND PROCEDURE, No. 6, 34 Ind. Cas. 706.

(58) See RELIGIOUS ENDOWMENTS, No. 4, 35 Ind. Cas. 630.

(59) Remand of issues to first Appellate Court—Power of latter Court to direct Court of first instance to take additional evidence. See REMAND, No. 2, 9 S.L.R. 143.

(60) Adverse possession—Disturbance of possession under decree of Court—Decree reversed in—Continuity of possession broken—Evidence Act, S. 144. See RES JUDICATA, No. 12, (1916) 2 M.W.N. 133.

(61) See REVIEW, No. 4, 24 C.L.J. 517.

(62) See SHAMILAT, No. 2, 36 Ind. Cas. 601—3 P.R. 1917.

(63) Points not raised in lower Courts, inadmissibility of. See TRANSFER OF PROPERTY ACT, No. 38, 33 Ind. Cas. 975.

Appeal—(Continued).**—2.—Second Appeal—(Concluded).**

(64) Interference in second appeal to find out whether defendant may be regarded as a trespasser. See TRESPASSER, No. 1, 1 Pat. L.J. 47.

—3.—To Privy Council.

(1) *Appeal to His Majesty in Council—Final decree—Remand for decision on merits—Civ. Pro. Code, 1908, S. 109.*

A suit was disposed of by the first Court on the preliminary grounds of estoppel and limitation without taking evidence. On appeal, it was held that on the allegations made by the plaintiff, if true, there could be no estoppel, and that the question of limitation could not be decided till the evidence was gone into. A remand was made directing those points to be determined after the evidence relevant to them was gone into.

Held, that this was not a final order or decree within the meaning of S. 109 of Act V of 1908 and no leave to appeal to His Majesty in Council against it could be granted. *Raghubar Dayal (Pandit) v. Champa Kunwar*, 19 O.C. 36—33 Ind. Cas. 756.

STUART and PANDIT KANHAIYA LAL,
A.J.CS.

(2) Substantial question of law to be involved.

No appeal lies to the Privy Council unless there is a substantial question of law arising on the findings of fact concurrently arrived at. Questions of law already settled by the Privy Council by a long course of decisions cannot afford ground for preferring appeal to the said council. *Nasir Hussain v. Ashraf-un-Nisa*, 30 Ind. Cas. 239.

LINDSAY, J.C. and KANHAIYA LAL, A.J.C.
References:—29 I.A. 28=25 M. 215=6 C.W. N. 241 (P.C.)=4 Bom. L.R. 248=11 M.L.J. 379 and 16 Ind. Cas. 197=10 A.L.J. 364=16 C.L.J. 613=14 Bom. L.R. 1055=16 C.W. N. 889=23 M.L.J. 210=34 A. 455=12 M.L.T. 361=(1912) M.W.N. 976=39 I.A. 156 at p. 160=15 O.C. 271, *Ref. to*.

(3) *Entire claim disallowed by first Court—Claim allowed in part by Appellate Court—Whether confirming decree—Respondent allowed leave to appeal—Leave to be granted to petitioner—Petitioner to have benefit of doubt in order granting certificate*—S. 110, *Civ. Pro. Code*, 1908. *Sri Sri Sri Yikrama Deo Garu v. Sri Sri Sri Yikrama Deo Maharajulangu*, 18 M. L.T. 387=(1916) M.W.N. 122=31 Ind. Cas. 272. See Final Part 1915, Col. 308.

(4) *Application for leave to appeal to His Majesty in Council—Six months from what point to be computed—Time in obtaining copy of decree, exclusion of—Limitation Act (1908), S. 12, Sch. I, Art. 179. Ram Sarup v. Jaswant Rai*, 18 A.L.J. 1114=38 A. 82=31 Ind. Cas. 906. See Final Part, 1915, Col. 309.

(5) See CIV. PRO. CODE (1908), No. 224, 30 Ind. Cas. 372.

Appeal—(Concluded).**—3.—To Privy Council—(Concluded).**

(6) Application for leave to—Question of law involved in appeal, nature of. See CIV. PRO. CODE (1908), No. 219, 19 O.O. 131.

(7) Claim for declaration and injunction—Valuation of claim discretionary—Trial of suit by second-class Sub-Judge—Real value of claim can be shown by plaintiff—Leave to appeal. See CIV. PRO. CODE (1908), No. 218, 18 Bom. L.R. 469.

(8) Decision of lower Court confirmed by Chief Court—Question of fact—No substantial question of law—Leave to appeal not to be granted. See CIV. PRO. CODE (1908), No. 223, 64 P.R. 1916.

(9) Leave to—Value of subject-matter of suit. See CIV. PRO. CODE (1908), No. 694, 30 Ind. Cas. 204.

(10) Order of remand when not a "final order"—Application for leave to appeal to Privy Council when may be refused. See CIV. PRO. CODE (1909), No. 658, 14 A.L.J. 50.

(11) Position of person who has obtained succession certificate to collect the debts—Whether a 'question of law.' See CIV. PRO. CODE (1908), No. 213, 14 A.L.J. 143.

(12) Property in dispute, value of—Valuation, how to be determined—Valuation in the plaint, whether estops the plaintiff—Admission, if rebuttable. See CIV. PRO. CODE (1908), No. 225, 24 O.L.J. 350.

(13) Appeal by plaintiff by leave of High Court—Defendant not made respondent added and allowed to file cross-objection by Privy Council. See CONTRACT, No. 13, 20 C.W.N. 1054.

(14) Dilatory conduct in—Costs. See HINDU LAW—WIDOW, No. 14, 20 M.L.T. 235.

(15) Letters Patent appeal—Judgment of reversal passed by single Judge of High Court cancelled—Leave to appeal to Privy Council. See LETTERS PATENT (CALCUTTA), No. 8, 43 O. 90.

(16) Appeal by claimant to Privy Council—Subject-matter of appeal, if mortgage-debt or property claimed—Appealable value. See MORTGAGE SUIT, No. 1, 20 C.W.N. 1279 (P.C.).

Appellate Court.

See APPEAL.

See CIV. PRO. CODE (1908), Ss. 96 to 110 and O. XLI to XLV.

See PRACTICE AND PROCEDURE.

(1) Grounds of appeal urged but not disposed of by the. See PUN. ACT XVI OF 1897 (TENANCY), No. 18, 4 P.W.R. 1916, (Rev.).

(2) Statement as to an admission in judgment of Court of First Instance—Absence of affidavit denying the same by vakil who appeared in Court below—Statement not to be lightly treated by. See ADMISSION, No. 1, 31 M.L.J. 269.

Appellate Court—(Concluded).

(3) Amendment of plaint—Acquisition of substantial right by defendant—Power of, to order amendment. See CIV. PRO. CODE (1908), No. 861, 30 Ind. Cas. 379.

(4) Appeal—Additional evidence, produced after arguments heard—Admission of such evidence by the, if proper—Reasons not recorded for admission of the evidence, effect of. See CIV. PRO. CODE (1908), No. 666, 24 C.L.J. 457.

(5) Appellate Court's powers to add party exonerated—Memorandum of objection. See CIV. PRO. CODE (1908), No. 676, 31 Ind. Cas. 978.

(6) Appellate Court's power to reverse decree against non-appealing party. See CIV. PRO. CODE (1908), No. 677, 31 Ind. Cas. 986.

(7) Judgment of, contents of—Second appeal, grounds of—Findings of fact—Consideration of evidence on record—Disposal of all grounds of appeal. See CIV. PRO. CODE (1908), No. 672, 108 P.L.R. 1916.

(8) Jurisdiction—Suit for damages for breach of betrothal tried by wrong Court—How dealt with by. See CIV. PRO. CODE (1908), No. 59, 93 P.R. 1916.

(9) Reversal of judgment of Lower Court—Duty of, to give reasons for its judgment. See CIV. PRO. CODE (1908), No. 674, 30 Ind. Cas. 292.

(10) Review, application for, maintainability of, when, seized of case. See CIV. PRO. CODE (1908), No. 699, 156 P.L.R. 1916.

(11) To bring all parties on record—Willful omission of necessary party—Decree for sale. See CIV. PRO. CODE (1908), No. 212, 31 Ind. Cas. 814.

(12) Refusal of sanction by original Court—Appeal—Sanction granted by—Legality. See CRIM. PRO. CODE, No. 10, 1 Pat. L.J. 586.

(13) Practice—Judgment—Contents of—Second appeal—Findings of fact—Interference. See EVIDENCE, No. 5, 34 Ind. Cas. 942.

(14) Appellate Court's right of interference—Original document lost, proof of. See EVIDENCE ACT, No. 49, 31 Ind. Cas. 579.

(15) Discretionary power of Appellate Court to grant or refuse extension of time—When interfered with in second appeal. See LIMITATION ACT (1908), No. 9, 92 P.R. 1916.

(16) Appellate Court, interference by, with appointments of Receiver made by lower Court. See RECEIVER, No. 5, 4 L.W. 285.

(17) Decree of the, effect of—Appeal by some of the parties, effect of. See REVIEW, No. 4, 24 C.L.J. 517.

(18) Failure of plaintiff to produce certificate in first Court—Duty of, to permit him to do so in appeal. See SUCCESSION CERTIFICATE, No. 2, 30 Ind. Cas. 510.

Appellate Court, Jurisdiction of.

Decree confirmed in appeal—First Court, if can amend its own decree subsequently—Jurisdiction—Practice. See CIV. PRO. CODE (1908), No. 239, 4 L.W. 225.

Appellate Court, Powers of.

Powers of Courts of appeal or revision in revoking or granting sanction given or refused by a subordinate authority—Remand not proper. See SANCTION TO PROSECUTE, No. 5, 9 Bur. L.T. 128.

Appointed Daughter.

(1) See HINDU LAW—ADOPTION, No. 14, 1 Pat. L.J. 581.

Appointment.

Application to remove a person from an—Burden of proof—Powers to appoint whether includes power to dismiss. See RECEIVER, No. 1, (1916) M.W.N. 10.

Appropriation.

Contract Act, ss. 60, 61—Payment in discharge of running account. See CONTRACT ACT, No. 60, 1 Pat. L.J. 474.

Appropriation of Payments.

Guarantor if can control appropriation. See SURETY, No. 1, 23 C.L.J. 256.

Arbitration.

See APPEAL.

See AWARD.

See CIV. PRO. CODE, 1908, Sch. II.

See RIGHT OF SUIT.

(1) *Civ. Pro. Code* (1908), Sch. II, S. 1, paragraph 1—*Arbitration—Pending suit—Private reference—Application to Court for adjournment containing a prayer to send records to arbitrator—Application treated by the parties and the Court as one to Court itself to make the reference—Subsequent objection to the reference—Estoppel.*

Where, in a pending suit, the parties privately referred the matters in dispute to an arbitrator and then applied to the Court for the adjournment of the case and for sending the records to the arbitrator, and it appeared that the parties and the Court treated the said application as one made to the Court for an order of reference and acted upon that footing, held that the defendants were afterwards estopped from contending that the above application was not of such a character. *Krishnamoorthy v. Ganapathlingam*, 3 L.W. 375=34 Ind. Cas. 741.

SADASIVA AIYAR and MOORE, JJ.

(2) *Arbitrator, powers of—Decision on question of law by arbitrator—Arbitrator's decision whether questionable because not in accordance with the received interpretation of the law.*

When points of law are referred to arbitrators, they have a right to decide them and their decision cannot be questioned on the ground that it is not in accordance with the received interpretation of the law. *Chhab Lal v. Musammat Parbat*, 19 O.C. 48=33 Ind. Cas. 737. STUART, A.J.C.

(3) *Specific Relief Act* (I of 1877), S. 21—*Civ. Pro. Code* (Act V of 1908), Sch. II, Cls. 18 and 22.

Arbitration—(Continued).

Under Cl. (22) of the second schedule of the Civ. Pro. Code the last thirty-seven words of S. 21 of the Specific Relief Act do not apply to any agreement to refer to arbitration, or to any award to which the provisions of that schedule apply.

A valid award will bar a suit based on any of the claims embraced in the submission and covered by the award. *Ma Yon v. Maung Kya Gang*, 9 Bur. L.T. 98=35 Ind. Cas. 710.

TWOMEY, J.

(4) *Reference in pending suit—Suit dismissed for default—Restoration of suit—No fresh reference to arbitration—Award—Decree thereon—No objection as to nullity of arbitration for want of fresh reference—Waiver—Review—Order without jurisdiction—Appeal—Maintainability—Revision—Civ. Pro. Code* (1908), O. XLVII, rr. 4 (2), 7 (1) (b).

A suit was dismissed for default, after the reference to arbitration by the Court at the request of parties but before the award was put in. On application, the case was restored to file and without objection by either party the arbitrator was directed to put in his award. He was not re-appointed nor was any fresh reference based on a fresh application by the parties made, but he was treated as being still arbitrator. Various objections were made before the award was presented to Court, but no objection was taken that the dismissal of the suit put an end to the arbitration and that the arbitrator's power had finally ceased to exist. The Court passed a decree in accordance with the award. An appeal was preferred, and, in the appeal, objection was taken on the ground that the arbitration had become null and void, by reason of the dismissal of the suit for default. The Appellate Court overruled the objection but, on review, changed its mind and remanded the case for re-trial under O. XLI, r. 23. Civ. Pro. Code, holding that the dismissal for default destroyed the arbitration. Against this order, an appeal was filed and the respondent disputed the maintainability of the appeal.

Held that a wide discretion is given to Courts under O. XLVII, r. 2, that it is impossible to hold that the Lower Appellate Court in granting the review acted in contravention of r. 4 and that, in consequence, no appeal lay (a).

Held further, that in granting the review, the Lower Appellate Court exercised a jurisdiction not vested in it by law and that the order was open to revision (b).

Per *Johnstone, C.J.*—When a case is restored after dismissal for default, it does not become *res integra* but is again before the Court in the condition it was in at the time of dismissal, and the defendant, by his conduct—by the nature of his objections to the arbitration and to the filing of award—must be taken to have waived the objection which he afterwards made

Arbitration—(Continued).

on appeal. *Hari Singh v. Allah Bakhsh*, 115 P.R. 1916.

JOHNSTONE, C.J., and SHADI LAL, J.

References:—(a) 11 P.R. 1919; 3 I.A. 221; 2 O. 131 (P.C.) *Ref. to*; 24 W.R. 186 and 25 R. 124, *Dist.*

(5) *Award—Decree passed on invalid award—No appeal—Civ. Pro. Code 1908, Sch. II, paragraphs 15 and 16—Civ. Pro. Code, 1882, S. 522.*

In a partition suit, the parties put in a compromise petition whereby they appointed five arbitrators to make a partition and agreed that their award should be conclusive. Only three of the five arbitrators met and considered the matter referred to them and made their award declaring the nature of the partition which they had agreed upon. Of the two remaining arbitrators, one signed the award before it was filed in Court. But the other who neither acted as an arbitrator nor signed the award before it was filed in Court, signed the award after it was filed in Court and after certain parties filed their objections in Court as to the validity of the award. The Court overruled the objections and passed a decree in terms of the award.

Held, that the decree of the Court was final and that no appeal lay on the ground that the decree is based upon an invalid award (a).

No appeal lies from a decree pronounced in pursuance of an award, except so far as the decree is in excess of, or not in accordance with the award. *Khudiram Mahato v. Chandl-charan Mahato*, 1 Pat. L.J. 306=35 Ind. Cas. 358.

ATKINSON and JWALA PRASAD, JJ.

References:—(a) 29 C. 167; 33 O. 599; 32 M. 510; 36 A. 69; 2 C.L.J. 142 and 1 Pat. L.J. 90, *F.*

(6) *Reference to arbitration—Execution by some of the parties.*

To be binding on any of the parties a reference to arbitration should be executed by all the parties to the reference. If not so executed it is void even as to those who have executed it.

The authority of the arbitrators does not begin till all the parties have signed the reference to arbitration. *Nga Tha Zan v. Nga Kyaw Kaing*, 9 Bur. L.T. 253.

MCCOLL, A.J.C.

(7) *Partition—Arbitration—Intentional absence of party in spite of due notice—Award of arbitrator—Validity—Civ. Pro. Code (Act V of 1908), Sch. 2, para 20, application under.*

Where a defendant in a Civil suit receives due notice from the Court of the suit and the date fixed for its hearing and wilfully abstains from appearing, it is not incumbent on the Court to inform him of the fact that it intends to proceed *ex parte*.

Similarly where a party who has joined in the submission to an arbitration, without just cause subsequently denies the arbitrator's

Arbitration—(Continued).

authority and clearly indicates his intention of not appearing, and in spite of this the arbitrator resolves to proceed with the case, and gives him due notice of the various dates fixed, there is nothing in the law of arbitration in India which makes it necessary for the arbitrator to give any further notice, and it cannot be said that the arbitrator is guilty of misconduct, if he adopts for the purposes of the trial before him, the procedure laid down by the Legislature for the ordinary Civil Courts.

If an arbitrator takes evidence and hears arguments in the absence of one of the parties without having given due notice of the time and place fixed for the hearing, he would be guilty of misconduct which would vitiate his award; but where in preliminary proceedings prior to the hearing of the case, neither evidence is taken nor arguments are heard nor the partition is carried out, the non-fixing of the dates of the informal meetings cannot amount to any misconduct on the part of the arbitrator.

Where a party is absent intentionally at the time of the delivery of the award, and the award is communicated to him at once by the arbitrator, the fact that he was absent does not vitiate the award. *Joshi Damodori v. Joshi Ram Nath*, 33 Ind. Cas. 467.

TUDBALL and WALSH, JJ.

(8) *Reference out of Court—Award—Application to have the award filed in Court—Award vague and indefinite—Plaintiff allowed to withdraw his application so that he may ask the arbitrators to make the award certain and definite and then come to Court.*

Where an award is uncertain and does not specify either the amount, or the land awarded or does not give directions sufficient to enable it to be ascertained or identified it is one which is liable to be set aside on account of uncertainty; where such an award had been made on a reference out of Court and an application was made to have the award filed in Court, *held* that the applicant should be permitted to withdraw his application so as to enable the party to go back to the arbitrators and ask them to make a complete award treating the arbitration as still pending, the applicant being given the liberty to file a fresh application after the award is completed. *Lala Jagroop Singh v. Bankalshwar Rawan Bahadurpal Singh*, 34 Ind. Cas. 355.

STUART and KANEIYA LAL, A.J.C.S.

(9) *Absence of head arbitrator at time of hearing—Substance of evidence not communicated to head arbitrator—Opinion on merits given without affording parties opportunity of presenting their cases.*

Where an arbitrator who had been selected as the head arbitrator, was not present at the sitting of the arbitrators, when some of the witnesses were examined, and the examination of witnesses was not conducted in the presence of the parties and the parties were not given

Arbitration—(Continued).

an opportunity of presenting their cases before the arbitrators, in the absence of proof that the parties agreed to dispense with the presence of the head arbitrator, an award passed by the arbitrators could not be sustained, as the action of the arbitrators was improper, though they were prompted by the best motives and dispensed with the presence of the head arbitrator at a sitting in consideration of his old age and infirmity. *Lekha Singh v. Bodil Singh*, 30 Ind. Cas. 384.

STUART and KANHAIYA LAL, A.J.CS.

References:—11 Ind. Cas. 898=14 O.L.J. 143; 27 Ind. Cas. 31= U.B.R. (1914) II, 26= 7 Bur. L.T. 279, R.

(9-a) *Award—Order of reference fixing no date for making award—Notice of filing award not given—Effect—Opinion not supported by reason is not a decision.*

A Court in setting aside an award on the ground that no date had been fixed by the order of reference for the making of the award and that no notice of its filing was given to the plaintiff, acts in the exercise of its jurisdiction illegally and with material irregularity(a).

A mere expression of opinion one way or the other without any reasons being set forth in support of that opinion cannot be regarded as a sufficient decision of the objections raised. *Abdul Karim v. Muhammad Husain*, 32 Ind. Cas. 345.

KANHAIYA LAL, A.J.C.

References:—(a) 9 Ind. Cas. 241; 20 Ind. Cas. 773=16 O.C. 233, R.

(10) *Agreement to refer dispute to the arbitration of Bengal Chamber of Commerce, if makes applicable the Rules of the Chamber to such arbitration—Misconduct—Decision of Judge on Original Side, if binding on another Judge on Original Side. Chaitram Ramillas v. Baidhi Chand Keerl Chand*, 19 C.W.N. 820=21 O.L.J. 584=42 O. 1140=30 Ind. Cas. 681. See Final Part, 1915, Col. 312.

(11) *Disagreement between arbitrators—Award by umpire without consulting the arbitrators and differing from them—Validity—Lekha mukhi mortgage—Suit for redemption—List of mortgages prepared at the Settlement of 1898—Entry of amount due on a mortgage—Presumption of its correctness—Ss. 44, 46—Punjab Land Revenue Act (1887)—Rule 86 framed thereunder. Jumma v. Mubarik Khan*, 55 P. R. 1915=167 P.W.R. 1915=30 Ind. Cas. 87=50 P.L.R. 1916. See Final Part, 1915, Col. 313.

(12) *Judicial misconduct, charge of—No enquiry—Acting with material irregularity—Civ. Pro. Code (1908), S. 115—Award extending to matters not within the scope of submission—Award if can be amended. Juggobundhu Saha v. Chand Mohan Saha*, 22 O.L.J. 237=31 Ind. Cas. 33, See Final Part, 1915, Col. 314.

(13) *Reference to—Suit filed after reference—Court's power to stay suit. See ACT IX OF 1899 (ARBITRATION), No. 1, 10 S.L.R. 1.*

Arbitration—(Concluded).

(14) *Rules of British Indian Association—Award of private arbitrators. See OUDH ACT I OF 1869 (OUDH ESTATES), No. 8, 30 Ind. Cas. 249.*

(15) *Application for mutation of names—Reference to arbitration—Suit in Civil Court based on title—Jurisdiction. See U.P. Act III OF 1901 (U.P. LAND REVENUE, No. 6, 14 A. L.J. 85.*

(15-a) *Reference to, by Tahsildar—Award invalid. See U.P. ACT III OF 1901 (U.P. LAND REVENUE), No. 3-b, 32 Ind. Cas. 573.*

(16) *No legal appointment of arbitrators—Award becoming nullity—Decree in accordance with award—Appeal whether lies—Court if can advise arbitrators. See AWARD, No. 2, 11 P.W.R. 1916.*

(16-a) *See CIV. PRO. CODE (1908), No. 560, 32 Ind. Cas. 347.*

(17) *See CIV. PRO. CODE (1908), No. 585, 35 Ind. Cas. 675.*

(18) *Agreement to refer disputes to arbitration whether falls within the scope of O. XXIII, r. 3, Civ. Pro. Code. See CIV. PRO. CODE (1908); No. 564, 23 O.L.J. 482.*

(19) *Award—Decree—Appeal—Revision. See CIV. PRO. CODE (1908), No. 728, 35 Ind. Cas. 914.*

(20) *Decree based on arbitration award, appeal from, and revision of. See CIV. PRO. CODE (1908), No. 259, 31 Ind. Cas. 453.*

(21) *Prior suit for partition—Minor parties—Reference to arbitration—Decree in accordance with award—Appeal from decree—Compromise in appeal—Leave of Court not obtained either to arbitration or to consent decree—Effect—Minor's right of suit to avoid the decree—Prior partition suit re-opened with reference to all parties. See CIV. PRO. CODE (1908), No. 587, 30 M.L.J. 465.*

(22) *Reference to, by next friend or guardian ad litem without leave of Court. See CIV. PRO. CODE (1908), No. 190, 9 Bur. L.T. 158.*

(23) *Suit—Reference to arbitration without intervention of Court—Application to file award in Court—Procedure. See CIV. PRO. CODE (1908), No. 162, 18 Bom. L.R. 559.*

(24) *See HINDU LAW—PARTITION, No. 8, 19 O.C. 240.*

(25) *Sham arbitration proceedings—Award—Nullity. See PARDANASHIN LADIES, No. 1, 20 C.W.N. 957.*

(26) *Sale of goods—Contract not bearing eight-anna stamp and containing, clause, not invalid. See STAMP, No. 2, 10 S.L.R. 14.*

Arbitration Act.

See ACT IX OF 1899.

Archakas.

Alienation of offerings to the deity in favour of Archakas—Suit to declare the invalidity of the alienation—Suit against committee and, by two worshippers—Trustees not a party—No

Archakas—(Concluded).

sanction of the Court or Advocate General—Maintainability. See RELIGIOUS ENDOWMENTS ACT, No. 6, 31 M.L.J. 777.

Arrest.

See ATTACHMENT.

See CIV. PRO. CODE (1908).

See EXECUTION OF DECREE.

(1) Pendency of insolvency proceedings—Leave of Court for application to, insolvent—Effect of refusal of discharge on protection order. See ACT III OF 1909 (PRESIDENCY TOWNS INSOLVENCY), No. 8, 9 Bur.L.T. 262.

(2) Decision on question as to legality of arrest whether a 'decree'—Appeal. See CIV. PRO. CODE (1908), No. 1-a, 3 L.W. 35.

Arrest before Judgment.

Counter-petition filed—No application for compensation—Award of compensation if legal—Damages for injury to reputation and humiliation whether awardable. See CIV. PRO. CODE (1908), No. 182, 3 L.W. 30.

Assam Civil Courts Act.

See BEN. ACT XII OF 1887.

Assam Labour and Emigration Act.

See ACT VI OF 1901.

Assault.

On process server. See CRIM. PRO. CODE, No. 8, 19 O.O. 91.

Assessment.

See LANDLORD AND TENANT.

See RENT.

Land claimed as lakhiraj—Assessment with land revenue—Government's right to assess if may be barred by limitation. See REGULATION I OF 1886 (ASSAM LAND AND REVENUE) No. 2, 20 O.W.N. 576.

Assets.

(1) Meaning of. See CIV. PRO. CODE (1908), No. 122, 30 M.L.J. 391.

(2) "Assets that may be in the hands of the legal representative," meaning of. See EXECUTION OF DECREE, No. 11, 14 A.L.J. 899.

(3) Of deceased person, whether includes Annuity. See MAHOMEDAN LAW—DOWER, No. 5, 33 Ind. Cas. 516.

Assignment.

(1) Of an incorporeal right—Requirements of, under Hanafi Law. See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), No. 1, 4 L.W. 939.

(2) Promissory note—Execution in one place and, in another—Suit by Assignee in Court within whose jurisdiction, is made—Maintainability. See CIV. PRO. CODE (1908), No. 61, 31 M.L.J. 816.

(3) Executory contract to convey land—Assignment—Validity—Transfer of Property Act whether exhaustive of the topic of assignability. See CONTRACT, No. 9, 3 L.W. 435.

Assignment—(Concluded).

(3-a) By mortgage. See LIMITATION ACT (1909), No. 284, 32 Ind. Cas. 814.

(4) Assignment of mortgage—Equities—Decree debt against assignor subsequent to date of assignment—Equitable set-off when may be allowed. See MORTGAGE (GENERAL), No. 13, (1916) M.W.N. 351.

(5) Assignment *pendente lite*—Mortgagor assigning his rights before final decree—Assignee not party to final decree proceedings—Final decree conclusive as against him also. See TRANSFER OF PROPERTY ACT, No. 122, 12 N.L.R. 50.

(6) Rent—Debt—Simple mortgage and subsequent lease of the hypotheca to mortgagee—Meeus profits. See TRANSFER OF PROPERTY ACT, No. 16, 31 Ind. Cas. 473.

Assignment of Decree.

See CIV. PRO. CODE (1908), O. XXI, r. 16.

(1) Decree—Execution—Assignment *benami* for one of the judgment-debtors—Executability of decree—Adjustment. See CIV. PRO. CODE (1908), No. 426, 4 L.W. 534.

(2) Execution of decree—Right of Assignee prior to decree to execute decree. See EXECUTION OF DECREE, No. 33, 30 Ind. Cas. 831.

(3) Decree of possession and meane profits—With respect to meane profits. See MESNE PROFITS, No. 1, 1 Pat. L.J. 427.

Attachment.

See CIV. PRO. CODE (1908), Ss. 47, 50-54, 60-64 and O. XXI.

See EXECUTION OF DECREE.

See SALE.

(1) Attachment, subsistence of, determination of—Order of attachment not withdrawn, presumption when—Civ. Pro. Code (1908), O. XXI, r. 57, whether retrospective.

The question whether by reason of the disposal of an execution petition, an attachment ceased to exist, should be determined with reference to the facts of each case (a).

Unless an order of attachment is withdrawn or dealt with on the merits, the presumption is that it is in force (b).

Where the attaching creditor acquired a right to subsistence of an attachment under the old Code, that right cannot be taken away by giving retrospective operation to O. XXI, r. 57, Civ. Pro. Code 1908 (c). *Raghavachariar v. Anantha Reddi*, 31 Ind. Cas. 911.

SESHAGIRI AIYAR and KUMARASWAMI SASTRI, JJ.

References:—(a) 17 M. 58, F. (b) 8 A.L.J. 619; 37 A. 542, F. (c) 2 L.W. 4; 27 Ind. Cas. 568, R.

(2) *Quere*.—Whether leave is necessary for an application to execute the decree by attachment of the insolvent's property. *In the matter of Ko Shwe Gya*, 9 Bur. L.T. 262.

YOUNG, J.

(3) Attachment—Withdrawal of—Code of Civil Procedure (1882)—Application under.

Attachment—(Continued).

Daud Ali v. Ram Prasad, 18 A.L.J. 760—37 A. 542—30 Ind. Cas. 787. See Final Part, 1915, Col. 818.

(4) **Provident Fund money—Remittance by money order—Attachment by decree-holder while money in custody of Post Office—Effect.** See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 37, 14 A.L.J. 236

(5) **Attachment by Court of first instance—Sale stayed by appellate Court—Dismissal of execution application in consequence—Effect on attachment.** See CIV. PRO. CODE (1908), No. 469, 3 L.W. 601.

(6) **Attachment of debt ostensibly payable to other than judgment-debtor—Necessity of enquiry as to who is real creditor—Duty of Court.** See CIV. PRO. CODE (1908), No. 460, 20 C.W.N. 189

(7) **Attachment of non-existent right—Court whether bound to sell.** See CIV. PRO. CODE (1908), No. 122, 30 M.L.J. 391.

(7-a) **Claim—Evidence of possession not adduced—Decision on title.** See CIV. PRO. CODE (1908), No. 473, 32 Ind. Cas. 34.

(8) **Debt, and sale of.** See CIV. PRO. CODE (1908), No. 468, 35 Ind. Cas. 469.

(8-a) **In execution—Transfer of property after attachment—Equities between decree-holder and auction-purchaser.** See CIV. PRO. CODE (1908), Nos. 483 and 496, 36 Ind. Cas. 732.

(9) **Of property in execution—Dispute between judgment-debtor and decree-holder regarding amount of property attached—Allegations of collusion between Amin and decree-holder—Duty of executing Court to enquire.** See CIV. PRO. CODE (1908), No. 90, 1 Pat. L. J. 558.

(9-a) **Order when takes effect.** See CIV. PRO. CODE (1908), No. 141-a, 32 Ind. Cas. 276.

(10) **Purchase of property under attachment—Void—Purchaser not entitled to lien for purchase money.** See CIV. PRO. CODE (1908), No. 142, 34 Ind. Cas. 34.

(11) **Sale without, validity of.** See CIV. PRO. CODE (1908), No. 456, 36 Ind. Cas. 292.

(12) **Company—Attachment prior to liquidation—Property attached if vests in liquidator—Property attached sold and proceeds brought into Court—Proceeds how to be distributed.** See COMPANY, No. 1, 20 C.W.N. 368.

(13) **Execution—Decree against a female personally—Mahal lands assigned to females for enjoyment in common, of rents after judgment-debtor's death—Invalidity.** See EXECUTION OF DECREE, No. 26, 33 Ind. Cas. 83.

(14) **Of debt payable outside jurisdiction—Attachment, effect of—Money paid under an illegal order, where to be refunded.** See EXECUTION OF DECREE, No. 17, 24 C.L.J. 588.

Attachment—(Concluded).

(15) **Of decrees—Exclusion of time occupied by attachment—Civ. Pro. Code, O. XXI, r. 53.** See LIMITATION ACT (1908), No. 52, 30 Ind. Cas. 587.

(16) **Decree against executor-legatee in his personal capacity, of money due to judgment-debtor as executor.** See REFERENCE, No. 1, 9 Bur. L.T. 226.

(17) **Mortgage deed, when comes into operation—before registration—Effect.** See REGISTRATION ACT (1908), No. 36, 32 Ind. Cas. 431.

Attachment before Judgment.

See ATTACHMENT.

See CIV. PRO. CODE (1908), O. XXXVIII.

(1) **Tort—Attachment before judgment, application for—Notice alone issued—Petition dismissed—Malicious attachment, action for, if sustainable—Abuse of process.**

The mere issue of a notice of an application for attachment before judgment does not give rise to a cause of action for a suit for damages for malicious attachment, even though the application for attachment had been made maliciously and without reasonable and probable cause.

An improper procuring of the process of the Court by the application of such process in an improper manner and for improper purposes does not amount to an abuse of the process of the Court. **Rama Aiyar v. Govinda Pillai**, 3 L.W. 82—30 M.L.J. 180—(1916) M.W.N. 156—32 Ind. Cas. 448—39 M. 952.

SADASIVA AIYAR and NAPIER, JJ

References:—35 M. 593, D.; 11 Q.B.D. 674; (1915) 1 K.B. 600, F.

(2) **Plaintiff obtaining decree if acquires lien on money deposited to have attachment withdrawn—Defendant adjudicated insolvent before money could be realised in execution of decree—Receiver in insolvency if may claim money deposited—Provincial Insolvency Act (III of 1907), S. 34.** **Promotha Nath Chakravarti v. Mohini Mohan Sen**, 19 C.W.N. 1900—31 Ind. Cas. 573. See Final Part, 1915, Col. 321.

(3) **Application for—Notice issued—Defendant showed cause—Dismissal of application—Appeal.** See CIV. PRO. CODE (1908), No. 623, 23 C.L.J. 392.

(4) **Application for—Summons to defendant to furnish security—Money paid into Court—Subsequent insolvency of defendant—Priority charge.** See CIV. PRO. CODE (1908), No. 622, 39 M. 903.

(5) **Conveyance executed after the attachment, in pursuance of a contract entered into before the attachment—Validity.** See CIV. PRO. CODE (1908), No. 144, 23 C.L.J. 115.

(6) **Moveables—Attachment by prohibitory order—Compensation—Suit for damages—Limitation.** See LIMITATION ACT (1908), No. 105, 31 M.L.J. 257.

Attestation.

(1) See ACT X OF 1865 (SUCCESSION), No. 6, 4 L.W. 255.

Attestation—(Concluded).

(1-a) Absence of, clause—Validity of will. See ACT X OF 1865 (SUCCESSION), No. 6-a, 30 Ind. Cas. 263.

(2) See U.P. ACT II OF 1901 (AGRA TENANCY), No. 10, 31 Ind. Cas. 815.

(3) Mortgage—Admission by mortgagor—Other parties not admitting execution—Effect—Proof by attesting witnesses whether necessary. See EVIDENCE ACT, No. 42, 20 C.W.N. 1044.

(4) By heir—Mortgage by widow—Estoppel. See HINDU LAW (WIDOW), No. 23, 30 Ind. Cas. 388.

(5) Of a deed does not by itself create estoppel against or imply consent of the attesting reversioner. See HINDU LAW (WIDOW), No. 14, 20 M.L.T. 335.

(6) See MORTGAGE—GENERAL, No. 46, 34 Ind. Cas. 165.

(7) Deed of gift—by two witnesses—One witness described as 'Scribe'—Effect—Validity of attestation. See REGISTRATION ACT (1908), No. 32, 33 Ind. Cas. 33.

(8) Attested agreement to deliver merchandise with a penal clause not bond. See STAMP ACT (1899), No. 4, 9 Bur. L.T. 111.

(9) See TRANSFER OF PROPERTY ACT, No. 81, 34 Ind. Cas. 397.

(10) Document signed by one attesting witness—Scribe writing the name of another person as a marginal witness—No proof of authority to sign—Validity of mortgage or charge. See TRANSFER OF PROPERTY ACT, No. 85, 14 A.L.J. 673.

(11) Scribe if attesting witness. See TRANSFER OF PROPERTY ACT, No. 83, 20 C.W.N. 699.

(12) Witnesses not present at actual execution—Admission of execution by mortgagor—Effect. See TRANSFER OF PROPERTY ACT, No. 84, 14 A.L.J. 361.

(13) Proof of will—Clear and trustworthy evidence of attesting witness if to be rejected because appearance of document suspicious. See WILL, No. 9, 30 M.L.J. 555.

(14) Will—Proof of due execution and attestation—Attesting witnesses turned hostile—Court may find execution proved from other evidence—Proof that testator saw attesting witnesses sign, and latter saw testator sign, if necessary, where will regular on its face—Presumption of due execution. See WILL, No. 1, 20 C.W.N. 192.

Attesting Witness.

(1) See ACT X OF 1865 (SUCCESSION), No. 6, 4 L.W. 255.

(2) Proof of deed of gift—Writer signing merely as writer—Evidence to show that writer signed as. See TRANSFER OF PROPERTY ACT, No. 148, 36 Ind. Cas. 275.

Attorney.

Vakils—Attornies—Their right of audience on the original side of the Madras High Court. See VAKIL, No. 1, 31 M.L.J. 698.

Attorney and Client.**(1) Attorney, application by, for discharge—Notice to client, sufficiency of.**

If an attorney wishes to withdraw from a case even for good grounds, he must give his client reasonable notice of his intention, so that the client may have a reasonable opportunity of getting other advice and making arrangements before the hearing of the application of the attorney for obtaining his discharge.

When an attorney gave notice to the client on the day previous to his making application before the Court for obtaining his discharge and obtained the order.

Held, on appeal, that the order must be set aside for insufficiency of notice. *Prabhu Lal v. Kumar Krishna Dutt*, 20 C.W.N. 443—23 C.L.J. 473—33 Ind. Cas. 73.

SANDERSON, C.J., WOODROFFE and MOOKERJEE, JJ.

(2) Attorney—Discharging himself, if may detain clients' papers, pending suit—Lien in such case how secured—When discharged by client, except for misconduct, if may detain papers.

Sanderson, C.J. (Woodroffe, J., agreeing).—Where an attorney who had been acting for his client in the ordinary way refused to go on acting for him unless his out-of-pocket expenses were paid, that amounted to a discharge of the attorney by himself and he could not claim to retain the papers when they were wanted by his former client for continuing the litigation. He would, at most, be entitled to have his lien protected by an undertaking by the new attorney.

The same rule would apply where it was part of the original retainer of the solicitor that he should only be bound to act as long as the money should be supplied from time to time for the necessary out goings (a).

Mookerjee, J.—If a solicitor is discharged by his client otherwise than for misconduct, he cannot, so long as his costs are unpaid, be compelled to produce or hand over the papers; but if he discharges himself he may be ordered to hand over the papers to the new solicitor on the latter undertaking to hold them without prejudice to his lien.

A solicitor could not be treated as finally discharged till the leave of the Court had been obtained. (b) *Prabhu Lal v. Kumar Krishna Dutt*, 20 C.W.N. 437—23 C.L.J. 326—33 Ind. Cas. 73.

SANDERSON, C.J., WOODROFFE and MOOKERJEE, JJ.

References.—(a) 35 W.R. 232; L.R. 18 Eq. 440—32 W.R. 277, F. (b) 36 C. 609.

(3) Attorney's costs, if may be declared a charge on infant's immoveable property recovered by suit when irrecoverable from next friend—Infant if may be sued and personal decree made against—Immoveable and moveable property, no distinction between—Attorney's lien, meaning of.

An attorney appointed by the next friend of an infant to prosecute a suit for recovery of immoveable property may sue the infant for

Attorney and Client—(Concluded).

and obtain a decree declaring a charge in respect of the balance of costs in the property recovered by the suit, where it appears that there is no chance of such costs being recovered from the next friend. No decree can be made in such a suit against the infant personally. **Kumar Krishna Dutt v. Hari Narayan Gungul, 20 C.W.N. 587 = 43 C. 676 = 33 Ind. Cas. 708.**

CHAUDHURI, J.

(4) Admission by attorney if binds client. See ACT III OF 1909 (PRESY. TOWNS INSOLVENCY), No. 5, 20 C.W.N. 995.

Attorney's Lien.

Attorney's lien, meaning of—Attorney, if may claim lien on his client's (plaintiff's) decree as against defendant's prior decree against plaintiff—Equities between attorney, client and others interested in property.

The defendants had obtained a decree against the plaintiffs in a prior suit for Rs. 1,451-9-0 including costs, and the plaintiffs in a subsequent suit obtained a decree for Rs. 1,431-8-0 and thereupon the defendants applied that the satisfaction of the plaintiff's decree might be entered; but the attorney of the plaintiffs made an application claiming a lien on the decretal amount of his client:

Held—That the attorney could not claim any lien on the decree obtained by his client in preference to the claim of the defendants in respect of their prior decree.

An attorney's lien is subject to all the equities between the client and the parties interested in the property.

Meaning of attorney's lien discussed. **Bhupendra Nath Bhose v. Sassoon & Co., 43 C. 932 = 21 C.W.N. 106.**

CHAUDHURI, J.

Auction Purchaser.

See SALE.

See VENDOR AND PURCHASER.

(1) See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 28, 31 Ind. Cas. 884.

(2) Sale held by Official Receiver—Right of, to sue for specific performance against the Receiver. See ACT III OF 1907 (PROV. INSOLVENCY), No. 26, 9 Bur. L.T. 61.

(2-a) Attachment in execution—Transfer of property after attachment—Equities between decree-holder and. See CIV. PRO. CODE (1908), No. 142-a, 36 Ind. Cas. 732.

(3) Deposit—No confirmation of sale—Application to set aside sale. See CIV. PRO. CODE (1908), No. 506, 31 Ind. Cas. 918.

(4) Refund of purchase-money—Right of suit by—Act XIV of 1882, S. 815. See CIV. PRO. CODE (1908), No. 28, 14 A.L.J. 1216.

(4-a) Sale of share in Naukar rights—Acquisition of full right by purchaser—Necessity for purchaser to apply for possession. See CIV. PRO. CODE (1908), No. 527, 36 Ind. Cas. 768.

Auction Purchaser—(Concluded).

(5) See LIMITATION ACT (1909), No. 239, 35 Ind. Cas. 758.

(6) Lease by mortgagor after mortgage decree but before sale, whether binds to—Nature of mortgage decree—*Lis pendens*—Transfer of Property Act. Ss. 52, 58. See SMALL CAUSE COURT, JURISDICTION OF, No. 1, 20 M.L.T. 512.

Auction Sale.

See EXECUTION OF DECREE.

See SALE.

(1) Claim through sale prior to—Bar of suit by such purchaser. See CIV. PRO. CODE (1908), No. 50-a, 36 Ind. Cas. 681.

(2) Court auction purchase—Knowledge that the property did not belong to the judgment-debtor. See TRANSFER OF PROPERTY ACT, No. 33, 34 Ind. Cas. 494.

(3) Employment of puffers—Sale whether voidable. See CONTRACT ACT, No. 114, 3 P.W.R. 1916.

Authorised Agent.

Plaint signed by—Act II of 1901 (Agra Tenancy), S. 193 (e). See CIV. PRO. CODE (1908), No. 515, 31 Ind. Cas. 859.

Award.

See APPEAL.

See ARBITRATION.

See CIV. PRO. CODE (1908), SCH. II.

(1) Date of submission of the award—Tenth day expiring on the day on which Court is closed—Art. 158 of Act IX of 1908.

Held, that presenting an award without the knowledge of the parties before the date fixed for its filing is not submission of the award to the Court within the meaning of Art. 158 of Act IX of 1908. Such submission is to be considered to have taken place on the latter date and it is from this date that the period of ten days for filing the objection begins to run.

Held, also, that if the ten days' time expires on the date when the Court is closed, the objections can be filed on the first day on which the Court re-opens. **Jawahir Singh v. Mehr Singh, 14 P.W.R. 1916 = 34 Ind. Cas. 250.**

JOHNSTONE, C.J.

Reference:—30 P.W.R. 1915, D.

(2) Arbitration—Award—Decree in accordance with award—Appeal—Revision, when maintainable—Award, nullity, effect of—Arbitrators, Court if can advise—Civ. Pro. Code (1908), S. 115, Sch. II, para 16.

Held, that an application for revision of a decree based on an award can be entertained on the ground of material irregularity committed by the Court when no appeal under the Civ. Pro. Code, is maintainable against that decree, but such jurisdiction will be used very sparingly.

Obiter:—Where there is no legal appointment of arbitrators, the award is a nullity and an appeal against the decree is maintainable (a).

Award—(Continued).

Held, also that there is nothing objectionable in the Court's helping the arbitrators with advice and orders when they come to it in a difficulty (b). *Kanhia Lal v. Narain Singh*, 11 P.W.R. 1916=28 P.R. 1916=31 Ind. Cas. 700.

JOHNSTONE, C.J. and CHEVIS, J.

References :—(a) 26 Ind. Cas. 583=(1914) M. W.N. 65, *Not F.* (b) 25 P.R. 1902 (F.C.)=12 M.L.J. 77=4 Bom. L.R. 161=6 C.W.N. 226=29 C. 167=29 I.A. 51; 88 P.R. 1902 (F.B.); 89 P.R. 1901 (F.B.); 1 P.R. 1908 (F.B.)=58 P.W.R. 1907; 12 P.W.R. 1911=9 Ind. Cas. 385; 38 M. 256=21 Ind. Cas. 308=14 M.L.T. 814=25 M.L.J. 507=(1914) M.W.N. 142; 13 P.W.R. 1914=23 Ind. Cas. 925; 18 Ind. Cas. 701, R.

(3) *Decree—Civ. Pro. Code, Sch. II, para. 21, cl. (1)—Performance of the award between the date of the award and the date of decree thereon.*

The new Civ. Pro. Code having fixed the conditions clearly and reasonably in Sch. II, para. 21, cl. (1), Courts cannot refuse to file awards by imposing further conditions than those mentioned therein. The words of the statute law are imperative.

Parties can agree to refer disputes pending in a suit between them to private arbitration without making an application to Court (a).

The award cannot be attacked on the ground that the obligations imposed under the award have been performed between the date of the award and the date of the application to file the award. But it might be a valid defence to an application for execution of the decree passed on the award.

Quære :—Whether facts of a particular kind, even though they took place before the passing of the decree in a suit, could be set up by the judgment-debtor, as a plea in bar to the execution of the decree (b)? *Annamalal Chetty v. Ramasamy Chetty*, (1916) M.W.N. 203=19 M.L.T. 228=33 Ind. Cas. 67.

SADASIVA AIYAR and MOORE, JJ.

References :—(a) (1912) M.W.N. 1091, *F.* (b) 11 B. 708, *Appr.*; (1910) M.W.N. 798 and 15 M.L.J. 370, *doubled*.

(4) *Arbitration—Award made after time—Agreement not to raise any objection against award binding on the parties—Difference between S 521 of Act XIV of 1882 and para. 15 of Sch. II to Act V of 1908.*

1. The difference between S. 521 of the old Code and para. 15 of Sch. II to the new Code is that, under the former, an award made after the time fixed by the Court for making it was a mere nullity and consequently the Court could *suo motu* treat it as non-existent, but according to the latter such an award is simply liable to be set aside upon an application by one or other of the parties. So if no such application is or can be made or if it is refused on some ground, the award becomes final, and no appeal lies from the decree based thereon (a).

2. Where the parties have expressly agreed that the award was to be final and binding and

Award—(Continued).

that none of the parties would offer any 'objection whatsoever' to it, no objection either on the ground that the award was made after time or on any other basis which can be raised under the said para. 15 is entertainable (b).

3. It is competent for the parties to agree that the question of fraud or misconduct on the part of the arbitrator shall not be raised by either party. *Bhai Kahan Singh v. Rai Bahadur Lala Mohan Lal*, 44 P.W.R. 1916=34 Ind. Cas. 177.

RATTIGAN, J.

References :—(a) 29 C. 822, *F.*; 13 A. 300 (F.C.). *Obsolete*. (b) (1892) 3 Chap. 441; 19 Eq. 462, *F.*, *Obiter*.

(5) S. 115, *Civ. Pro. Code* (1908)—*High Court's powers in revision—Material irregularity—Award filed—Objections taken to award—Date fixed for final disposal a day after filing objections—Application for adjournment rejected—Decree in accordance with award.*

An award was filed on December 11th, 1914. Ten days were allowed for filing of the objections thereto and December 22nd, 1914, was fixed for the trial of the objections. One of the objections related to the misconduct of the arbitrator. On the day fixed for the hearing the objector appeared but was not ready with his evidence, and he filed an application asking for adjournment to enable him to produce his evidence. The application was refused and the Court then made a decree in accordance with the award. The Court gave no reasons for refusing the adjournment. Upon an application in revision, *held* that there had been, so far as appeared either on the face of the proceedings or from any other evidence, a failure by the lower appellate Court to hear and determine the application for adjournment, or the objection which the Court itself gave leave to file, and that this was a material irregularity within the meaning of S. 115 of the Code and justified interference on the part of the High Court. *Durga Bahad Singh v. Fateh Bahadur Singh*, 14 A. L.J. 425=33 Ind. Cas. 30.

PIGGOTT and WALSH, JJ.

(6) *Order recording award—No appeal lies—Agreement to abide by decision of majority of arbitrators—Award not signed by minority—Effect.*

No appeal lies against the recording of an award made by the arbitrators (a).

Where the parties agreed in the first instance to abide by the decision of the majority of the arbitrators, a decision of the majority comes to after full discussion by the whole body of the arbitrators is binding on the parties, even though it is not signed by the minority (b). *Ram Narain Ram v. Pati Ram Tewary*, 1 Pat. L.J. 90=34 Ind. Cas. 105.

SHARFUDDIN and ROSE, JJ.

References :—(a) 29 C. 167, *F.* (b) 6 W.R. 95, *F.*

(7) *Arbitration—Award—Suit based in award—Award alleged to be invalid,—*

Award—(Continued).

Original cause of action, plaintiff, whether can fall back upon, when award held to be invalid—Alternative relief—Court, duty of.

Held, that a valid and enforceable award made without the intervention of the Court bars a suit on the original cause of action.

Therefore, where a plaintiff alleges that an award made out of Court is invalid but seeks its enforcement if the Court finds it to be valid, or in the alternative prays for a decree on the original cause of action in case the award is found to be invalid, it is the duty of the Court to determine the validity of the award and to pass a decree in its terms if it is found to be valid, or to adjudicate upon the original cause of action if it is found to be invalid. **Firm Shamasuddin-Chiragh Din v. Firm Muhammad Hussain Muhammad Sadiq**, 68 P.W.R. 1916=33 Ind. Cas. 494.

SHADI LAL and LESLIE JONES, JJ.

(8) *Decree—Revision when lies—Material irregularity—Misconduct of arbitrator—Court's power to modify award—Sch. II, Art. 12, Civ. Pro. Code (1908).*

Material irregularity on the part of the Court in dealing with objections to an award is a ground for revision, though it is no ground for revision that the arbitrator himself had been guilty of some misconduct, and that the Court had wrongly adjudicated upon the objection raised regarding that misconduct.

Under Art. 12, Sch. II, Civ. Pro. Code (1908), the Court may only modify or correct an award, first, by striking out of it something not referred to arbitrator; secondly, by amending imperfections in form or correcting any obvious error which can be amended without affecting the decision of the case; and thirdly, where the award contains a clerical mistake or an error arising from an accidental slip or omission.

The Court will be acting entirely without jurisdiction if it makes substantial modifications because it takes a different view from that held by the arbitrator as to what was just and fair in this or that set of circumstances. **Farma Dat v. Bipju**, 78 P.R. 1916=124 P.W.R. 1916=40 P.L.R. 1917=35 Ind. Cas. 887.

JOHNSTONE, C.J.

(9) *Civ. Pro. Code (1908), S. 104 (d), (f), Sch. II, Art. 17—Reference to arbitration—Order rejecting award for misconduct—Appeal—Revision—Parties agreeing not to object to award, effect of—Escoppel—Contract Act, S. 38—Court Fees Act, Sch. II, Art. 17 (vi)—Punjab Land Revenue Act (XVII of 1887), S. 158—Prayer for setting aside award, valuation of.*

Plaintiff and defendants, members of a joint Hindu family, wished to separate. On 6th March, 1910, they entered into an agreement to refer their disputes to arbitration and nominated three gentlemen as arbitrators one of whom was to act as umpire. The arbitrators were authorized to partition the property in unequal shares, but not to exclude any party altogether. No award was written and in February, 1918, an application was made to the

Award—(Continued).

Court asking that the agreement to refer be filed in Court and the usual proceedings be taken thereupon. On 23th March, 1913, the parties put in a joint application saying that a compromise had been effected and that they agreed to the appointment of arbitrators as in the agreement of 6th March, 1910, and asking that the arbitrators be directed to file their award. The parties agreed to abide by the award and to raise no objections to it. The reference having been made, the arbitrators put in their award on 13th October, 1913. Both sides filed objections, but the Court allowed only those filed by the defendants and declared the award invalid on the ground of misconduct, as the arbitrators gave only a life-interest to first defendant in some lands and excluded him contrary to the terms of the reference. Against this order the plaintiff appealed under S. 104, Civ. Pro. Code:

Held that:—

(1) neither cl. (d) nor cl. (f) of S. 104, Civ. Pro. Code applied to the case, and, therefore, no appeal lay as an appeal from an order (a);

(2) the proceeding was a "suit," and the order appealed against amounted to a "decree" and was consequently appealable as an appeal against decree and the mere fact that the plaintiff had appealed as from an order did not put him out of Court (b);

(3) the rejection of an award not being open to revision, the present petition could not be treated as a revision (c);

(4) the appeal fell under Art. 17 (vi) of Sch. II of the Court Fees Act, for both the original application under Art. 17, Sch. II, Civ. Pro. Code, and the appeal embodied a prayer that could not be valued in money, and, therefore, the Rs. 10 Court-fee put in by the appellant was sufficient;

(5) inasmuch as the arbitrators gave no "share" to defendant No. 1 but merely a life-interest in a small piece of land and so violated the injunction in the original agreement that no party was to be wholly excluded, the award was *mala fide* and consequently liable to be set aside;

(6) the agreement by the parties not to raise objections to the award meant only the usual engagement to accept the award, and it was always open to the parties to object on the ground of fraud or bad faith on the part of the arbitrators (d).

Obiter.—(7) It is not an unqualified rule that in arbitration cases, where there is no appeal, there can never be a revision.

(8) It is not sufficient for an applicant for revision to show that the lower Court has erred, but he must also show that it acted without jurisdiction or refused to exercise its lawful jurisdiction or proceeded illegally or with material irregularity (e).

(9) A mistaken view by the lower Court as to what amounted to the misconduct of an arbitrator is no ground for revision (f).

Quære.—Whether the exclusion of Civil jurisdiction provided in S. 158, Land Revenue

Award—(Continued).

Act, as regards partition is intended to apply where the partition is done by private agency?

(10) The sum of Rs. 1,400 allowed as pleader's fee by the first Court was reduced to Rs. 250, and Rs. 700 was awarded by the Chief Court. *Ram Jawaya Mal v. Deyl Ditta Mal*, 107 P.W.R. 1916=117 P.R. 1916=34 Ind. Cas. 192.

JOHNSTONE, C.J. and SHADI LAL, J.

References:—(a) 9 P.R. 1913=248 P.L.R. 1913=16 Ind. Cas. 996; 28 P.R. 1914=20 P.W.R. 1914=21 Ind. Cas. 925, R. (b) 126 P.R. 1907=88 P.W.R. 1907; 27 M. 255=14 M.L.J. 856; 84 P.R. 1901, R.; 28 Ind. Cas. 60=8 S.L.R. 260, Diss.; 5 A. 333=A.W.N. (1893) 56; 6 A. 186 (F.B.)=A.W.N. (1884) 31; 21 B. 63; 12 P.W.R. 1911=9 Ind. Cas. 985, D. (c) 66 P.R. 1915=146 P.W.R. 1915=31 Ind. Cas. 80, P. (d) 44 P.W.R. 1916=34 Ind. Cas. 177, Diss.; 6 M. 368, Appr. (e) 88 P.R. 1902 (F.B.); 25 P.R. 1902=12 M.L.J. 77=4 Bom. L.R. 151=5 O.W.N. 226=29 O. 177=29 I.A. 51, R. (f) 89 P.R. 1902, R.

(10) *Award filed in Court—Judgment pronounced in terms of award before expiry of 10 days for filing objections—Material irregularity—Revision—Bogus award—Duty of Court—Statement that a party agreed to the award—Effect—Admission whether conclusive—S. 31, Evidence Act—Court when must act nunc pro tunc—Pleader's authority to refer to arbitration—S. 115, O. III, r. 1, and Sch. II, cl. 15 (1), Civ. Pro. Code.*

After receiving the award, the Court has to exercise a judicial function before it determines to give judgment in accordance with the award. If in the exercise of the function it commits a material irregularity, it is the duty of the Court of revision to rectify the proceedings and undo what has been done in a procedure opposed to the law. Revision on such grounds as these does not impugn the award but rather the procedure of the Court in dealing with the award (a).

Whatever may be the rights of the parties as to appeal or the limitations put upon its own powers in revision, the High Court will not allow any party to abuse the process of the Court and obtain a judgment and decree on a bogus award.

Under para 16, Sch. II, Civ. Pro. Code, a Court is not empowered to give judgment until the time for making an application to set aside the award has expired. This condition is not affected by the consideration that an application may have been made and set aside or that parties may have stated that they have no objections to urge. It is a condition subject to which jurisdiction to make judgment is conferred on the Court and when that condition is not fulfilled the judgment is no judgment (b).

The statement by a party that he agreed to an award is merely an admission that he had no objections to urge to it. But an admission is not conclusive unless it operates as an estoppel (S. 31, Evidence Act) and there is no question

Award—(Continued).

of estoppel in such a case, for the Court has no jurisdiction to give judgment at once on the admission. The party can at any time within ten days file objections explaining that his previous admission was due to a mistake of fact or law.

Where a party is deprived of such an opportunity of filing objections by the precipitate and illegal action of the Court in passing judgment before the expiry of ten days for filing the objections, the lower Court must, in order to remove this prejudice, act *nunc pro tunc* and allow objections to be filed after the illegal judgment is set aside (c).

A pleader duly appointed to act for a party has authority under O. III, r. 1, Civ. Pro. Code, to make any application including an application for a reference to arbitration. If he does so against the wishes of his client, he is responsible to his client but the client is nevertheless bound. *Srikishen Roohmal v. Relumal Parlamal*, 9 S.L.R. 183=34 Ind. Cas. 845.

PRATT, J.C. and BOYD, A.J.C.

References:—(a) 29 O. 167; 20 A. 474; 86 B. 105; 39 B. 638; 6 S.L.R. 168, R. (b) 20 W.R. 311; 7 C. 166 (169), R. (c) 11 M. 144, R. (d) 14 B. 455; (1848) L.J. 17 Ex. 297, R.

(11) *When bar to subsequent suit. A valid award will bar a suit based on any of the claims embraced in the submission and covered by the award. Ma You v. Maung Kya Gaing*, 9 Bur. L.T. 98=35 Ind. Cas. 710. TWOMFY, J.

(12) *Title of persons under an award of arbitrators to a property—Award not filed in Court, effect of—Dred of conveyance not executed to give effect to terms of award, effect of. Moham-mad Hadl (Salyed) v. Salyed Mohammad Tak*, 18 O.C. 282=32 Ind. Cas. 465, See Final Part, 1915, Col. 324.

(13) See MAD. ACT I OF 1908 (ESTATES-LAND), No. 29, 4 L.W. 278.

(14) Reference to arbitration without intervention of Court—Application for filing award—Objection dismissed—Appeal whether lies. See APPEAL (GENERAL), No. 5, 14 A.L.J. 332.

(15) Liability of broker as principal—Custom and usage of Calcutta Gunny Market—Evidence of custom—Admissibility—Award of Bengal Chamber of Commerce—Jurisdiction. See BROKERS, No. 2, 20 C.W.N. 365.

(16) Arbitration—Decree—Appeal—Revision. See CIV. PRO. CODE (1908), No. 728, 35 Ind. Cas. 914.

(17) Decree based on arbitration—Appeal from, and revision of. See CIV. PRO. CODE (1908), No. 259, 31 Ind. Cas. 458.

(18) Private arbitration—Power to divide property—Awarding extra amount—Withdrawal of questions from arbitrator—Effect—Filing an award—Appeal if lies. See CIV. PRO. CODE (1908), No. 714, 14 A.L.J. 481.

(19) Suit—Reference to arbitration without intervention of Court—Application to file

Award—(Concluded).

award in Court—Procedure. See CIV. PRO. CODE (1908), No. 163, 18 Bom. L.R. 559.

(20) Sale of goods—Calcutta Baled Jute Association's contract—"Home guarantee" clause—Effect—Dispute between Calcutta buyer and Calcutta seller—Arbitration in London between Calcutta purchaser and London purchaser—Effect upon Calcutta seller. See CONTRACT, No. 7, 43 C. 77.

(21) Review—Power of Court. See LAND ACQUISITION ACT (1894), Nos. 1 and 2, 31 M. L.J. 827.

(22) Suit on. See LIMITATION ACT (1908), No. 204, 31 Ind. Cas. 816.

(23) Sham arbitration proceedings—Award—Nullity—Time for recovery of property lost by award when begins to run—Award if may be upheld as family arrangement. See PARDANASHIN LADIES, No. 1, 20 C.W.N. 957.

(24) Final award—Whether bars civil suit. See SPECIFIC RELIEF ACT, No. 10, 8 L.B.R. 157.

Balliff.

(1) Warrant—Direction to, to attach goods—Execution by Nazir—Resistance to his entry—No offence—No day mentioned in the warrant of day before which it is to be executed—Illegality. See PENAL CODE, No. 3, 1 Pat. L.J. 550.

Ballment.

(1) See CONTRACT ACT, No. 138, 9 Bur. L.T. 224=34 Ind. Cas. 297.

(2) Return of bailed goods—Liability for refusal to return on expiry of period—Conversion of goods—Measure of damages. See CONTRACT ACT, No. 138, 9 Bur. L.T. 224=34 Ind. Cas. 297.

Banjar Land.

Right of lambardar to lease out. See LAMBARDAR, No. 1, 12 N.L.R. 136.

Bank.

(1) Deposit by client—Proof of handing money to cashier in the Bank premises—Sufficiency—Liability of Bank—Cashier—His position—Fraud on the part of Bank official—No necessity to prove.

Where a plaintiff alleges that he paid money into a Bank the onus is on him to prove affirmatively that the money was paid in. If the plaintiff could prove that the money had been made over to a cashier of the Bank in the Bank premises as an amount to be placed to his credit in the Bank's books, he is entitled to succeed in his suit.

The cashiers of the Bank as well as of probably all Banks where its employees were held out by it to receive moneys from their clients and the Banks would be liable for all moneys paid to one of them in the Bank's premises for credit to a client's account even if no other official in the Bank saw or heard of the money.

It was not incumbent on the plaintiff to allege any fraud on the part of any of the

Bank—(Concluded).

officials of the Bank. *Maneckjee Palonjee v. Nederlandsche Handel*, 34 Ind. Cas. 176.

FOX, C.J. and FARLETT, J.

(2) Deposit of money for safe custody—Deposit by depositor in, where he had his own money—Failure of Bank—Liability to make good loss. See CONTRACT ACT, No. 135, 36 Ind. Cas. 31.

(3) Deposit of money in a—Proof of payment—Burden of proof—Fraud. See DEPOSIT, No. 1, 9 Bur. L.T. 160.

Bank Cashier.

Deposit by client—Proof of handing money to cashier in the Bank premises—Sufficiency—Liability of,—His position—Fraud on the part of Bank official—No necessity to prove. See BANK, No. 1, 34 Ind. Cas. 176.

Bankruptcy.

Discharge by Singapore Court—Whether operates as discharge from debts in India—Discharge of father—Liability of sons in a joint Hindu family. See STRAITS SETTLEMENTS BANKRUPTCY ORDINANCE, No. 1, 31 M.L.J. 386.

Banks (Presidency) Act.

See ACT XI OF 1876.

Bar to Suit.

(1) A valid award will bar a suit based on any of the claims embraced in the submission and covered by the award. *Ma Yon v. Maung Kya Gaing*, 9 Bur. L.T. 98.

TWOMBY, J.

(2) See CIV. PRO. CODE (1908), No. 17, 31 Ind. Cas. 25.

(3) Duty of plaintiff to lump together several causes of action—Bar of subsequent suit. See CIV. PRO. CODE (1908), No. 322, 30 Ind. Cas. 607.

(4) Suit by co-sharer against Lambardar for profits—Dismissal of suit for default—Subsequent suit for certain years including years covered by previous suit. See CIV. PRO. CODE (1908), No. 377, 30 Ind. Cas. 568.

Benamidar.

See BENAMI TRANSACTION.

(1) Ejectment suit—Certified purchaser, if can recover possession. See CIV. PRO. CODE (1908), No. 150, 4 L.W. 609.

(2) Transfer of Property Act, S. 41—Real owner holding out another—Transfer of latter—Notice—Burden of proof, whether lies on the purchaser or owner—Having interest in property, it notice or shifts onus. See LIMITATION ACT (1909), No. 132, 4 L.W. 200.

Benami Transactions.

(1) Benami transaction—Sale—Fictitious transaction—Vendor in possession of property sold—His own fraud not bar to resist claim for possession.

In a suit for recovery of possession of certain properties, the sale under which the plaintiffs

Benami Transactions—(Continued).

claim was found to be fictitious and was never acted upon, and the defendants (i.e., the vendors) remained in possession. *Held* that the defendants can plead that the sale was *benami* and that the plaintiffs could not recover (a).

The maxim '*nemo allegans turpitudinem suam audiendus est*' must give way to the maxim '*In pari delicto potior est conditio possidentis*,' and the defendant who was in possession of the properties could therefore be permitted to set up the true facts of the transaction. *Nand Lal v. Jethu Lal*, 21 P.R. 1916=33 Ind. Cas. 455.

SHADI LAL and LE ROSSIGNOL, JJ.

References.—(a) 31 B. 405; 37 B. 217, *Not P.*; 19 M.I.A. 551; 21 W.R. 422; 24 W.R. 391; 18 B. 372; 8 C.W.N. 620; 1 A. 403; 61 P.R. 1895; 25 P.R. 1905; 35 C. 551 (P.C.), R.

(2) *Benamidar, right of, to maintain a suit in his own name.*

Held, that a *benamidar* can maintain a suit in his own name. *Nihal Singh (Kunwar) v. Dular Singh*, 18 O.C. 363=33 Ind. Cas. 615.

LINDSAY, J.C.

References.—13 A.L.J. 24; 21 A. 380; 10 O.C. 10, R.

(3) *Sale—Purchase-money paid by father—Son's name entered in sale-deed as sole vendee—Intention.*

The plaintiff sued for a declaration that the sale of certain shops by his father shall not affect his rights of inheritance. The claim was based on the grounds, *inter alia*, that the vendor was a minor at the time of the sale and that the property was ancestral in his hands. It appeared that the shops were purchased in 1890 by one B in the name of his minor son, the vendee, who was entered in the sale-deed as the sole vendee under guardianship of his father, and who subsequently sold them to the present defendants:

Held, (1) that although the funds for the purchase of 1890 were advanced by the plaintiff's grandfather, his real intention was not to make the purchase a *benami* transaction, but to make an advancement of the purchase-money to his son, the plaintiff's father, and to constitute him as the real owner of the shops;

(2) that the plaintiff was not entitled to the relief sought for, as the shops were not ancestral property in his father's hands;

(3) that the fact that leases of the property were executed in the name of the plaintiff's grandfather only showed that he managed the property on behalf of his son and was altogether insufficient to prove the *benami* nature of the transaction. *Natha Mal v. Jivan Ram*, 77 P. W.R. 1916=33 Ind. Cas. 733.

SHAH DIN and CHEVIS, JJ.

(4) *Presumption of advancement—English principle not applicable to India—Burmans more oriental than European—Presumption—Burden of proof.*

Held that, when a purchase is made by a Hindu or Mahomedan in the name of his son, the presumption is in favour of its being *benami*

Benami Transactions—(Continued).

purchase, and it lies on the son to prove that he is solely entitled to the legal and beneficial interest in the estate.

The burden of proof lies with more than the ordinary weight on the person alleging that the purchase was intended for the benefit of the son, whenever the rights of creditors are in issue in such a transaction.

The English principle of "advancement" is not applicable to India. *Nga Tin Gyl v. Nga Tye Aung*, 9 Bur. L.T. 35=35 Ind. Cas. 14.

SAUNDERS, J.C.

(5) *Benami purchase—Source of money settling ownership.*

In the case of *benami* purchaser, the question of ownership must depend upon the answer to another question, namely, with whose money was the property purchased. *Bharat Indu v. Muhammad Mahbur Ali Khan*, 31 Ind. Cas. 586.

RICHARDS, O.J. and RAFIQUE, J.

References.—3 M.I.A. 249; 37 A. 557, R.

(5-a) *Evidence—Presumption—Civil Procedure Code (Act V of 1908), S. 66—Suit, meaning—Suit for declaration against certified purchaser—Pleadings—Title by adverse possession not set up in plaint—General prayer.*

In a suit for a declaration that plaintiff was the real owner of the property in dispute purchased in Court auction in the name of the defendant, and that the defendant was his *benamidar* the defendant pleaded that the transaction was not a fictitious transaction and asserted that the plaintiff had purchased the property on her behalf and had given it to her by gift and although the plaintiff was unable to give any explanation of a credible nature which induced him to enter into *benami* transactions on behalf of his daughter, the defendant, he proved satisfactorily that the money advanced on the deed was his own money, that the defendant at the time had no means of her own and that he remained in possession of the property from the time of the purchase. *Held* that according to the recognised presumption of law the transactions must be held on this evidence to have been *benami* transactions, unless and until the defendant rebuts the presumption.

The words "no suit" in S. 66 of the Code of Civil Procedure, 1908, not only include a suit for possession but also a suit for a declaration (a).

Where in a suit for declaration the plaintiff does not assert anywhere in the plaint title by adverse possession and the defendant was never called on to answer such a plea, and no issue was framed on the point, and no evidence called upon it and in the claim for relief no claim is made that a declaration should be given to the plaintiff on the ground that his title had become perfected by adverse possession, and there are no materials on the record to show whether the plaintiff's title has or has not become perfected by adverse possession, the appellate Court would not frame an issue and

Benami Transactions—(Continued);

send the suit back to the lower Court for the taking of evidence and a finding as to the question of adverse possession. *Sitara Begam v. Muhammad Ishag Khan*, 32 Ind. Cas. 366.

STUART, A.J.C.

References:—(a) 23 A. 175=A.W.N. (1901) 44, R.

(6) *Criterion—Purchase by Hindu in the name of Mahomedan mistress—No presumption of advancement—Evidence Act, S. 116—Tenant admitted into possession, if may deny landlord's title and set up a different title derived from stranger—Estoppel—Document, non-production where not called upon by opponent, if matter for comment.* *Musammat Bilas Kunwar v. Dearaj Ranjit Slugh*, 19 C.W.N. 1207=29 M. L.J. 335=18 M.L.T. 248=2 L.W. 830=(1915) M.W.N. 767=13 A.L.J. 991=17 Bom. L.R. 1006=37 A. 557=22 C.L.J. 516=20 Ind. Cas. 299 (P.C.). See Final Part, 1915, Col. 329.

(7) *Benamidar, suit by—Suit for partition—Partition.* *Atrabannessa Bibi v. Safatullah Mia*, 22 C.L.J. 259=43 C. 504=31 Ind. Cas. 189. See Final Part, 1915, Col. 330.

(8) *Possession, recovery of, suit for—Purchaser's duty to inquire—Civ. Pro. Code (1908), S. 66, scope and meaning of—Benami purchases—Benamidar's position and title—Real owner's powers.* *Hanuman Persad Thakur v. Jadunandan Thakur*, 29 Ind. Cas. 787=20 C. W.N. 147=43 C. 20. See Final Part, 1915, Col. 330.

(9) *Mortgage—Benamidar mortgagee, right of, to sue—Mortgagor, whether can object to mortgagee's right—Civ. Pro. Code (1908), S. 100—Evidence Act, S. 92.* *Ma Tun v. Ma Waing Tha*, 29 Ind. Cas. 892=8 Bur. L.T. 240=8 L. B.R. 205. See Final Part, 1915, Col. 331.

(10) See ACT III OF 1909 (PRESIDENCY TOWNS INSOLVENCY), No. 2, 20 M.L.T. 311.

(11) *Creditor if includes his benamidar.* See ACT III OF 1909 (PRESIDENCY TOWNS INSOLVENCY), No. 5, 20 C.W.N. 995.

(12) *Court auction—Benami purchase—Release by purchaser in favour of beneficiary—Nature of right conveyed.* See CIV. PRO. CODE (1908), No. 149, 3 L.W. 233.

(13) *Court auction—Benami purchase—Suit by real owner for declaration of title—Maintainability.* See CIV. PRO. CODE (1908), No. 146, 3 L.W. 86.

(14) *Decree—Execution—Assignment benami for one of the judgment-debtors—Executability of decree—Adjustment.* See CIV. PRO. CODE (1908), No. 426, 4 L.W. 534.

(15) *Uncertified adjustment—Transfer benami to one of the judgment-debtors—Executability of decree.* See CIV. PRO. CODE (1908) No. 427, 3 L.W. 186.

(16) *Agreement opposed to public policy—Assignment of mortgage taken by patwari benami—Not void.* See CONTRACT ACT, No. 19, 14 A.L.J. 962.

Benami Transactions—(Concluded).

(17) *Nature of—Oral evidence to show if the transaction was benami—Oral evidence whether permissible between benamidar and true owner.* See EVIDENCE ACT, No. 56, 18 Bom. L.R. 134.

(18) *Purchase in name of minor son—Presumption.* See HINDU LAW (DEBTS), No. 5, 74 P.W.R. 1916.

(19) *Test of.* See LIMITATION ACT (1908), No. 43, 20 C.W.N. 522.

(20) *Mortgage—Suit for sale—Person alleged as benamidar impleaded as defendant—No defence by such person—Whether suit maintainable.* See MORTGAGE (GENERAL), No. 2, 14 A.L.J. 30.

(21) See WILL, No. 18, 32 Ind. Cas. 267.

Bengal Acts.

See ACTS—BENGAL ACTS.

Bequest.

See ACT X OF 1865.

See ACT V OF 1881.

See WILL.

See MAHOMEDAN LAW (GIFT), No. 2, 32 Ind. Cas. 516.

Bequest and Transfers (Hindu) Act.

See MAD. ACT I OF 1914.

Berar Inam Rules, 1879.

Inam estate in Berar, by what law governed—Nature and incidents of such Inam grant—Conversion of inam into free-hold—Their nature and origin. See INAM ESTATE, No. 1, 12 N. L.R. 150.

Betrothal.

Jurisdiction—Suit for damages for breach of, tried by wrong Court—How dealt with by Appellate Court. See CIV. PRO. CODE (1908), No. 59, 93 P.R. 1916.

Bhagdari Act.

See BOM. ACT V OF 1862.

Bhogra Land.

See C.P. ACT XVIII OF 1881 (CENTRAL PROVINCES LAND REVENUE) No. 1, 12 N. L.R. 189.

Bill of Exchange.

(1) *Acceptance—Consignment of goods from an enemy port by an enemy steamer—Outbreak of war after acceptance—Ship arriving in Bombay but leaving without discharging cargo to a neutral port before outbreak of war—Acceptor dishonouring bill by non-payment—Government Proclamation enabling British subject to obtain goods on enemy steamer in neutral port—Negotiable Instruments Act (XVIII of 1881) ss. 32 and 43.*

On the 24th June 1914, a German, residing at Hamburg, drew a bill of exchange upon the defendants in favour of the plaintiffs for £65-0-8 payable at thirty days' sight to the order of the plaintiffs for value received.

Bill of Exchange—(Concluded).

The bill purported to be drawn upon the defendants against 50 bales of goods per *S.S. Lichtenfels* a German steamer. It was presented to the defendants for acceptance with the shipping documents relating to the bales of goods mentioned in the bill; and was accepted on the 20th July 1914 payable at the office of the plaintiffs in Bombay. The *S. S. Lichtenfels* reached Bombay just before the out-break of war between Great Britain and Germany and in order to evade capture left Bombay and took shelter in the neutral port of Marmagoa. The bill was presented for payment on due date with the shipping documents but was dishonoured by non-payment. In the meanwhile, the British Government issued a Proclamation authorising British subjects to make payments for the purpose of obtaining their cargoes in neutral ports to the agents of shipowners in an enemy country. The plaintiffs averred their readiness and willingness to hand over the documents against payment of the amount due under the bill. Eventually they filed a suit to recover the amount of the bill, alleging that the acceptance being unqualified and absolute the defendants were bound to pay. The defendants denied their liability contending that the acceptance was qualified, the bill having been drawn on them against goods and they need not pay till they were put in a position to receive the goods:

Held, (1) that the plaintiffs were entitled to succeed from either point of view, for if the acceptance was unqualified the defendants were bound to pay on due date, and if the acceptance was qualified they were still bound to pay "at or after maturity" when money was demanded after the proclamation whereunder consignees were permitted to take delivery of goods from enemy ships in neutral ports;

(2) that the consideration for the acceptance did not fail, for the proclamation permitted performance before it was too late of the condition alleged. *R. K. Motilal & Co. v. The Mercantile Bank of India, Ltd.*, 19 Bom. L.R. 521.

SCOTT, C.J. and HEATON, J.

(2) C.I.F.C.I. contract, presented with shipping document—Acceptance of the bill. See CONTRACT, No. 15, 18 Bom. L.R. 915.

(3) Contract becoming illegal after it is made—Effect of accepting. See TRADING WITH ENEMY, No. 1, 9 Bur. L.T. 99.

Bill of Lading.

(1) "At shipper's risk with option of carrying on deck" in the Bill of Lading—Meaning. See SHIPPING CONTRACTS, No. 2, 8 Bur. L.T. 273.

(2) Conflict between charter-party and—Charter-party to prevail—Liability of shipowner. See SHIPPING CONTRACTS, No. 1, 18 Bom. L.R. 230.

Birth.

(1) Statements as to date of birth when admissible—Presumption as to knowledge of

Birth—(Concluded).

date of birth—Burden of proof as to date of birth—Admissibility of horoscope. See EVIDENCE ACT, No. 12, 8 L.W. 216.

(2) Choukidar's register, value of, as to date of, or death. See HINDU LAW—(REVERSIONER), No. 8, 19 O.C. 221.

Birth Register.

Admissibility in evidence. See EVIDENCE ACT, No. 22, 10 S.L.R. 38.

Blank Sheets.

Registrar—Admission as to signing of only—Effect. See MORTGAGE—(GENERAL), No. 49, 35 Ind. Cas. 56.

Board of Revenue.

(1) Revisional jurisdiction of. See BEN. ACT VII OF 1876 (ESTATES PARTITION), No. 2, 1 Pat. L.J. 491.

(2) Revision by. See CIV. PRO. CODE (1909), No. 351, 31 Ind. Cas. 479.

Board's Circulars.

Cir. 21. See U.P. ACT III OF 1901 (LAND REVENUE), No. 10, 34 Ind. Cas. 689.

Bombay Acts.

See ACTS—BOMBAY ACTS.

Bombay Cotton Trade Association Rules.

Rule 17 of the. See CONTRACT ACT, No. 51, 18 Bom. L.R. 96.

Bona fide Purchaser.

(1) Meaning of the term—Whether notice of appeal negatives *bona fides*. See EXECUTION SALE, No. 2, 30 M.L.J. 497.

(2) Court auction—Sale—Irregularity in the conduct of, not protected—Major judgment-debtor—Treated as minor—Vitiated sale—Notice—Execution. See SETTING ASIDE SALE, No. 1, 20 M.L.T. 479.

Bona fides.

Pardanashin lady. Transaction with—Gift deed—Undue influence—Onus. See PARDANASHIN WOMAN, No. 1, 35 Ind. Cas. 895.

Bond.

(1) Unregistered bond—Bond providing for re-payment on happening of certain contingency—Suit on bond—Limitation. See LIMITATION ACT (1908), No. 147, 30 P.W.R. 1916.

(2) Attested agreement to deliver merchandise with a penal clause not. See STAMP ACT (1999), No. 4, 9 Bur. L.T. 111.

Boundaries and Surveys Act.

See MAD. ACT XXVIII OF 1860.

Boundary.

(1) Second appeal—Boundary disputes—Thak map and Government chittas, which to be preferred—Chittas assumed to be public documents and therefore preferred—Error of law affecting

Boundary—(Concluded).

weight to be attached to evidence—Remand. **Nabendra Kishore Roy v. Srimati Rahima Banu**, 19 O.W.N. 1015—81 Ind. Cas. 695. See Final Part, 1915, Col. 935.

(2) See EVIDENCE ACT, No. 80, U.B.R. (1916), 2nd Qr., p. 110.

(3) Recital of, in documents of title—Transaction between third parties—Admissibility of such recital. See EVIDENCE ACT, No. 15, 86 Ind. Cas. 610.

(4) Statement, in a sale-deed as to ownership of another land given as—Subsequent suit between the purchaser and another about such land—Relevancy. See EVIDENCE ACT, No. 10, 94 Ind. Cas. 534.

Brahmins.

Grant to, before Permanent Settlement for subsistence—*Onus*—Suit for commutation of rent. See MAD. ACT I OF 1908 (MADRAS ESTATES LAND), No. 4-a, 32 Ind. Cas. 249.

Breach of Contract.

See CONTRACT.

(1) Jurisdiction—Suit for damages for breach of betrothal tried by wrong Court—How dealt with by Appellate Court. See CIV. PRO. CODE (1908), No. 59, 93 P.R. 1916.

(2) Effect of war on contract previously concluded—Contract for sale of goods—Seizure and release of goods by the Crown, effect of—Damages for. See CONTRACT, No. 17, 33 Ind. Cas. 540.

(3) Hire—Omission to return article after specified date—Remedy for—Suit for damages. See CONTRACT, No. 21, 86 Ind. Cas. 276.

(4) Shipping contract—Carriage by sea—Shipper and shipowner, their rights and liabilities—Omission to call at appointed port—Damages, suit for. See CONTRACT, No. 20, 84 Ind. Cas. 843.

(5) Deposit not a penalty—Forfeiture on deposit—Right of defaulter to claim credit in mitigation of damages. See CONTRACT ACT, No. 87, 10 S.L.R. 4.

(6) Misrepresentation—Ability to discover truth—Hotel-keeper—Landlord and tenant—Right to sue for rent—Distraint. See CONTRACT ACT, No. 14, 112 P.L.R. 1916.

(7) Suit for damages—Measure of profits. See CONTRACT ACT, No. 85, 86 Ind. Cas. 264.

(8) Land situated in the mofussil—Exchange effected before the Transfer of Property Act—Warranty of title—Breach—Damages. See EXCHANGE, No. 1, 31 M.L.J. 880.

(9) Contract, breach of—Indemnity bond—Damages—No actual loss, if action premature—Loss of title, substantial loss. See INDEMNITY BOND, No. 1, 20 M.L.T. 268.

(10) Mortgage—Mortgagor receiving rents—Suit by mortgagee for amounts improperly collected by mortgagor. See LIMITATION ACT (1908), No. 142, 34 Ind. Cas. 173.

(11) Suit for damages for breach of covenant in a registered *Zur-i-peshgi* lease. See LIMITATION ACT (1908), No. 192-b, 34 Ind. Cas. 51.

Breach of Promise.

To marry, compensation for. See BUDHIST LAW (MARRIAGE), §No. 2, 9 Bur. L.T. 77.

Breach of the Peace.

Mandamus—Commissioner of Police—Refusal to issue license to conduct procession, though right established by Civil Court—Apprehension of. See (MADRAS CITY POLICE) ACT III OF 1888, No. 1, 31 M.L.J. 426.

British Indian Association.

Rules of—Award of private arbitrators. See OUDH ACT I OF 1869 (ESTATES), No. 8, 30 Ind. Cas. 249.

Broker.

(1) *Principal and broker—Suit for commission—Limitation Act*, 1908, Sch. I, Arts. 115, 102.

The relation between a broker and the person for whom he acts is that of agent and principal. Unlike the factor he is not entrusted with the custody and apparent ownership of the goods, but he is a mere negotiator to effect business and is paid for his services a commission on the sales resulting from his efforts. Where the contract is not in writing, its terms are to be inferred from the course of dealings between the parties.

Hence, where a broker between whom and his employer the contract, as found by the Court of appeal below, was that he would be paid his commission at certain rates upon the date of delivery thereof, held, that the suit was one for money under a contract which for purposes of limitation was governed by Art. 115, Limitation Act, and was not one for wages within the meaning of Art. 102. **Sushil Chaudar Das v. Gauri Shankar**, 14 A.L.J. 873 = 39 A. 81 = 36 Ind. Cas. 371.

WALSH and SUNDAR LAL, JJ.

(2) *Broker liable as principal—Custom and usage of Calcutta Gunny Market—S. 92, Prov. (5), Evidence Act—Evidence of custom or usage incidental to contract—Contract Act, Ss. 230 and 236—Arbitration and award by Bengal Chamber of Commerce, jurisdiction.*

An award made by the Bengal Chamber of Commerce was sought to be set aside by defendants in Court on the ground that the Chamber acted in excess of jurisdiction in having made the award in favour of the plaintiffs disregarding the fact that the contract in question was made by plaintiffs as brokers although in fact the plaintiffs had no principals and the contract was not therefore enforceable. The plaintiffs alleged that there was a custom in the market in respect of gunny, hessian and manufactured jute goods by which brokers are held liable upon such contracts and such custom being well known to the Chamber, the award was properly made and valid.

The Court allowed evidence of custom and usage to be given and held that there was such a custom and that the defendants knew of it (a).

Broker—(Concluded).

Held—that Ss. 230 and 236, Contract Act, the former of which deals with undisclosed principal and the latter with falsely contracting as agent, were not applicable to this case.

Held also, that the evidence of usage of trade applicable to the contract which the parties making it knew, or may be reasonably presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the instrument itself is silent (b).

§ That the usage being known to the Chamber the matter was within the jurisdiction and the award was properly made. *In the matter of Joy Lall & Co. v. Moosotha Nath Mullick*, 20 C.W.N. 365 = 35 Ind. Cas. 3.

CHAUDHURI, J.

References :—(a) 19 C.W.N. 623, D. (b) L.R. 7 Q.B. 126 (1871), F.

(3) *Undisclosed principal—Bought and sold notes—Contract—Construction by similarity—Ss. 230 and 232, Contract Act—Arbitration. Patiram Banerjee v. Kankinarra Co., Ltd.*, 19 C.W.N. 623 = 42 C. 1050 = 31 Ind. Cas. 607. See Final Part, 1915, Col. 336.

Brokerage.

Brokerage on sale within time limit, meaning of. See APPEAL (GENERAL), No. 4, 20 C.W.N. 335.

Brokerage Contract.

Under-brokerage contract—Brokerage contract terminable by parties by three months' notice before the end of the term—Under-broker who had notice of brokerage contract if may claim damages for whole term when brokerage contract legally terminated before expiry of term—Under-broker wrongfully dismissed before brokerage contract terminated—Damages, measure of—Brokerage contract, if terminable by fresh agreement—Under-broker, if may insist on termination by notice—Hindu joint family, carrying on business in partnership—Contract by family, if terminates with death of co-parcener—Contract Act, S. 253, cl. 10—Rule of Hindu law, if to be considered.

By an agreement between A and B, dated 31st May 1911, the former appointed the latter to act as broker for him for 5 years or for such further period as might be mutually agreed upon between the parties. It was provided in the agreement that it might be determined by either party by giving three months' notice to the other party. In pursuance of another term of the said agreement B (the broker) appointed C to act as under-broker for him during the subsistence of the said agreement and C (the under-broker) had notice of the said agreement. On 12th August 1912, the broker B wrongfully dismissed the under broker C, and subsequently on 2nd December 1912 in good faith entered into a second agreement with A inconsistent with the first.

Brokerage Contract—(Concluded).

Held, in a suit by C against B for wrongful termination of the under-brokerage contract, that as the under-brokerage contract depended upon the subsistence of the brokerage contract and the latter contract was validly terminated on the 2nd December 1912, the under-brokerage contract also came to an end on the same day, and the plaintiff was entitled to recover damages as for the period from his dismissal on 12th August to the termination of the contract on 2nd December 1912.

Per Mookerjee, J.—That the three months' notice required by the contract between A and B was for the benefit and protection of the contracting parties themselves, and C was not entitled to make a grievance that either party has allowed the other to determine that agreement without insisting on the prescribed notice.

Where X and Y, members of a joint family (of which Y was the *karta*) carrying on a joint family business, entered into a contract of under-brokerage and X subsequently died; but Y and the other party to the contract went on dealing with each other as if the contract subsisted:

Held, per curiam, that X's death did not terminate the contract.

Per Mookerjee, J.—Where there are two joint agents and one of them dies, upon his death, the contract of agency terminates only so far as he is concerned, but not as regards the surviving agent.

The rights and liabilities of co-parceners in a joint Hindu family cannot be determined by exclusive reference to the Contract Act, but must be considered also with regard to the general rules of Hindu Law; according to these rules, the death of one of the co-parceners does not dissolve a family partnership. *Raghumull v. Luchmondas*, 20 C.W.N. 708.

SANDERSON, C.J., WOODROFFE and MOOKERJEE, JJ.

Buddhist Law.

- 1.—GENERAL.
- 2.—ADOPTION.
- 3.—ALIENATION.
- 4.—DIVORCE.
- 5.—GIFT.
- 6.—INHERITANCE.
- 7.—JOINT FAMILY.
- 8.—MAINTENANCE.
- 9.—MARRIAGE.
- 10.—PARTITION.
- 11.—PRE-EMPTION.
- 12.—WIDOW.

—1.—General.

- (1) *Rajbansis—Non-Burman Buddhists—Law applicable.*

The Burmese Buddhist Law is not applicable to the Rajbansis, even if they are Buddhists. The law to be applied to them is the customary law prevailing amongst them in their *habitat* which is Chittagong. *Fosson or Fakir Chan v. Adl Chandro Borwa*, 8 L.B.R. 301 = 9 Bur. L.T. 248 = 35 Ind. Cas. 431.

FOX, C.J.

Buddhist Law—(Continued).**—1.—General—(Concluded).**

(3) *Burmese Buddhist Law—Buddhist monk's arrest in execution of decrees—Presumption as to power of disposal—Civ. Pro. Code (1908), O. XXV, r. 1. U. Willatha v. U. Thiri, 30 Ind. Cas. 112=8 Bur. L.T. 337=8 L.B.R. 342. See Final Part, 1915, Col. 337.*

—2.—Adoption.

(1) *Burmese Buddhist Law—Adoption—Proof of publicity or notoriety—Effect of taking a share in the natural parent's estate—Eldest child's right to a share in the joint estate of the parents.*

It is only when the fact of adoption is left to be inferred from past statements and conduct that adequate proof of publicity or notoriety of the relationship should be insisted upon. When there are admissions of the adoptive parents and the positive evidence of persons present at the adoption no further proof of publicity is needed.

When there is positive evidence of adoption, the fact that the alleged adoptive child took a share by inheritance in the estate of his or her natural parents cannot overthrow the conclusions derived from such evidence.

The eldest child's right to a fourth share of the joint estate of his or her parents on the death of one of them lapses unless made within a reasonable time after the death of one of them.

(a). *Maung Seik v. Ma Thit Pu, 9 Bur. L.T. 154=33 Ind. Cas. 947.*

U KIN, J.

Reference:—8 Bur. L.T. 138, Appr.

(2) *Adoption shortly before death of adopter—Validity.*

An adoption effected a month before the death of the adopter is not invalid. *Mi Man v. Maung Gyi, U.B.R. (1915), 3rd Qr., 87=32 Ind. Cas. 539.*

MCCOLL, J.C.

(3) *Chinese Buddhist Law—Adoption.*

Adoption of children by childless married couples is of common occurrence in China, but when a question regarding an alleged adoption is raised before the Courts, care must be taken to see that the alleged adoption is properly proved.

Per Fox, C.J.—The customs as to adoption and inheritance have no connexion with Buddhism, Confucianism, or Taoism, but they appear to be based to a great extent on the veneration of ancestors which existed before the first teachers of the above religions appeared, and which still is the strongest influence with the majority of Chinese whichever of the above faiths they profess.

Per Fox, C.J.—Adoption of children by childless married couples would appear to be more prevalent in China than in Burma even. The dying out of a family appears to be regarded as disastrous. Jernigan says at page 124 of his work, "China in Law and Commerce"—"The dying out of a family should be prevented, as by the desolation of the house the dead lost their religious honour, the Gods of the family

Buddhist Law—(Continued)**—2.—Adoption—(Concluded).**

their sacrifices, the hearth its flame, and the forefathers their name amongst the living." Adoption is resorted to prevent these calamities, and the most frequent case is the adoption of a nephew by a childless uncle. According to most of the authors the adopted son takes exactly the same position as a natural son. The adoption of females would not with certainty avoid the calamity of the family in the paternal line dying out, for on marriage a woman becomes a member of the family of her husband, and severs connection with the family of her father: *Ma Pwa v. Yu Lwal, 8 L.B.R. 404=9 Bur. L.T. 187=34 Ind. Cas. 99.*

FOX, C.J., and PARLETT, J.

—3.—Alienation.

(1) *Burmese Buddhist Law—Widower's power of disposing his property—Auratha son's right—Purchaser, rights and liabilities of. Maung Shwe Po v. Maung Bein, 8 Bur. L.T. 25=27 Ind. Cas. 632=8 L.B.R. 115. See Final Part, 1915, Col. 337.*

(2) *Sale of joint ancestral property by a brother impeached by the widow of his deceased brother—Invalidity—Pre-emption. Ma Ton Pat v. Ma Than, 8 Bur. L.T. 155=30 Ind. Cas. 601. See Final Part, 1915, Col. 338.*

(3) *Widow's power of disposal of joint property of herself and her late husband—Necessity—Interpolation in texts of Dhammathats. In re Ma Sein Ton v. Ma Son, 8 Bur. L.T. 203=30 Ind. Cas. 588 (F.B.). See Final Part, 1915, Col. 338.*

—4.—Divorce.

(1) *Burmese Buddhist Law—Evidence of adultery—Divorce—Separation of property.*

According to Burmese Buddhist Law if a wife commits adultery, her husband is entitled to discard her and send her away with nothing but the clothes on her person. If it is proposed to abandon her for adultery, and she leaves her husband's house there is a divorce from the time she leaves her husband and the holder of a decree against her cannot attach property in her husband's possession as she is no longer entitled to a share in it. A Court may presume adultery where it is satisfied that a guilty attachment subsisted between the parties, and that opportunities occurred when a guilty intercourse might with ordinary facilities have taken place. *Maung Pya Gi v. Maung Po Ka, 9 Bur. L.T. 74=33 Ind. Cas. 118.*

U KIN, J.

(2) See **BUDDHIST LAW—GIFT**, No. 1, 9 Bur. L.T. 87.

—5.—Gift.

(1) *Burmese Buddhist Law—Kanwin and payin property—Gift—Transfer of Property Act, S. 123.*

Kanwin property is the property given by the bridegroom to the bride at the time of marriage for the joint purposes of the married pair. Such

Buddhist Law—(Continued).**—5.—Gift—(Concluded).**

a gift if not in writing and registered as required by S. 123 of the Transfer of Property Act is void, and if there is a divorce by consent without fault on either side it must go to the husband. *Maung Shwe Kho v. Ma Mya*, 9 Bur. L.T. 87=33 Ind. Cas. 199.

U KIN, J.

(2) *Buddhist Law—Shinbyu gifts—Manu Kye Book X. Ma Pan Nyun v. Ma Hla Sein*, 8 Bur. L.T. 149=8 L.B.R. 190=30 Ind. Cas. 665. See Final Part, 1915, Col. 339.

—6.—Inheritance.

(1) *Rights of an illegitimate child to father's estate during the lifetime of his legitimate wife.*

Held by Fox, C.J., Ormond and Twomey, JJ. (Parlett, J., dissenting) that were a Burman Buddhist died leaving a widow and an illegitimate child, the latter is not entitled to any share in the estate left by him.

Held further, that such an illegitimate child, even if entitled to a share in its deceased father's estate, cannot claim and obtain such share in the lifetime of her father's widow.

Held by Parlett, J. (Fox, C.J., Ormond and Twomey, JJ., dissenting) that a step-child, though illegitimate, has a right of partition against the surviving step-parent when there are no legitimate children; and that the daughter in this case is entitled to $\frac{2}{3}$ ths of the property taken by her father to the marriage with the surviving widow and to $\frac{1}{6}$ th of the joint property acquired during that marriage. *In re Ma Hoya v. Ma On Bwis*, 9 Bur. L.T. 15 (F.B.)=33 Ind. Cas. 171.

FOX, C.J., ORMOND, TWOMEY and PARLETT, JJ.

(2) *Buddhist Law—"Out of time grand children," rule as to, applicability of—Children and step children—Procedure to be followed by Court when plaintiff has no cause of action—Civ. Pro. Code (1909), O. I, r. 10.*

When there are no children surviving but only the grand-children, the latter succeed on the same footing as children, and the rule as to "out of time" grand-children, comes in only when a distinction has to be made between different classes of heirs, e.g., children and grand-children, and has no application when all the nearest heirs stand in the same degree of relationship to the deceased (a).

Neither O. I, r. 10, nor any other provision of the Code of Civil Procedure authorises a Court, on finding that the plaintiff must fail, to import into the case as co plaintiff a person who has different cause of action inconsistent with that of the original plaintiff and who moreover has not paid Court-fees on the new claim.

In a non-administration suit by one member of the family against another in his own right, the Court should adjudicate his claim on its

Buddhist Law—(Continued).**—6.—Inheritance—(Continued).**

own merits. *Maung Shwe Paw v. Mi Pan Zi*, 8 Bur. L.T. 288=8 L.B.R. 302=31 Ind. Cas. 389.

TWOMEY and ORMOND, JJ.

References:—(a) U.B.R. (1897—1901), II, 66, R.

(3) *Grand children by a predeceased orasa son—Children of the same parents.*

If an orasa son or daughter predeceases his or her parents, his or her eldest son or children together receive on the death of the grand parents the same share as their youngest uncle or aunt. Children of the same parents take the portion received by them in equal shares. *Chan Tha v. Mi Ma Pyu*, 9 Bur. L.T. 95=33 Ind. Cas. 127.

U KIN, J.

(4) *Partition on re-marriage of mother—Shares of children by first marriage and second husband in unpartitioned property—Court fees.*

When children partition with their mother upon her re-marriage they have no further right in the share taken by her. Her second husband becomes the heir to their exclusion.

Of the property that was left unpartitioned the children of the first marriage take three-fourths, and the second husband takes one-fourth.

The plaint must be stamped according to the plaintiff's valuation of his share. *Maung Shwe Bon v. Maung Pu*, 9 Bur. L.T. 97=35 Ind. Cas. 731.

TWOMEY and ORMOND, JJ.

(5) *Chinese Buddhist Law—Inheritance—Adoption—Family house.*

In this case one M, as next friend of W, a minor, brought a suit against N, the widow of K, a Chinaman who had been born and bred in Burma, for a declaration *inter alia* that W was K's adopted son. K had been a Chinese Buddhist and all the parties to the suit were or professed to be of the same religion.

Held, that the law applicable to the case was as far as it could be ascertained the customary law of Chinese Buddhists. *Ma Pwa v. Yu Lwal*; 8 L.B.R. 404=9 Bur. L.T. 187.

FOX, C.J., and PARLETT, J.

(6) *Inheritance—Succession among Chinese Buddhists—Exclusion of females—Indian Succession Act not applicable to Chinese Buddhists—Absence of written law on inheritance among Chinese Buddhists—Justice, equity and good conscience. Ma Thein Shin v. Ah Sheln*, 7 Bur. L.T. 246=24 Ind. Cas. 367=8 L.B.R. 222. See Final Part, 1914, Col. 263.

(7) *Inheritance—Orasa son—Limitation within which he should assert his claim to $\frac{1}{2}$ th—Right lapses if not asserted without unreasonable delay. Ma Thit v. Maung Tun Tha*, 8 Bur. L.T. 198=30 Ind. Cas. 688. See Final Part, 1915, Col. 341.

(8) *Burmese Buddhist Law—Orasa son—Eldest daughter's children not given preferential*

Buddhist Law—(Continued).**—6.—Inheritance—(Concluded).**

Adoption when there is Orasa son—Adult eldest daughter's presumptive status of Orasa—Liable to be displaced by an Orasa son in existence at parents' death. *Maung Po Hman v. Maung Tin*, 8 Bur.^s L.T. 140-29 Ind. Cas. 766-8 L.B.R. 113. See Final Part, 1915, Col. 341.

(9) *Succession to nephew—Division between paternal and maternal aunts per capita and not per stirpes—Equality of division is the rule adopted in such cases.* *Ma On Bwin v. Ma Tu*, 8 Bur. L.T. 141-30 Ind. Cas. 635. See Final Part, 1915, Col. 341.

(10) *Inheritance—Husband and wife dying without issue, simultaneously or within a short interval of one another—Manu Kye Book X, S. 56—Kin Wun Mingyi's Digest, S. 308—Analogous case of a married couple dying leaving parents—Manu Kye X, S. 32—Digest, S. 347.* *Ma Ein v. Tin Nga*, 8 Bur. L.T. 145-8 L.B.R. 197-30 Ind. Cas. 594. See Final Part, 1915, Col. 342.

(11) *Inheritance—Orasa son—Mother not marrying again—Rule stated in Manu Kye, Book X, S. 5—Kin Wun Mingyi's Digest, S. 30—Atlasankheppa, S. 155.* *Maung Kyi Hlaing v. Ma Htu*, 8 Bur. L.T. 154-8 L.B.R. 189-30 Ind. Cas. 640. See Final Part, 1915, Col. 342.

(12) *Burman Buddhist marrying three wives in succession—Property inherited during marriage—Shares of children of the marriage—'Auratha son' who is.* *Nga Lu Daw v. Mi Mo Yi*, U.B.R. (1915) 2nd Qr., p. 66-31 Ind. Cas. 87. See Final Part, 1915, Col. 342.

(13) *Buddhist marrying again after death of wife—Rights of children of first marriage after his death—Right of widow—Ketima and apaditha adoptions, distinction between—Evidence of adoption.* *Mi Chan, Mya v. Mi Ngwe Yon*, U.B.R. (1915) II Qr., p. 74-31 Ind. Cas. 94. See Final Part, 1915, Col. 343.

—7.—Joint Family.

(1) *Burmese Buddhist Law—Joint undivided ancestral property—Adverse possession—Burden of proof—Limitation Act (IX of 1909), Sch. I, Art. 144.*

In a suit to which Art. 144 of the First Schedule of the Limitation Act applies, it is for the plaintiff in the first place to prove title and if the plaintiff succeeds in proving title, the onus of proving adverse possession for 12 years lies upon the defendant (a). *Ma Nyeln v. Ma May*, 9 Bur. L.T. 84-32 Ind. Cas. 568.

TWOMEY, J.

Reference:—2 L.B.R. 184, Dist.

(2) *Burmese Buddhist Law—Ancestral property—Presumption of separation—Burden of proof.*

There is no presumption in Burmese Buddhist Law that property left by a person long deceased is part of an undivided estate. Among Burmese Buddhists, division of ancestral property among the co-heirs is the rule, cases of co-heirs remaining in commensality being extremely rare.

Buddhist Law—(Continued).**—7.—Joint Family—(Concluded).**

No general rule can be laid down as to the burden of proving jointness or separation without regard to the facts and circumstances of each particular case.

When land has been in exclusive possession of some of the heirs for a long period it must be presumed that the separate enjoyment is the result of partition and the person asserting that it forms part of an undivided estate should be required to prove it (a). *Maung Po U v. Maung Po Thin*, 9 Bur. L.T. 164-33 Ind. Cas. 985.

U KIN, J.

—8.—Maintenance.

(1) *Family house—Widow's right to maintenance.*

A family house within the meaning of the Chinese Buddhist Law would refer to "a house which has belonged to paternal ancestors or one which a man has started for his family and their male descendants." Per *Fox, C.J.*

Per *Fox, C.J.*—The root idea of a family house is that of a living together continuously for years in a house regarded as the family house descending from father to sons.

Before a widow can be deprived of maintenance for leaving the house in which her husband had lived, it must be shown clearly not only that it was a family house, but also that she let it without cause.

Per *Fox, C.J.*—Moreover in the absence of any guide as to what would be done in China if the other members of a family made themselves objectionable to the widow of a member, and made it impossible for her to live with them in the same house, I think that any rule there may be depriving the widow of maintenance unless she continues to live with her husband's relations should not be enforced. *Ma Pwa v. Yu Lwal*, 8 L.B.R. 404-9 Bur. L.T. 187-34 Ind. Cas. 99.

FOX, C.J. and PARLETT, J.

—9.—Marriage.

(1) *Marriage between Buddhist Chinaman and Burmese Buddhist woman according to Burmese custom—Validity under Chinese Law—Presumption.*

No particular ceremony is essential for a valid marriage under the Chinese Buddhist Law.

Where a marriage takes place between a Buddhist Chinaman and a Burmese Buddhist woman according to Burmese Buddhist custom, and the parties have co-habited as man and wife for several years, it must, in the absence of evidence to the contrary, be presumed that there was a valid marriage according to the Chinese Buddhist Law. *Ma Sheln v. Kim Sein alias Saw Chan Sein*, 8 L.B.R. 225-9 Bur. L.T. 81.

ORMOND, J.

Reference:—8 L.B.R. 222, R.

(2) *Burmese Buddhist Law—Breach of promise to marry, compensation for—Consent*

Buddhist Law—(Continued).**—9.—Marriage—(Continued).**

of children to proposed marriage—Parent's promise to marry their children if enforceable.

The rule of Burmese Buddhist Law, that a female, whether a minor or not, cannot be married without her consent, or against her will applies *a fortiori* to a male. If parents promise to make or compel their child to marry, the Court cannot enforce such promise, or give compensation for its breach, because in so doing it would infringe the principle that the consent of parties to a marriage must be free (a). *Maung Thein v. Ma Thein Hnin*, 9 Bur. L.T. 77=8 L.B.R. 347=34 Ind. Cas. 507.

FOX, C.J.

Reference:—U.B.R. 1897—1901, II, 197, R.

(3) Chinese Buddhist Law—Marriage—Law of domicile as affecting marriage—Customary law of woman when to be considered.

A Chinese Buddhist man and a Burmese Buddhist woman entered into a contract of marriage embodied in a written document. The material portion of the document ran as follows: "As I, *M.S.*, will live with *M.E.* for her whole life as husband and wife, hereafter I, *M.S.*, from the day we thus live as husband and wife throughout my whole life will never abandon *M.E.*, whether infirmity or blindness or any affliction overtakes her or any person interferes or makes mischief between us or any relation on my side objects. Handing all my salary as well as all property we may acquire together, to her, my wife, I will attend to, maintain, look after and cherish her in conformity with the duties of a husband. If I fail in any of the aforesaid duties I will pay Rs. 5,000 as compensation for damage to the reputation of my wife *M.E.* *M.E.* also, upon *M.S.* not failing in but performing the duties defined above, will throughout her whole life carry out the various acts of attendance upon her husband in accordance with the duties of a wife. Though her husband becomes infirm or blind she will not desert him." *Held*, (i) that the abovesaid agreement was not void under S. 23 of the Contract Act.

(ii) That under it a life-long and binding union was contemplated by the parties.

(ii-a) *Held by Parlett, J.*—That in the absence of the preliminary negotiation between the parents of the parties and other ceremonies usual in Chinese marriages, the union could not be regarded as a valid marriage.

(iii) That the desertion of *M.E.* by *M.S.* would constitute a breach of promise of marriage by *M.S.*

(iv) That under S. 74 of the Contract Act it was open to the Court to award such compensation not exceeding the amount of Rs. 5,000 named in the document as appears to it to be reasonable.

(v) That the defendant's position or his insolvency does not alone justify a reduction of the damages.

Buddhist Law—(Continued).**—9.—Marriage—(Concluded).**

(vi) That Rs. 2,000 was a handsome sum to a girl in the plaintiff's position and a reasonable compensation under the circumstances.

Prima facie there is no strong reason why the customary law of the man should be applied, and the customary law of the woman utterly disregarded, at any rate up to and at the time of marriage. After marriage other considerations apply. (Per *Fox, C.J.*)

The *lex loci contractus* quoad *solemnitatis* determines the validity of a marriage, and the *lex domicilii* the question of the capacity of the parties to marry (a). Per *Fox, C.J.*, *Sela Kyal v. Ma E*, 8 L.B.R. 399=9 Bur. L.T. 179=34 Ind. Cas. 159.

FOX, C.J. and PARLETT, J.

References:—(a) (1861) 9 H.L. Cases, 193; (1890) L.R. 15 P.D. 76, *F.*; (1877) L.R. 3 P.D. 1; 3 Bur. L.R. 8 and 1 Chan Toon's L.C. 140, *R.*

(4) *Chinese Buddhist Law—Marriage after elopement with girl's parents' consent, legal and valid—Is consent of father of bridegroom necessary?* *Saw Maung Gyi v. Ma Thein Kha*, 8 Bur. L.T. 198=8 L.B.R. 208=30 Ind. Cas. 715. See Final Part, 1915, Col. 344.

—10.—Partition.

(1) *Partition during step-father's lifetime—Practice—Appeal—New defence inconsistent with original, if allowed—Limitation.*

A Court should not allow a new plea to be raised in appeal which is inconsistent with the original one in the lower Court.

It is for the Judge to decide questions of law arising in the course of trial and he should not accept a view suggested by Counsel unless satisfied as to its soundness, it being quite different from an admission of fact by Counsel or from his waiving or withdrawing any part of his client's claim under instructions.

Under Burmese Buddhist Law, partition can be claimed by a step-child during the step-father's lifetime (a).

When the parties are working lands in turns by mutual arrangement, there is no adverse possession (b). *Ma Min Kyal v. Maung Wa*, 9 Bur. L.T. 53=31 Ind. Cas. 875.

PARLETT, J.

References:—(a) S.J. 177, *R.* (b) 3 Bur. L.T. 1=5 L.B.R. 112, *R.*

(2) Burmese Buddhist Law—Partition—Children of two marriages and step-mother.

The Dhammathats agree that the division whether between children of two marriages or between children of the 1st marriage and their step-mother is always *per stirpes*, not *per capita*. Children are not entitled to a share during the lifetime of their mother, but only succeed as representing their mother. *Mi Chit Lu Ma v. Wi Win Ma U*, 35 Ind. Cas. 423.

PARLETT, J.

Reference:—B 4 L.R. 110, F.

Buddhist Law—(Concluded).**—11.—Pre-emption.**

Inheritance — Pre-emption — Right after partition—Spark's Code, Part II, S. 97—Customary Law—Justice, equity and good conscience—Buddhist Law applicable to questions regarding pre-emption. Maung Ye Nan O v. Aung Myat San, 8 Bur. L.T. 167=31 Ind. Cas. 512 (F.B.) See Final Part, 1915, Col. 344.

—12.—Widow.

Burmese Buddhist Law—Widow's power of disposal.

Under the Burmese Buddhist Law, a widow has an absolute power of disposing of the whole property subject to the right of others. *Maung Po Saling v. Maung San Min, 9 Bur. L.T. 56=31 Ind. Cas. 948.*

PARLETT, J.

Reference:—8 Bur. L.T. 203, R.

Building.

See LANDLORD AND TENANT.

(1) Land owner—Ownership of plot of land under. See FUN. ACT II OF 1905 (PRE-EMPTION), No. 8, 30 Ind. Cas. 517.

(2) Rights of building contractor. See CONTRACT, No. 6, 18 Bom. L.R. 156.

(3) Suit for ejectment—Defendant in possession for a long time by building on the land—Kutchahouse—No presumption that land lot for building purposes. See EJECTMENT, No. 2, 14 A.L.J. 115.

(4) Ejectment—Tenant's right to compensation for, or for time to remove them after expiry of term—Equitable estoppel. See LANDLORD AND TENANT, No. 29, 9 Bur. L.T. 101.

(5) See PROPRIETARY RIGHT, No. 1, 35 Ind. Cas. 262.

Bundlekhand Land Alienation Act.

See U.P. ACT II OF 1903.

Bungas.

Alienation—Religious office—, attached to golden temple at Amritsar—Manager of, office of, nature of—Alienation of office, if valid. See RELIGIOUS OFFICES, No. 1, 151 P.W.R. 1916.

Burden of Proof.

See BENAMI TRANSACTION.

See HINDU LAW (JOINT FAMILY).

See LANDLORD AND TENANT.

See PARDANASHIN WOMAN.

(1) In a suit to set aside an order dismissing a claim petition, the burden will be on the plaintiff to show that he was entitled to the property. *Nachlappa Chetty v. Chinniah Ambalam, 4 L.W. 362=36 Ind. Cas. 794.*

SRINIVASA AIYANGAR, J.

(2) *Suit to recover property by inheritance—Plaintiff's duty to prove descent and legitimacy—Absence of acquiescence.*

Where a man comes forward to claim property by right of inheritance, in the absence of

Burden of Proof—(Continued).

acquiescence by the defendant, he must establish his descent and legitimacy. *Chandan Singh v. Bhabhuti Singh, 80 Ind. Cas. 220.*

STUART, A.J.C.

References:—23 Ind. Cas. 972=1 O.L.J. 89, D.

(3) *Bengal Tenancy Act (VIII of 1885), S. 103—Record of rights—Entry of occupancy right—Presumption.*

An entry in a record of rights of an occupancy right creates a presumption in favour of the tenant which it is for the landlord to rebut. *Biswasar Singh v. Farbhoo Nath Pathuk, 84 Ind. Cas. 506.*

MULLICK, J.

(4) *Oldfield J.—It is for the party, who seeks to oust the jurisdiction of the ordinary Civil Courts, to establish right to do so (a). District Board, Tanjore v. Kannuawami Thondaman, 35 Ind. Cas. 121.*

OLDFIELD and SADASIVA AIYAR, JJ.

References:—39 M. 21; 25 Ind. Cas. 891; 27 M.L.J. 233, R.

(5) *Possession of document by obligor with endorsement of payment—Presumption arising from such possession—Unreliable evidence of payment—Inference of possession through dishonest means.*

Where in a suit on a bond the original bond is produced by the defendant with an endorsement of payment the plaintiff must prove the affirmative proposition that the debt is still outstanding (a).

But if it is found that the story of payment is absolutely ridiculous the Court may infer from that that the defendant got possession of the bond through dishonest means. *Madan Mohan Sahay v. Etwar Chand Mahto, 36 Ind. Cas. 562.*

ROE, J.

References:—(a) 17 Ind. Cas. 396=34 A. 511=12 M.L.T. 392=15 O.C. 278=(1912) M.W.N. 1052; 14 Bom. L.R. 1073=17 C.W.N. 49=16 O.L.J. 629=23 M.L.J. 741=10 A.L.J. 373=29 I.A. 184 (P.C.), R.

(6) *Ex parte decree against pardanashin lady—Suit to set aside decree on ground of fraud.*

Where a pardanashin lady sued to set aside an ex parte decree passed against her on the ground of fraud and collusion and by concealment of true facts, she must prove clearly that the ex parte decree was obtained by the concealment from the Court of material facts and circumstances which indicate that she was prevented by fraud from putting the Court in possession of the true facts. *Mussammat Parbat Koor v. Jagarnath Prasad, 36 Ind. Cas. 596.*

ROE, J.

(6-a) *Execution of document by pardanashin lady—Proof of knowledge of lady as to nature and character of transaction—Act done by lady as free agent—Husband a joint executant.*

Where a document is alleged to have been executed by a pardanashin lady the person in

Burden of Proof—(Continued).

whose favour the document has been executed must prove that the lady understood the nature and character of the transaction, and that she signed the deed fully understanding it. The fact that the husband of the lady jointly executed the document with her would not make the execution of the deed by her the less voluntary, if it is found that the lady acted in the transaction as a free agent and was duly informed of what she was about, even though the husband was the moving spirit in the negotiation of the loan evidenced by the document (a).

In determining the question whether a *pardanishan* lady was a free agent in executing a document and appreciated the result of her act the whole attendant circumstances must be looked to. The mental capacity of the lady being considered, it should be seen whether the circumstances of the case indicate a strong probability in favour of her voluntary execution. **Musammatt Saleha Bibi v. Oudh Commercial Bank, Ltd., Fyzabad, 36 Ind. Cas. 673.**

KANHAIYA LAL and KENDALL, A.J.Cs.

References:—(a) 29 Ind. Cas. 401=18 C.W.N. 1133, D.

(6-b) Jungle lands—Suit by Zemindar for possession—Plea of under-proprietary title—Adverse possession—Abadi—Scattered trees—Ownership.

In a suit by a Zemindar of a village for possession and declaration of title with regard to certain plots of land consisting of jungles and groves and with regard to some scattered trees in respect of which the ownership could only be exercised by occasional acts of dominion, the burden of proof lies on the defendant who asserts his under-proprietary title, and having regard to the nature of the property there is a further presumption that the plaintiff had possession. As the presumption of possession follows the title, it is for the opposite party to prove adverse possession.

Where a Zemindar sues to recover possession on the ground that the defendant had encroached upon the plots in dispute and the finding of the Court below is that the defendant is an occupancy tenant, plaintiff is not entitled to a decree for possession or to a decree for declaration of his proprietary title with respect to these plots. **Ram Saran v. Prithpal Singh, 32 Ind. Cas. 370.**

LINDSAY, J.C.

(6-c) Suit by talukdar—Plea of under-proprietary right—Adverse possession—Decision of Revenue Court.

In a suit brought by a talukdar of certain villages for obtaining a declaration that the defendants who are in possession of certain plots in those villages have no proprietary or under-proprietary rights therein, if the defendants wish to establish their under-proprietary rights, the burden of proving that they have such rights lies upon them (a).

A person may acquire under-proprietary rights by adverse possession. Where in a claim for ejectment laid before a Revenue Court

Burden of Proof—(Continued).

the defendant pleaded that he was the under-proprietor and the Revenue Court upheld the defendant's plea and refused to eject him on the ground that he was the under-proprietor, he may acquire under-proprietary rights by adverse possession. Time would run from the date of the decision of the Revenue Court. **Muhammad Mumtaz Ali Khan v. Harpal Singh, 32 Ind. Cas. 976.**

LINDSAY, J.C.

Reference:—(a) 8 O.C. 145, R.

(7) Waste Land Act applies to all lands—On those who plead it—Land sold under it—False description in notice, under it, effect of. See ACT XXIII OF 1863 (WASTE LANDS), No. 1, 14 A.L.J. 1205 (P.C.).

(8) Domicile of origin—Domicile of choice—Acquisition and abandonment of domicile. See ACT X OF 1965 (SUCCESSION), No. 2, 18 Bom. L.R. 715.

(8-a) See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 47-a, 36 Ind. Cas. 906.

(9) Of good faith. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 43, 14 A.L.J. 1183.

(10) Question of onus not important where all the evidence is before the Court. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 42, 31 M.L.J. 133.

(11) See BEN. ACT VIII OF 1885 (TENANCY), No. 36, 21 C.W.N. 112.

(11-a) Grant to Brahmin before Permanent Settlement for subsistence—Onus—Suit for commutation of rent. See MAD. ACT I OF 1908 (ESTATES LAND) No. 4-a, 34 Ind. Cas. 229.

(12) Vacant site—Possession follows title. See ADVERSE POSSESSION, No. 3, 116 P.W. R. 1916.

(13) See AGENT, No. 1, 35 Ind. Cas. 81.

(14) Ancestral property—Presumption of separation. See BUDDHIST LAW (JOINT FAMILY), No. 2, 9 Bur. L.T. 164.

(15) Joint undivided ancestral property—Adverse possession. See BUDDHIST LAW (JOINT FAMILY), No. 1, 9 Bur. L.T. 84.

(16) See CANCELLATION OF DEED, No. 1, 33 Ind. Cas. 441.

(16-a) Attachment in execution of two decrees of two Courts—Sale by lower Court—Rights of purchaser—Bona fides—Notice—Irregularity. See CIV. PRO. CODE (1882), No. 17-a, 32 Ind. Cas. 41.

(17) Sale followed by agreement for repurchase—Construction—Onus. See CONSTRUCTION OF DEED, No. 6, 35 Ind. Cas. 336.

(18) Gift of ancestral land by sonless proprietor among Gujars of Jhelum to sister's son—Validity by custom—Onus on sister's son. See CUSTOMS (PUNJAB—GIFT), No. 4, 127 P. R. 1916.

(19) Burden of proving malice and absence of reasonable and probable cause—Malicious

Burden of Proof—(Continued).

prosecution, suit for. See DAMAGES, SUIT FOR, No. 1, 20 M.L.T. 303.

(30) Deposit of money in a bank—Proof of payment—Fraud. See DEPOSIT, No. 1, 9 Bur. L.T. 160.

(31) See EJECTMENT, No. 4, 9 Bur. L.T. 152.

(32) Age—Certificate by a Medical man to private patient—Former judgment regarding age—Whether relevant—Value—Minority—Party pleading the same. See EVIDENCE ACT, No. 7, 33 Ind. Cas. 142.

(33) Corporations and individuals—Difference in regard to burden of proof. See EVIDENCE ACT, No. 87, 1 Pat. L.J. 168.

(34) Notice of hearing. See EVIDENCE ACT, No. 84, 4 L.W. 611.

(34-a) Suit on bond—Original not produced—Plea of payment. See EVIDENCE ACT, No. 91, 32 Ind. Cas. 349.

(35) See HINDU LAW (ALIENATION), No. 24, 34 Ind. Cas. 617.

(36) Debt contracted by father—Plea of immorality by son. See HINDU LAW (DEBTS). No. 7, 36 Ind. Cas. 44.

(37) Hindu Law—Succession as last male owner's heirs *ab intestato*. See HINDU LAW (INHERITANCE), No. 5, 31 Ind. Cas. 600.

(38) See HINDU LAW (JOINT FAMILY), No. 7, 19 O.C. 92.

(39) See HINDU LAW (JOINT FAMILY), No. 22, 33 Ind. Cas. 778.

(30) See HINDU LAW (JOINT FAMILY), No. 27, 34 Ind. Cas. 827.

(31) See HINDU LAW (JOINT FAMILY), No. 26, 34 Ind. Cas. 757.

(31-a) HINDU LAW (JOINT FAMILY), No. 30, 32 Ind. Cas. 291.

(32) See HINDU LAW (PARTITION), No. 9, 34 Ind. Cas. 466.

(33) Decision in appeal on wrong view as to—Second appeal—Remand. See HINDU LAW (SUCCESSION), No. 1, 3 L.W. 331.

(34) See HINDU LAW (WIDOW), No. 28, 34 Ind. Cas. 596.

(35) Hindu Law—Sale by Hindu widow—Legal necessity—*Onus probandi*. See HINDU LAW (WIDOW), No. 14, 20 M.L.T. 335.

(36) Setting up will of last male holder—*Onus*—Suit by reversioner for setting aside will as forgery and for declaration of invalidity of widow's alienation—Nature of suit. See HINDU LAW (WIDOW), No. 16, (1916) 2 M.W.N. 325.

(37) Widow—*Ex parte* decree—Effect—How far binding on reversioners—*Onus* of proof. See HINDU LAW (WIDOW), No. 27, 33 Ind. Cas. 446.

(38) Renewal of lease by Thekadar—Thekadar's powers, absence of definite restriction on—*Onus* of proof on landlord. See LEASE, No. 15, 33 Ind. Cas. 203.

Burden of Proof—(Continued).

(39) See LIMITATION ACT (1908), No. 127, 33 Ind. Cas. 661.

(40) Island arising in the sea within territorial limits—Title in Crown—Crown opposed by squatters—Crown if must prove that squatters had not acquired title by adverse possession—*Onus*. See LIMITATION ACT (1908), No. 269, 31 M.L.J. 324.

(41) *Pardanashin* woman executing sale-deed, liability of—Denial of receipt of consideration by executant of deed—*Onus* of proof. See LIMITATION ACT (1908), No. 192-a, 33 Ind. Cas. 746.

(42) Transfer of Property Act, § 41—Real owner holding out another—Transfer of latter—Notice, whether lies on the purchaser or owner—*Benamidar* having interest in property, if notice or shifts *onus*. See LIMITATION ACT (1908), No. 182, 4 L.W. 200.

(43) Of custom—*Wajib-ul-ars*, evidentiary value of statements in. See MAHOMEDAN LAW (INHERITANCE), No. 1, 20 M.L.T. 362.

(44) See MAHOMEDAN LAW (MARRIAGE), No. 3, 36 Ind. Cas. 20; 21 C.W.N. 345.

(44-a) Proof of dedication—Allegation of custom governing succession opposed to general rules—Burden of proof. See MAHOMEDAN LAW (WAKF), No. 8, 36 Ind. Cas. 951.

(44-b) MALABAR LAW (ALIENATION), No. 2, 32 Ind. Cas. 459.

(45) See MORTGAGE (GENERAL), No. 46, 34 Ind. Cas. 165.

(46) See MORTGAGE (GENERAL), No. 49, 35 Ind. Cas. 56.

(47) See MORTGAGE (GENERAL), No. 52, 35 Ind. Cas. 455.

(48) Evidence—Mortgage-deed—Execution proved—Denial of payment of consideration—*Onus* of proof. See MORTGAGE (GENERAL), No. 35, 33 Ind. Cas. 777.

(49) Promissory note by a young boy just emerged from minority with large expectations—, re-passing of consideration. See NEGOTIABLE INSTRUMENTS ACT, No. 23, 31 Ind. Cas. 739.

(50) *Pardanashin* lady, transaction with—Gift deed—Undue influence—*Bona fides*—*Onus*—Maintainability of declaratory suit, when possession not delivered. See PARDANASHIN WOMAN, No. 1, 35 Ind. Cas. 395.

(51) In application to remove a person from an appointment. See RECEIVER, No. 1, (1916) M.W.N. 10.

(52) Registration of sale-deed—No taint of fraud—Consideration not paid—Title passing notwithstanding—Stranger alleging fraud. See SALE, No. 12, 34 Ind. Cas. 125.

(53) Grant of land for services of a Huddar—Right to resume land when service not required—Right depending on the terms of the grant and character of services—Presumption. See SERVICE TENURE, No. 1, 18 Bom. L.R. 695.

(54) Duty of plaintiff to establish title set up by him. See TITLE, No. 1, 75 P.L.R. 1916.

Burden of Proof—(Concluded).

(54-a) Mortgage by agent under power of attorney—Act done by agent fraudulently—Liability of principal—Burden of proving good faith. See TRANSFER OF PROPERTY ACT, No. 42, 36 Ind. Cas. 968.

(55) See TRUSTEES, No. 1, 35 Ind. Cas. 204.

Burma Acts.

See ACTS—BURMA ACTS.

Calcutta Improvement Act.

See BEN. ACT V OF 1911.

Calcutta Municipal Act.

See BEN. ACT III OF 1899.

Calcutta University Act.

See ACT II OF 1857.

Canal and Drainage (Northern India) Act.

See ACT VIII OF 1873.

Canal Dues.

See ACT VIII OF 1873 (CANAL AND DRAINAGE), No. 1, 32 Ind. Cas. 556.

Cancellation

(1) Suit for cancellation of document—Court-fee. See COURT FEES ACT, No. 7, U B.R. (1915), 4th Qr., p. 102.

(2) Will—Death of testator—Subsequent suit for mere declaration that will is null and void—Maintainability—Prayer for cancellation essential—Court-fee payable—S. 7 (IV) (c), Court Fees Act. See SPECIFIC RELIEF ACT, No. 25, 87 P R. 1916.

Cancellation of Deed.

(1) *Suit to set aside deed and for recovery of possession of share—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 44, 91, 141.*

Whether a plaintiff must sue for cancellation of a document under which the defendant in possession claims, depends, we think, upon whether the onus of proving circumstances establishing its invalidity lies upon him or whether it lies upon the defendant to prove circumstances establishing its validity. For example, where a plaintiff sues to recover possession of property which the defendant has obtained under a document executed by the plaintiff or one under whom he claims, the plaintiff would have to establish facts entitling him to have the instrument cancelled or set aside and would have to sue within three years of those facts becoming known to him, as provided by Art. 91 of the Indian Limitation Act. On the other hand, where the defendant has acquired possession under a deed executed not by the real owner of the property but by some one having a power of disposal under certain circumstances on behalf of the real owner, the onus lies on the defendant to prove the existence of those circumstances, and the plaintiff may ignore the deed in bringing his suit for possession (2).

A suit was instituted by the plaintiff for a declaration that a certain deed of exchange was

Cancellation of Deed—(Concluded).

not binding on him, and for recovery of possession of his share in certain lands. Held that it was not necessary for the plaintiff to have the instrument set aside before he could recover possession; and that his suit was governed by the twelve years' period of limitation provided by Art. 141, Sch. I, Limitation Act (IX of 1908) (b). *Anandappa v. Totappa*, 33 Ind. Cas. 441.

SCOTT, C.J. and ROE, J.

References:—(a) 33 C. 257; 14 M. 26, R. (b) 34 C. 329 (P.C.), 25 O. 1 (P.C.), *Rel.*

(2) Suit for cancellation of sale-deed when no consideration passed—Point to be considered. See SPECIFIC RELIEF ACT, No. 24, 31 Ind. Cas. 77.

Carriage by Sea.

Shipping contract—Shipper and shipowner, their rights and liabilities—Omission to call at appointed port—Breach of contract—Damages, suit for. See CONTRACT, No. 20, 34 Ind. Cas. 843.

Carriers.

(1) *Carrier, common—Negligence—Railway Company if may free itself from liability by contract—Statutory limits imposed on such contract—Duty of care, apart from contract and excluded by it, if arises—Contract through agent or person held out as such—Agent not caring to acquaint himself with terms printed on ticket—Principal is bound by terms—Jury—Fact, finding of—Legal consequences flowing therefrom. Grand Trunk Railway Company of Canada v. Albert Nelson Robinson*, 19 O.W.N. 905=31 Ind. Cas. 684 (P.C.). See Final Part, 1915, Col. 348.

(2) Carriers by sea whether common carriers. See CONTRACT ACT, No. 66, 16 Bom. L.R. 126.

(3) Railway—Carriage of goods—Risk note Form B—Liability of carrier—Negligence of Railway—Onus of proof. See RAILWAY, No. 2, 9 S.L.R. 177.

(4) Liability of shipowners. See SHIPPING CONTRACTS, No. 1, 18 Bom. L.R. 230.

Carriers Act.

See ACT III OF 1865.

Caste.

(1) Or section of caste, whether can own temple. See CIV. PRO. CODE (1908), No. 165, 4 L.W. 228.

(2) Suit by plaintiffs as representing a caste section—Meeting of the caste for authorizing plaintiffs—Meeting not regularly convened—A number of caste people supporting plaintiff's action subsequent to suit cannot validate the action. See CIV. PRO. CODE (1908), No. 802, 18 Bom. L.R. 1.

Caste Disabilities Removal Act.

See ACT XXI OF 1850.

Cattle Trespass Act.

See ACT I OF 1871.

Cause of Action.

See CIV. PRO. CODE (1908), O. II, r. 2.

See RES JUDICATA.

(1) *Noabad taluk*—Khas mehal—Taluk, a tenure—Non-permanent taluk—Sale for arrears of revenue—Purchaser's title—Act VII of 1868 (B.O.), S. 12—Cause of action—Defendant admitting plaintiff's title in written statement, though claim notified before suit—Suit if may be dismissed for want of cause of action.

A Noabad taluk is a tenure, the land being khas mehal land of Government.

Where it was found that the tenure in question was not a permanent tenure, the purchaser thereof at a sale under Act XI of 1859 acquired it in the same state in which it was held at the time of the last settlement as provided by S. 12 of Bengal Act VII of 1868.

The fact that the defendant does not in his written statement deny the plaintiff's title to land of which plaintiff has sued for recovery does not show that the plaintiff had no cause of action.

Where, therefore, it appeared that the defendant did not at any time before the institution of the suit admit the plaintiff's title to the lands in suit, although plaintiff served him with notice of his claim.

Held—that this Court was not justified in dismissing the suit on the ground of want of cause of action, merely because the defendant in his written statement admitted plaintiff's title. *Gangadas Sil v. The Secretary of State*, 20 C.W.N. 636=32 Ind. Cas. 752.

N.R. CHATTERJEA and NEWBOULD, JJ.

(2) Chowkidari Chakran land resumed and settled with zamindar—Suit by patnidar for possession of those lands—Ejectment of tenants settled by zamindar. See BEN. ACT VI OF 1878 (VILLAGE CHOWKIDAR), No. 1, 33 Ind. Cas. 693.

(3) Amendment setting up different title and, if permissible. See AMENDMENT OF PLAINT, No. 1, 30 Ind. Cas. 391.

(4) See CIV. PRO. CODE (1908), No. 61, 31 M.L.J. 816.

(5) Court's power to reserve portion of—Accidental omission of portion of claim already due—Applicability of O. II, r. 2, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 323, 20 C.W.N. 475.

(6) Relief against added defendants based on alternative, not claimed in first suit—Second suit barred. See CIV. PRO. CODE (1908), No. 34, 10 S.L.R. 29.

(7) Separate trial—, essentially of different character. See CIV. PRO. CODE (1908), No. 328, 36 Ind. Cas. 29.

(8) What amounts to splitting up of—Causes of action when different. See CIV. PRO. CODE (1908), No. 812, 18 Bom. L.R. 45.

(9) See EJECTMENT, No. 7, 30 Ind. Cas. 218.

Cause of Action—(Concluded).

(10) Partnership—Suit for account by representatives of a deceased partner—Parties. See LIMITATION ACT (1908), No. 31, 33 Ind. Cas. 564.

(11) Dower, claim for—For dower distinct from that for share in inheritance. See MAHOMEDAN LAW (DOWER), No. 3, 19 O.C. 171.

(12) Allegation of *prima facie*—Dismissal of suit on surmises—Procedure. See PAUPER SUIT, No. 1, 30 Ind. Cas. 689.

(13) For pre-emption, extinguishment of. See PRE-EMPTION, No. 16, 19 O.C. 183.

Caveat.

See PROBATE.

See WILL.

What is a—Probate proceeding—Persons upon whom citations issued, preferring objections—Objections if must be stamped as caveat. See COURT FEES ACT, No. 30, 20 C.W.N. 787.

Central Provinces Acts.

See ACTS—CENTRAL PROVINCES ACT.

Certificate.

Age—, by a medical man to private patient—Former judgment regarding age—Whether relevant—Value—Minority—Party pleading the same—Burden of proof. See EVIDENCE ACT, No. 7, 33 Ind. Cas. 142.

Certificate Sale.

Suit for rent by purchaser at—Sale in execution of rent decrees—Purchaser by decrees-holder in certificate sale subsequently cancelled—Rent decrees and sale if thereby reversed. See FRAUD, No. 2, 20 C.W.N. 819.

Certified Copy.

Suit on mortgage—Original deed in possession of defendant—Admissibility of—Proof of mortgage. See EVIDENCE ACT, No. 31, 36 Ind. Cas. 673.

Certified Purchaser.

(1) Ejectment suit—Benamidar—If can recover possession. See CIV. PRO. CODE (1908), No. 150, 4 L.W. 609.

(2) Private transferee of certified purchaser, suit against, for confirmation of possession. See CIV. PRO. CODE, (1908), No. 146-a, 32 Ind. Cas. 963.

Certifying Payment into Court.

(1) See CIV. PRO. CODE (1882), No. 12, 39 M. 1026.

Cess Act.

See BEN. ACT IX of 1860.

Cess (Irrigation) Act.

See MAD. ACT VII OF 1866.

Cess (Road) Act.

See ACT IX OF 1880.

Chanda.

(1) Chanda, claim for, in respect of ohhatra-bhog, by puja pandas.

Chanda—(Concluded).

Held that the plaintiffs who were the Puja Pandas of the temple of a deity named Lingraj Mahaprabu at Bhubaneshwara are not entitled to claim *chanda* in respect of *chhatrabhog* at such temple. *Sapneswar Pujapanda v. Ratkanar Mahapatra*, 1 Pat. L.J. 514.

MULLICK and ATKINSON, JJ.

Charge.

See MORTGAGE.

(1) Document invalid as a mortgage whether can operate as a charge. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 42, 31 M.L. J. 133.

(2) Application for attachment before judgment—Summons to defendant to furnish security—Money paid into Court—Subsequent insolvency of defendant—Priority. See CIV. PRO. CODE (1908), No. 622, 39 M. 905.

(3) Mortgage or—Covenant to pay whether can be implied. See CONSTRUCTION OF DEED, No. 1, (1916) 2 M.W.N. 263.

(4) Decree creating charge over defendant's property—Release of property from the charge sought—Memorandum of appeal—*Ad valorem* fee payable. See COURT-FEES, No. 1, 11 P.R. 1916.

(5) Hindu law—Mitakshara—Joint family—Created by one member, whether it binds the family property after his death—Whether share of son born subsequently to creation of the charge is bound. See HINDU LAW (JOINT FAMILY), No. 15, 1 Pat. L.J. 497.

(6) Maintenance—Gift by husband to one who has been maintaining him during illness—Lien. See HINDU LAW (WIDOW), No. 31, 35 Ind. Cas. 566.

(7) Mortgage—Award of compensation for breach of penal clause—Amount awarded a, on mortgaged property. See LIMITATION, No. 4, 30 Ind. Cas. 323.

(8) Hypothec—Oral charge on moveable property—Validity—Subsequent written unregistered mortgage—Priority—S. 48, Registration Act. See MORTGAGE (GENERAL), No. 6, 32 P.R. 1916.

(9) Mortgage—Defective attestation—Validity—Creation of charge. See TRANSFER OF PROPERTY ACT, No. 85, 14 A.L.J. 673.

(10) Mortgage invalid—Whether can be treated as a. See TRANSFER OF PROPERTY ACT, No. 128, 9 Bur. L.T. 64.

(11) Mortgage not validly executed if creates a charge. See TRANSFER OF PROPERTY ACT, No. 89, 20 C.W.N. 989.

(12) See TRANSFER OF PROPERTY ACT, No. 73, 33 Ind. Cas. 121.

(13) For unpaid purchase-money, purchaser being directed to pay off a creditor of the vendor—If extinguishes charge. See VENDOR AND PURCHASER, No. 1, 31 M.L.J. 530.

Charitable Trust.

(1) See CIV. PRO. CODE (1889), No. 31, 35 Ind. Cas. 860.

Charitable Trust—(Concluded).

(2) Trustee's power to invest trust funds. See TRUST ACT, No. 3, 33 Ind. Cas. 677.

Charity.

(1) Suit relating to—Consent of Advocate-General to institution of suit. See CIV. PRO. CODE (1908), No. 328, 36 Ind. Cas. 29.

(2) See HINDU LAW (JOINT FAMILY), No. 19, 31 Ind. Cas. 35.

(3) Widow applying estate to charity—Consent of reversioners—Failure of one form of charity—Gift to another form—Validity. See HINDU LAW (WIDOW), No. 1, 7 P.W.R. 1916.

(4) Will—Construction—Properties left for charity—Surplus income secured to the family—Whether grant is personal or dedication to charity—Prohibition as to alienation, effect of—Presumption in cases of charitable bequests by Hindu testators. See HINDU LAW (WILL), No. 4, 4 L.W. 104.

Charter-party.

And bill-of-lading conflicting—Charter-party to prevail—Liability of shipowner. See SHIPPING CONTRACTS, No. 1, 18 Bom. L.R. 230.

Cheque.

Fees to pleader authenticated by affidavit of agent—Payment by. See RULES OF PRACTICE, No. 1, 32 Ind. Cas. 194.

Chief Courts (Punjab) Act.

See PUN. ACT XXIII OF 1865.

Chinese Buddhist Law.

(1) Inheritance—Adoption—Family house. See BUDDHIST LAW (INHERITANCE), No. 5, 8 L.B.R. 404.

(2) Marriage—Law of domicile as affecting marriage—Customary law of woman when to be considered. See BUDDHIST LAW (MARRIAGE), No. 3, 8 L.B.R. 399.

Chit Transaction.

See CONSTRUCTION OF DEED, No. 1, (1916) 2 M.W.N. 263.

Chose-in-action.

Rent—Assignment—Debt—Simple mortgage and subsequent lease of the hypotheca to mortgage—Mesne profits. See TRANSFER OF PROPERTY ACT, No. 16, 31 Ind. Cas. 473.

Chota Nagpur.

(1) Aboriginal tribes in—Law of inheritance applicable. See ACT X OF 1865 (SUCCESSION), No. 14, 20 C.W.N. 1082.

(2) Grants by the Maharaja of—Impartibility—Custom of primogeniture—*Lex loci* custom of. See CUSTOM (GENERAL), No. 1, 20 C.W.N. 876.

Chota Nagpur Tenancy Act.

See BEN. ACT VI OF 1908.

Choukidar.

Choukidar's register, value of, as to date of birth or death. See HINDU LAW (REVERSIONER), No. 3, 19 O.O. 221.

Chowkidari Act.

See BEN. ACT VI OF 1870.

Chowkidari Chakran.

Police duties performed under supervision of Government—Control of Government over private *chakran* if exists. See APPEAL (SECOND APPEAL), No. 3, 20 C.W.N. 1245.

Chowkidari Chakran Lands.

- (1) *Resumption—Question of fact—Chowkidari Chakran Act* (VI of 1870, B.C.), Ss. 60, 61—*Commissioner's report—Finality—Notice.*

In a suit to have it declared that certain resumed *chakra* lands are *chowkidari chakran* lands of Mauza A of which plaintiff is the *patnidar* and not the *chakran* lands of Mauza B of which defendants are the *patnidars*, the question is one of parcel or no parcel and as such is purely a question of fact.

The absence of notice under S. 61 of the Chowkidari Chakran Act would render the proceedings of the Commissioner of no effect against a person who was entitled to such notice and the Civil Court would interfere although but for such defect the order of the Commissioner would be final and conclusive. The Commissioner has no duty imposed upon him to give any notice to *patnidars* who are not impleaded in his enquiry and the report of the Commissioner is final and conclusive against such persons without notice. *Sarat Chandra Roy v. Secretary of State for India in Council*, 32 Ind. Cas. 545.

HOLMWOOD and IMAM, JJ.

- (2) Resumed and settled with zamindar—Suit by *patnidar* for possession of those lands—Cause of action—Ejection of tenants settled by zamindar. See BEN. ACT VI OF 1870 (VILLAGE CHOWKIDAR), No. 1, 33 Ind. Cas. 693.

Christian Marriage Act.

See ACT XV OF 1872.

Christians.

Roman Catholic Church—Claim by one section of worshippers to exclude another from a portion of the church—Caste distinctions—Authority of the Bishop. See WORSHIPPERS, No. 1, 19 M.L.T. 249.

City Land Revenue Act.

See BOM. ACT II OF 1876.

City Municipal Act.

See MAD. ACT III OF 1904.

City Police Act.

See MAD. ACT III OF 1888.

Civil Courts Act.

See BEN. ACT IV OF 1906.

See MAD. ACT III OF 1873.

See OUDH ACT XIII OF 1879.

Civil Courts, Bengal & Assam Act.

See BEN. ACT XII OF 1887.

Civ. Pro. Code (1882).

- (1) S. 13, *Expl. II—Suit for possession of land as vendee—Second suit in capacity of reversioner—Whether barred as res judicata—Reversioner purchasing whether renounces his rights as reversioner—Waiver. Kura and Bell v. Madho*, 68 P.R. 1915=151 P.W.R. 1915=31 Ind. Cas. 169. See Final Part, 1915, Col. 352.

- (2) S. 13, *Expl. IV—Scope—Change in Code of 1908—Effect. See RES JUDICATA*, No. 3, (1916) M.W.N. 223.

- (2-a) S. 37. See No. 11, *infra*.

- (3) Ss. 223, 224, 228, 230—Decree transferred to another Court for execution—Decree not returned by that Court—Application for execution made to original Court—No jurisdiction to execute—Application not made to proper Court—Limitation not saved. See LIMITATION ACT (1908), No. 288, 31 M.L.J. 300.

- (4) S. 224. See No. 3, *supra*.

- (5) S. 228. See No. 3, *supra*.

- (6) S. 229-B. See CIV. PRO. CODE (1908), No. 83, 18 Bom. L.R. 486.

- (7) S. 230. See CIV. PRO. CODE (1908), No. 118, 20 C.W.N. 952.

- (8) S. 230. See No. 3, *supra*, and No. 10, *infra*.

- (9) S. 244—Mortgage-decree—Order absolute for sale—Appeal—Nature of decree absolute. See TRANSFER OF PROPERTY ACT, No. 119, 18 Bom. L.R. 38.

- (10) Ss. 248, 637, 230—Application for transmission of decree and order permitting same, if revivor—Issue of notice under S. 248, Civ. Pro. Code, if proper—Application for execution if to follow or precede transmission and to be made to which Court—Question whether decree capable of execution it may be determined on application for transmission—Order, if quasi-judicial and may be delegated to Registrar. See LIMITATION ACT (1908), No. 304, 20 C.W.N. 689.

- (11) Ss. 257 and 310-A, 295, 37—*Payment into Court by strangers—Subsequent sale.*

Payment into Court under S. 267 of the Civ. Pro. Code (1882) can only be made by or on behalf of the person who is liable under the decree to make that payment. If the payment is made on behalf of the judgment debtor or his representative, it must be done by a recognized agent under S. 37 of the Civ. Pro. Code or by a pleader duly authorised.

If the whole amount due under the decree is paid into Court, the decree becomes satisfied without any formal order of the Court recording satisfaction.

Where two persons paid money but not on behalf of the judgment-debtor, under S. 310-A, as persons whose immovable property had been sold in execution of a money-decree, while the plaintiff property did not belong to them, though one of them had obtained a *sham* sale-deed from the judgment-debtor, such a payment does not always or necessarily have the effect of satisfying the decree.

Civ. Pro. Code (1882)—(Continued).

Payment into Court by persons who are not only strangers to the decree but persons who do not come at all under the description given in S. 310-A, i.e., persons entitled to have the execution-sale set aside under that section, cannot have the effect of satisfying the decree in the eye of the law, unless and until the decree-holder consented to receive the amount deposited in satisfaction of the decree.

The Court did not act without jurisdiction in distributing such amount paid into Court under S. 295 of the Civ. Pro. Code.

Where a decree has not been wholly satisfied, the holding of a sale in execution of that decree mentioning in the sale proclamation, an amount larger than the amount due under the decree, is only an irregularity and does not make the sale a nullity as having been held without jurisdiction. *Kasturi Aiyangar v. Arunachalam Chettiar*, (1916) M.W.N. 195 = 34 Ind. Cas. 350.

SADASIVA AIYAR and NAPIER, JJ.

- (12) S. 259—Civ. Pro. Code (Act V of 1908). O. XXI, r. 2—*Mortgagee (decree-holder) left in possession under decree—Liability under decree to account and to credit surplus income annually—Receipt, if payment under or adjustment of decree—Certificate within ninety days, if necessary.*

In this case the decree-holders who were mortgagees remained in possession of the property under the terms of the decree and the decree provided that every year they should render account and give credit for any surplus that might be in their hands after meeting the necessary expenses. They remained in possession for more than eight years though the decree expressly provided for their remaining in possession only for six years. The question of limitation that arose was whether such receipts by mortgagee decree-holders in possession of the property was "money payable under a decree paid out of Court or adjustment in whole or in part to the satisfaction of the decree-holder." Held that money so received cannot in any sense be said to be money payable under the decree within the meaning of O. XXII, r. 2 of Civ. Pro. Code, or S. 258 of the old Code, nor can it be said to be an adjustment between the decree holder and judgment-debtor. There was in fact no adjustment (a).

The mortgage decree-holders being in possession are to account for the money received by them, and if any money is still payable to them, they will be entitled to its payment. On the other hand if their decree had been satisfied, the judgment-debtors are entitled to delivery of possession of the property and also to any balance of the money that may remain in their hands. *Yella Reddi v. Syed Mohammadalli*, 39 M. 1026.

ABDUR RAHIM and SPENCER, JJ.

References:—(a) 28 M. 473, F.; 30 M. 255; 12 C.L.J. 65, D.

(19) Ss. 268, 274—*Attachment of debtor's interest under usufructuary mortgage—Attachment under S. 274 instead of S. 268—Payment*

Civ. Pro. Code (1882)—(Continued).

of mortgage money by mortgagor to the judgment-debtor in ignorance of the attachment—Personal remedy barred—Effect. *Ramasami Moopan v. Srinivasa Iyengar*, 28 M.L.J. 338 = 28 Ind. Cas. 284 = 39 M. 389. See Final Part, 1916, Col. 354.

(14) S. 274. See No. 13, *supra*.

(15) S. 282. See No. 18, *infra*.

(16) S. 283. See LIMITATION ACT (1908), No. 94, 31 Ind. Cas. 250.

(17) S. 283. See No. 18 *infra*.

(17-a) S. 285—*Attachment in execution of two decrees of two Courts—Sale by lower Court—Rights of purchaser—Bona fides—Notice—Burden of proof—Irregularity.*

Where there were two decrees against the same judgment-debtor and his property was attached first by the Sub-Court and then by the Munsif's Court and in execution of the decree of the Munsif's Court the property is sold while the attachment by the Sub-Court was subsisting, the sale is irregular and not invalid; the purchaser will take an indefeasible or a defeasible title according to whether he knows or does not know of the irregularity. If he buys *bona fide* and without notice, his title will be perfect and he will not be affected by the irregularity of the proceedings resulting in the sale. If he purchases with notice he runs the risk of his purchase being set aside (a).

The test to be applied in determining whether the purchaser had notice or not is whether he acted in good faith without being aware, whether by direct and formal notice or otherwise, that his title was liable to be questioned by reason of the superior Court's attachment.

It is for the purchaser at the sale by the Court of lower jurisdiction to prove that he made the purchase *bona fide* without knowledge of the pre-existing attachment by the superior Court. *Subbiah Aiyar v. Muthukumaraswami Pillai*, 32 Ind. Cas. 41.

ABDUR RAHIM and AYLING, JJ.

Reference:—(a) 22 B. 68, F.

(18) Ss. 287, 289, 283. See LIMITATION ACT (1877), No. 3, 18 Bom. L.R. 782.

(19) S. 295. See No. 11, *supra*.

(20) S. 310-A. See No. 11, *supra*.

(21) S. 315 See MAD. ACT I OF 1908 (ESTATES LAND), No. 35, 35 Ind. Cas. 163.

(22) S. 315—*Refund of purchase money—Right of suit by auction-purchaser.* See CIV. PRO. CODE (1908), No. 621, 14 A.L.J. 1216.

(22-a) S. 315. See CIV. PRO. CODE, (1908) No. 624, 2 L. W. 861.

(23) Ss. 332, 335. See CIV. PRO. CODE (1908), No. 535, 96 P.W.R. 1916.

(24) S. 335—*No enquiry—Order for possession—Limitation Act, 1908, Sch. II, Art. 11.*

On resistance being offered in an execution proceeding an order passed therein without enquiry is not an order under S. 335, Civ. Pro. Code, 1882. So a suit for possession brought

Civ. Pro. Code (1882)—(Continued).

one year after the order is not barred by the provisions of Art. 11, Sch. II, Limitation Act, 1908. *Raghunath Jha v. Brijnandan Singh*, 31 Ind. Cas. 444.

WALMSLEY and NEWBOULD, JJ.

References:—15 C. 521 D.; 12 C.L.R. 550; 34 C. 491, R.

(25) S. 335. See No. 23, *supra*.

(26) S. 367—Suit by legal representative to establish his position—Duty of plaintiff. See RELIGIOUS ENDOWMENTS, No. 1, 30 M.L.J. 274.

(27) S. 371—*Abatement of suit—First suit by mortgagor to redeem in his personal right—Second suit to redeem by his co-parceners not barred by the abatement.*

A mortgagor having filed a suit for redemption died during the pendency of the suit which was ordered to abate in 1883. The mortgagor's son sued in 1912 to redeem the mortgaged land on the ground that it was ancestral property in which he had an interest at birth. The trial Court held that the second suit was, but the lower appellate Court held that it was not barred by the order of abatement in the first suit. On appeal:

Held, affirming the decree of the lower appellate Court, that the first suit, not having been brought by the mortgagor in a representative capacity, was defective as a redemption suit; and that, therefore, the mortgagor's personal right to sue did not embrace the rights of his co-parceners and none of them could be concluded by the application of S. 371 of the Civ. Pro. Code of 1882. *Ramchandra Narayan Joshi v. Shripatro Tukojirao Deshmukh*, 18 Bom. L.R. 33=40 B. 248.

SCOTT, C.J., and SHAH, J.

(28) S. 373—Inability to adduce all the evidence at the first hearing—Order for withdrawal of suit with liberty to bring fresh suit—Validity—Fresh suit, if barred. See RES JUDICATA, No. 7, 23 C.L.J. 489.

(28-a) S. 424—*Suit against Secretary of State—Notice.*

Where a case set up in the plaint is altogether different from the case stated in the notice given under S. 424 of the Code of Civil Procedure, 1882, the suit must fail on the ground that the notice given under S. 424 was not a proper notice. *Abdul Wahab v. Secretary of State*, 32 Ind. Cas. 235.

CHATTERJEE and NEWBOULD, JJ.

(29) S. 462—*Bond executed by grandmother for self and as guardian of grandson—Grandson—Liability of.*

One of two joint promisors cannot plead the minority and consequent immunity of the other as a bar to the promisee's claim against him.

J, S (a minor), and V all had claims to the estate of a deceased. J and S bought off V's claim by giving him a bond for Rs. 90,000, and a suit which V had instituted was thereupon dismissed. No application under S. 462 was

Civ. Pro. Code (1882)—(Continued).

made for the consent of the Court to this compromise on behalf of S. By virtue of the compromise S obtained considerable property. Later, V sued J and S on the bond.

Held, that the fact that S could not be made liable under the bond did not discharge J.

The lower appellate Court having dismissed the suit against S, V appealed on the ground (*inter alia*) that S should not be allowed to set aside the bond unconditionally, and that if he failed to recover Rs. 90,000 from J he should have a right of recourse as against the property obtained by S under the compromise.

Held, that these matters could not be considered in a suit upon the bond.

Seem, that, if the contingency apprehended by V really arose, he might have a remedy in other proceedings. *Jamaa Bal Saheb Mohital Avarggi v. Yasanta Rao Ananda Rao Dhybar*, 14 A.L.J. 534=20 C.W.N. 840=18 Bom. L.R. 432=(1916) M.W.N.462=24 C.L.J. 74=3 L.W. 540=31 M.L.J. 18=20 M.L.T. 31=39 M. 409=36 Ind. Cas. 213 (P.C.).

LORD SHAW, SIR JOHN EDGE and SIR LAWRENCE JENKINS.

(30) S. 522—Decree on invalid award—No appeal. See ARBITRATION, No. 5, 1 Pat. L.J. 306.

(31) S. 539—*Act XX of 1863 (Religious Endowments), S. 18—Wakf—Scheme suit—Removal of trustees—Sanction—Parties—Religious and charitable trust—Public trust—Limitation—Wakf not specifying proportion of income to be apportioned to grantor's family.*

Where a *sanad* provides for the maintenance of a mosque and for khairat (charity), feeding travellers, etc., and the public offer prayers at the mosque, the trust created is a public, charitable and religious trust.

A suit for scheme and removal of trustees should be instituted with the sanction of the Advocate-General and no leave of Court is necessary under S. 18, Act XX of 1863 (a).

A person electing to proceed under Act XX of 1863 can be given only such special relief as that special statute provides for and if he wishes for any relief beyond that, he should proceed under S. 539, Civ. Pro. Code, 1882 (b).

In such a suit under S. 18, Act XX of 1863, the Court is not concerned with the question of possession or limitation. The proper parties are the persons who were managing the trust professing to be trustees, irrespective of any person in possession of any part of the trust property.

A wakf is not invalid on the ground that it does not specify the proportion in which the income is to be appropriated for the several objects (c). *Makhlachor Rahman v. Falsur Rahman*, 35 Ind. Cas. 880.

CHATTERJEE and RICHARDSON, JJ.

References:—(a) 8 C. 32; 11 C. 33, D. (b) 8 C.W.N. 404, F. (c) 17 C. 498 (P.C.), F.

(32) S. 539—Appointment of trustees and settling scheme of management for a religious

Civ. Pro. Code (1882)—(Concluded).

institution—Discretionary powers of Civil Court. See MAHOMEDAN LAW (WAKF), No. 5, 14 A.L.J. 741.

(39) S. 544. See CONTRACT, No. 13, 20 C.W.N. 1054.

(34) Ss. 562, 564—Appellate Court—Powers of remand. See CIV. PRO. CODE (1908), No. 655, 12 N.L.R. 126.

(35) S. 564. See No. 34, *supra*.

(36) S. 568—Additional evidence—Appellate Court, power of—Documents, admission of, in the appellate Court—Oral evidence consequent on admission, it can be objected—Mortgage effected during partition suit—Right of mortgagor. *Shaikh Nura v. Balkuntho Nath Roy*, 21 C.L.J. 596 = 30 Ind. Cas. 398. See Final Part, 1915, Col. 358.

(37, 38) S. 583-A. See LIMITATION, No. 2, 1 Pat. L.J. 420.

(39) S. 593—Restitution—Decree for redemption against mortgagor with possession in first Court reversed on appeal—Mortgagor's application to first Court for recovery of mesne profits for period of dispossession in execution of first Court's decree—Jurisdiction—Remedy when jurisdiction wrongly exercised by appeal or revision.

Where the plaintiffs in a suit for redemption of a mortgage with possession, having obtained a decree in the Court of a Subordinate Judge, recovered possession in July 1878, but the High Court on appeal varied that decree by directing the plaintiffs to pay a further sum of Rs. 9,000 but on their failure to do so, the mortgagee recovered possession in April 1880, and then applied to the Subordinate Judge for an order for mesne profits for the period he was out of possession, and obtained a decree for a sum of over Rs. 5,000, and in execution of that decree, the plaintiffs' equity of redemption was sold and purchased by the decree-holder, and an application under S. 311 of the Civ. Pro. Code of 1882 to set aside the sale failed.

Held, in a second suit for redemption brought by an assignee of the mortgagor, that the Subordinate Judge had jurisdiction to make the decree for mesne profits by way of restitution, and if he exercised that jurisdiction wrongly the persons aggrieved had their remedy, under the Code of Civil Procedure, either by appeal to the High Court or by an application for revision, and the present action was wholly misconceived. *Pandit Parbhu Dyal v. Kalyan Das*, 20 C.W.N. 426 = 19 M.L.T. 206 = 3 L.W. 299 = (1916) M.W.N. 234 = 23 C.L.J. 411 = 38 A. 163 = 18 Bom. L.R. 382 = 33 Ind. Cas. 505 (P.C.).

VISCOUNT HALDANE, LORD PARMEOR, LORD WRENBURY, SIR JOHN EDGE and MR. AMEER ALI.

(40) S. 584—High Court in second appeal, if may remit a case for re-hearing on a new case not raised in the pleadings—Costs. See APPEAL (SECOND APPEAL), No. 3, 20 C.W.N. 1245.

(41) S. 687. See No. 10, *supra*.

Civ. Pro. Code (1908).

(1) Agent's Court—Applicability of the provisions of the, regarding re-hearing and review—Agency rules—Rules 10, 18 and 20. See JURISDICTION OF CIVIL COURTS, No. 3, 31 M.L.J. 319.

(1-a) Ss. 2 and 47, and O. IX, r. 13—Arrest, legality of—Decree—Appeal—Ex parte decrees—Application for setting aside—Time allowed to pay the decree amount—Effect of order—Execution, stay of.

A decision on the question whether an arrest of the judgment-debtor by a Court-officer is legal or otherwise is a 'decree' within the meaning of Ss. 2 and 47, Civ. Pro. Code, and is appealable (a).

Where, on an application by a judgment-debtor to set aside an *ex parte* decree, the Court granted him time to pay the decree amount into Court, held that the order did not legally operate as a stay of execution of the *ex parte* decree. *Subbarama Ayyar v. Arunachellam Chettiar*, 3 L.W. 35 = 33 Ind. Cas. 731.

SADASIVA AIYAR and NAPIER, JJ.
Reference:—(a) 20 M.L.J. 136, F.

(1-b) Ss. 2, 97, O. XXXIV, rr. 1, 5—Mortgage-decree—Order absolute for sale—Appeal—Nature of decree absolute. See TRANSFER OF PROPERTY ACT, No. 119, 18 Bom. L.R. 38.

(2) S. 2 (2)—Order overruling preliminary objection against maintainability of suit—Not a decree—No appeal lies.

An order overruling a preliminary objection as to the maintainability of a suit and directing the suit to proceed is not a decree within the meaning of S. 2 (2), Civ. Pro. Code. There is no determination of the rights of the parties with regard to any of the matters in controversy, i.e., any of the *reliefs* claimed in the suit, and moreover the adjudication is not conclusive. No appeal therefore lies from such an order. *Ma Gun v. R. Monandy Servey*, 8 L.B.R. 218 = 9 Bur. L.T. 195 = 33 Ind. Cas. 664.

ORMOND and TWOMEY, JJ.
References:—16 Bom. L.R. 954; 20 C.L.J. 476, F.; 37 B. 60, Diss.

(3) S. 2 (2), (11)—Abatement, order of—Whether decree—Hindu Law—Mitakshara—Suit by unmarried daughter—Death of such plaintiff—Whether right to sue survives to her married sisters.

R, a separated Hindu, was succeeded by his widow. On the death of the widow, B, one of the daughters, brought a suit for her father's estate on the ground that being a maiden, she was entitled thereto in preference to her married sisters. The married sisters were defendants to the suit. During the pendency of the suit B died, and the names of the married sisters were transferred from the array of defendants to that of plaintiffs. The lower Court declared the suit to have abated:

Held, (1) that new plaintiffs having been brought on the record and a formal decree having been made declaring the suit to have abated, an appeal lay;

Civ. Pro. Code (1908)—(Continued).

(2) that a Hindu woman in possession of an estate as such represented the estate, and the persons who were entitled to succeed one after another were entitled on succession to continue the litigation commenced by their predecessor. **Jadhaul Kuer v. Mahpal Singh**, 14 A.L.J. 8 = 38 A. 111 = 32 Ind. Cas. 104.

RICHARDS, C.J. and RAFIQ, J.

References:—35 O. 481; 38 M. 406, R.

(4) Ss. 2 (4), 21, O. XX, rr. 12 to 18. See PRELIMINARY DECREE, No. 1, 9 Bur. L.T. 119.

(5) S. 2 (2), O. IX, rr. 8, 9—"Claim or part thereof," meaning—Plaintiff absent at trial—Costs—Part decreed and rest dismissed—Appeal.

A decree for part of a claim admitted by the defendant and the dismissal of the rest of the claim for default of appearance of plaintiff at the trial of the suit is a decree and is appealable.

Seshagiri Aiyar, J. (dubitante)—

Coutts-Trotter, J.—On Court decreeing the admitted part of the claim and dismissing the rest of the claim under O. IX, r. 8, Civ. Pro. Code, 1908, the entire adjudication should be treated as a decree.

The same adjudication, the same document cannot be, as to part, a decree, and as to another part of it, something else.

The words "admits the claim or part thereof" apply to a case where, on examining the plaint and the defendant's admission in the written statement, it can be considered that he, there and then, agreed to pay the money or to submit to the relief claimed in the plaint (a).

A plaintiff ought not to be shut from the judgment seat where costs will afford a sufficient protection to the defendant as against the plaintiff who is guilty of some technical error or mistake.

Seshagiri Aiyar, J. :—

S. 2, cl. (2), Civ. Pro. Code, 1908, applies only to total dismissals for default and not to partial dismissals.

The word "claim" is not necessarily synonymous with the amount sued for. It may refer to the right litigated, irrespective of the arithmetical figure stated in the relief column. The fact that the burden of proof is on the defendant will not enable the plaintiff to get a decree if there is admission of the right sued for (b). **Munlawami Gouda v. Junjadu**, 35 Ind. Cas. 65.

COUTTS TROTTER and SESHAGIRI AIYAR, JJ.

References:—(a & b) (1891) 2 Q.B. 233, R.

(6) S. 2 (2), O. XXII, r. 9—Adjudication directing abatement of suit on account of plaintiff's death, whether decree—Appeal.

Held that where a Court passes a purely formal order recognising the abatement which is a *fait accompli*, such an order though virtually disposing of the suit, does not adjudicate upon any rights and cannot be treated as a decree. If, on the other hand, the order of the abatement is the result of an adjudication upon the rights of the parties with respect to a

Civ. Pro. Code (1908)—(Continued).

matter in controversy, and is not passed upon an application for the revival of the suit made under O. XXII, r. 9, it amounts to a decree and is appealable as such. **Naranjan Nath v. Afzal Hussain**, 111 P.W.R. 1916 = 146 P.L.R. 1916 = 198 P.R. 1916 = 34 Ind. Cas. 822.

JOHNSTONE, C.J., CHEVIS and SHADI LAL, JJ.

References:—10 B. 200; 18 M. 496 = 5 M.L.J. 63, Appr.; 17 A. 172 = A.W.N. (1895) 42; 25 A. 206 = A.W.N. (1903) 15, Not Appr.; 34 Ind. Cas. 374 = 30 M.L.J. 486 = (1915) M.W.N. 301 = 19 M.L.T. 364; 25 Ind. Cas. 643 = 12 A.L.J. 113; 31 Ind. Cas. 4, B.

(7) S. 2 (11)—Decree whether binding on person not represented in the suit—Death of defendant pending suit—Person having no interest in deceased's estate added as representative—Decree and execution proceedings whether binding on true heir—Decree legally obtained against proper person—Execution proceedings against wrong representative—Bona fides—Effect.

A mortgaged the property in suit to the present defendants and subsequently to the present plaintiff. Defendants sued A on their mortgage. Plaintiff was not a party to that suit. A died during the pendency of the suit and the suit was continued against one S, the divided brother's son of A. A's daughter was not made a party to the suit after A's death. Defendants obtained a decree against S and purchased the equity of redemption. Plaintiff now sued on his mortgage and contended the decree obtained in the previous suit did not bind A's daughter who alone was competent to represent her father, and consequently the purchase of the equity of redemption by the defendants behind her back cannot bind either the daughter of A or the plaintiff. Held that the decree and the execution proceedings were not binding on the daughter who was the true heir of A, and that his divided brother's son, who had only a *spes successionis* so long as the daughter was alive, cannot be said to have any interest in the property in suit.

If on the death of a defendant his proper legal heir is not brought on the record as required by law, the decree in such a suit will not be binding upon the true heir (a).

Prima facie no decree can be binding against a person who has not been represented in the suit. To this well-known principle there are exceptions. If a decree has been legally obtained against the proper person, it may be permissible in execution proceedings to implead another person as the legal representative and to carry on execution as against him although he is not the real representative of the deceased judgment-debtor. Of course, the decree-holder must act honestly in selecting the legal representative. There must be due care and caution and want of *mala fides* (b).

Where the suit is brought against a proper defendant and after his death only some of the legal representatives are brought on the record, a decree given against such representatives

Civ. Pro. Code (1908)—(Continued).

would bind the others similarly situated. This position may be justified upon the analogy of S. 11, Expl. 6, Civ. Pro. Code. The principle is that, if there is on the record some person who is interested in defending the suit, the fact that that person does not completely represent the deceased is not a ground for holding that the decree is not properly obtained (c). *Madala Madavarayudu v. Tanikalla Subbamma*, 31 M.L.J. 222=(1916) 2 M.W.N. 233=35 Ind. Cas. 124.

AYLING and SESHAGIRI AIYAR, JJ.

References :—(a) 32 O. 296; 25 A. 214 (220); 26 M. 330; 14 M.I.A. 605, R. (b) 25 B. 337; 33 M. 6=19 M.L.J. 671, R.; 29 M.L.J. 698; 33 M. 75, R. (c) 32 M. 230, R.

(8) S. 2 (11)—*Suit by daughter for possession of father's estate—Death of plaintiff pending suit—Her father's brother's grandsons added as legal representatives—Right to continue suit—Abatement. Gandhi Ramaswami v. Puramsetti Podamunayya*, 17 M.L.T. 186=27 Ind. Cas. 1001=39 M. 382. See Final Part, 1915, Col. 361.

(9) S. 2 (11)—*Will left by debtor—Decree against his widow in possession and his illegitimate son in ignorance of the will—Execution sale—Right of purchaser—Sale whether binding on legatee—Executor de son tort—"Legal representative," definition of—Applicability under old Civ. Pro. Code. Gnanambal Ammal v. Yeerasami Chetty*, 29 M.L.J. 698=31 Ind. Cas. 920. See Final Part, 1915, Col. 362.

(10) S. 2 (11), O. XXII, r. 10 and O. XXXIV—*Suit by two executors on foot of mortgage—One executor dying before preliminary decree and the other after it—Testator's junior widow brought in as representative—Application by senior widow to be brought on record dismissed—Order dismissing petition whether appealable—"Devolution" in O. XXII, r. 10, meaning of. Lakshmi Achi v. Subbarama Aiyar*, 2 L.W. 403=17 M.L.T. 385=28 M.L.J. 491=(1915) M.W.N. 327=29 Ind. Cas. 142=39 M. 188. See Final Part, 1915, Col. 363.

(10-a) S. 9—See JURISDICTION OF CIVIL COURTS

(10-b) S. 9—See RIGHT OF SUIT.

(11) S. 9—*Right to exclusively conduct a Mandapapadi, if of a civil nature—Competency of temple trustees to grant such exclusive right.*

The right of exclusively conducting a *Mandapapadi* (a religious ceremony performed at periodical festival) and receiving the honours and emoluments appurtenant thereto is a right to perform an act of worship and therefore of a civil nature and enforceable in a Civil Court.

Krishnan, J.—It is a matter within the discretion of the trustees of a temple to make such arrangement as they think fit for the performance of any recognised ceremony and in the *bona fide* exercise of that discretion for the benefit of the temple to give a permanent and exclusive right to any worshipper to

Civ. Pro. Code (1908)—(Continued).

perform any particular ceremony provided such arrangement does not lead to the stoppage of the ceremony or to any other injurious consequences to the temple (a). *Thirumalai Alwar Aiyangar v. Srinivasachariar*, (1916) 2 M.W. N. 327=31 M.L.J. 768=4 L.W. 562=36 Ind. Cas. 568.

SPENCER and KRISHNAN, JJ.

Reference :—16 M.L.J. 458, D.

(12) S. 9. See RIGHT OF SUIT, No. 1, 1 Pat. L.J. 381.

(13) Ss. 9, 92, 115—*Preliminary issue regarding maintainability of suit—Revisability—Civil suits, what are—Ubhayakar's right, if civil in nature—Dharmakarta if can impose conditions on Ubhayakar—Religious Endowments Act (XX of 1863), Ss. 14 and 18—Suits to enforce privileges—Sanction when necessary for institution.*

Quere.—Whether S. 115, Civ. Pro. Code, warrants interference by the High Court with a ruling by the lower Court on a preliminary issue, although it goes to the maintainability of the suit?

On the question whether a right claimed in a suit is a civil right, the following points are established: *First*, if the right litigated is a right to worship, it is a civil right, as nobody can prevent a worshipper from proceeding to the temple and worshipping the deity (a). *Secondly*, where the claim is made to an office emoluments, however insignificant the emoluments may be, the plaintiff is entitled to seek the aid of the Court to have his right established. *Thirdly*, where a right has been acquired or exercised hereditarily for performing certain festivals in the temple and where such right is negated by the *Dharmakarta*, the person whose rights have been so infringed is entitled to ask the Court to have that right declared in his favour (b).

Even though a person is hereditarily entitled to perform a festival, the *Dharmakarta* may impose a condition on him, *vis.*, that it is open to him (the *Dharmakarta*) to receive contributions from others to perform the festival on a grander scale than that person is really able to do.

There are three classes of cases which concern rights to enforce privileges in a temple. (1) The object of a suit may be to secure certain advantages to a trust, in which case, any two persons, with the sanction of the Advocate-General or the Collector of the District concerned, can institute a suit in that behalf. (2) The Religious Endowments Act empowers persons who have an interest in the temple to go to a Court of Law for a declaration that the trustee is bound to carry out certain duties. (3) The third class of cases is where individuals can claim rights, either as citizens, or as having a hereditary right, to worship in a temple or perform certain festivals. In such a case the suit is really for a direction that the officer in charge of the trust should perform the duties according to *mamool*, and the sanction of the Advocate-General or the District Judge is not required for its institution

Civ. Pro. Code (1908)—(Continued).

either under S. 92, Civ. Pro. Code, or Ss. 14 and 18 of the Religious Endowments Act (c). **Kadriavelu Chetty alias Mannappa Chetty v. Nunjundalyar**, 3 L.W. 512=36 Ind. Cas. 88.

SESHAGIRI AIYAR, J.

References :—(a) 6 M. 151, R. (b) 33 A. 527; 19 M. 62; 11 M. 450, R.; 28 M. 23; 7 M. 91, D. (c) 19 M.L.J. 743; 28 M. 23; 4 M.H.C. 112, F.

(14) *S. 10—Two suits in Karachi Court and in Calcutta High Court in respect of same subject-matter—Stay of proceedings—Jurisdiction upon what depends.*

This was a suit in the Calcutta High Court and defendants applied for its stay under S. 10, Civ. Pro. Code, on the ground that the matters in issue were also directly and substantially in issue in a suit previously instituted by them at Karachi. The parties were the same in both the suits and both related to the same contracts between the parties.

Held, that the only question that required to be considered was whether the Karachi Court had jurisdiction to grant the reliefs claimed. The plaint in the suit at Karachi having set out allegations that clearly gave jurisdiction to that Court to try the case, **held**, the suit in Calcutta must be stayed till the disposal of the suit at Karachi.

Jurisdiction does not depend upon actual facts but upon the allegations made concerning them. **Padamsee Narainjee v. Lakhamsee Ralsee**, 43 C. 144=33 Ind. Cas. 288.

IMAM, J.

(15) *S. 10—Scope and applicability of.*

The trial of a suit can be stayed under S. 10 of the Civ. Pro. Code, 1908, only when the Court trying the previously instituted suit has jurisdiction also to grant the relief asked for in the subsequently instituted suit (a).

The section which leaves no discretion cannot be invoked on mere grounds of convenience, if the necessary conditions are not fulfilled. The section contemplates that the findings in the first suit would be binding in the later suit, and that there would be no need for a fresh trial of the issues already determined. **Gopiklean v. Padamraj**, 12 N.L.R. 174.

MITTRA, OFFG. A.J.C.

References :—(a) 11 A. 148; 4 C.L.R. 282, R.

(16) *S. 10—Suit, stay of—'Matter in issue'—Suit for rent—Proceedings on appeal.*

S. 10 of the Code of Civil Procedure does not bar the trial of a suit for rent for a period subsequent to that included in the previously instituted suit for rent.

The expression 'matter in issue' in S. 10 of the Code of Civil Procedure has reference to the entire subject in controversy between the parties.

The object of S. 10 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue.

Proceedings on appeal are for many purposes deemed only a continuation of the suit

Civ. Pro. Code (1908)—(Continued).

instituted in the first Court (a). **Bepin Behar Majumdar v. Jogendra Chandra Ghosh**, 24 C. L.J. 514=36 Ind. Cas. 641.

MOOKERJEE and CUMING, JJ.

References :—(a) 18 M.L.T. 400; (1915) M. W.N. 844, R.

(17) *S. 10—Parties in two suits not litigating under same title—Earlier suit pending—Later suit disposed of—Effect of plea of bar.*

Plaintiff filed a suit against the defendant. Subsequent to this suit, both the plaintiff and the defendant were made defendants in another suit. The second suit was decided prior to the first suit. The defendant in the first suit relied on the pleadings of the plaintiff, as the defendant in the second suit. It was argued for the plaintiff that the Court was debarred by S. 10, Civ. Pro. Code, from trying the latter suit until the first suit had been disposed, that consequently the trial was held without jurisdiction, and that therefore the defendant could not rely on plaintiff's pleading during it or on the decision which ended it. **Held** that the plaintiff's contention was untenable. **Sadagopachariar v. Rama Thirumalachariar**, 31 Ind. Cas. 25.

OLDFIELD and SADASIVA AIYAR, JJ.

(18) *S. 10—Stay of original suit—Pending appeal in Rangoon Chief Court—Appeal only a continuation of suit.* **Chinnakaruppan Chetty v. Meyyappa Chetty**, (1915) M.W.N. 844=18 M.L.T. 400=30 Ind. Cas. 763. See Final Part, 1915, Col. 365.

(19) Ss. 10 and 151. See ACT IX OF 1899 (ARBITRATION), No. 1, 10 S.L.R. 1.

(19-a) S. 11—See RES JUDICATA.

(20) *S. 11—Res judicata—Previous suit between vendor and purchaser—Subsequent suit between two purchasers from the same vendor.*

In order that a previous decision against a transferor may operate as *res judicata* against the transferee as claiming under the transferor, the transferee's title must have arisen subsequently to the commencement of the first suit.

Held, that a suit by a vendor against a purchaser of a land for cancellation of sale did not bar a subsequent suit for possession by another purchaser against the vendor and the first purchaser if the second purchaser's title had arisen before the institution of the first suit. **Ma U v. Maung Lu Gale**, 9 Bur. L.T. 88=32 Ind. Cas. 610.

ORMOND, JJ.

(21) *S. 11—Previous suit for rent—Small cause nature—Question of title incidentally determined—Later suit for title—Previous determination, whether bars trial of the issue in later suit—No res judicata.*

The incidental determination of an issue of title in a former suit for rent of the nature cognizable in a Court of Small Causes does not finally stop the parties to such suit from raising the same issue in a suit brought to try the

Civ. Pro. Code (1908)—(Continued).

title(a). **Baldeo Pershad v. Narain Halwal**, 34 Ind. Cas. 123.

BANERJEE, J.

References.—(a) 2 A. 97, F.; 26 C. 428 and 10 C.W.N. 820, R.

(22) S. 11—*Res judicata between co-defendants.*

Courts are generally unwilling to extend the doctrine of *res judicata* to co-defendants and it has been applied, where it has been applied, with great caution.

In order that a finding in a case should be *res judicata* between co-defendants three things are necessary: (1) that there should be a conflict of interest between co-defendants, (2) that it should be necessary to decide on that conflict in order to give to the plaintiff the relief appropriate to his suit, and (3) that the judgment should contain a decision of the question raised as between the co-defendants. **Jadav Chandra Sircar v. Kallash Chandra Singh**, 34 Ind. Cas. 929=26 C.L.J. 322.

CHATTERJEE and NEWBOULD, JJ.

References.—3 Hare 627=67 E.R. 530; 36 C. 193=5 C.L.J. 611=1 Ind. Cas. 913; 40 B. 10=17 Bom.L.R. 1106=33 Ind. Cas. 42, R.

(23) S. 11—*Res judicata—Finding not forming basis of decree.*

A finding by a Court upon a point which was not the basis of a decree and which was not entered in the decrees so as to admit of an appeal by the party aggrieved cannot be considered to have been finally decided so as to operate as *res judicata*.

A Court while dismissing a suit for ejectment of a tenant on the ground that no notice had been served on him under S. 49 of the Bengal Tenancy Act, recorded a finding in plaintiff's favour regarding the status of the tenant, *viz.*, that he was an *under-raiyat* and had not made out the custom under which he claimed to have acquired a right of occupancy.

Held that this finding would not operate as *res judicata* on the question of the tenant's status in a subsequent suit for ejectment brought against him by the same landlord. **Fazli v. Hari Kishore Chakravarti**, 33 Ind. Cas. 620.

D. CHATTERJEE and BEACHCROFT, JJ.

References.—11 C. 301=12 I.A. 23=4 Sar. P.C.J. 602=9 Ind. Jur. 202 (P.C.); 13 C. 17; 18 C. 647, F.; 24 C. 900, D.; 6 C. 319, *overruled* by 11 C. 301 (P.C.).

(24) S. 11—*Res judicata—Wrong decision in prior suit on question of law—Bar of subsequent suit—Estoppel.*

Plaintiff and defendants agreed that the defendants would discharge a certain liability of the plaintiff to a third party. The defendants having refused to pay to the third party, the latter filed a suit against the plaintiff and obtained a decree. Then the plaintiff sued the defendants and the third party to compel the defendants to pay the third party the amount decreed against him. The defendant then objected that the suit was premature as the plaintiff did not actually pay to the third party the

Civ. Pro. Code (1908)—(Continued).

sum agreed to be paid by the defendants. The Court accepted this contention and dismissed the suit. The decree against the plaintiff having been executed by the third party, the plaintiff had to pay the amount. He immediately thereafter brought the present suit against the defendants to recover the amount paid by him. The question for determination was whether the present suit of the plaintiff was barred by reason of the dismissal of the former suit. **Held** that the defendants were barred by the operation of S. 11, Civ. Pro. Code, from raising the contention that the plaintiff's suit could not be maintained on account of the dismissal of the prior suit having been wrong. He could not plead that the prior decree did not bind him. Therefore the present suit was not barred by the rule *res judicata*. **Subblah Udayar v. Srinivasa Udayar**, 36 Ind. Cas. 268.

TYABJI, J.

References.—21 W.R. 374 and 5 M.L.J. 79, *Rel. on.*

(24-a) S. 11—*Res judicata—Refusal of Court to try extraneous issues—Doctrine of constructive res judicata—Effect of verdict on one question in issue on another.*

Where the Court refused to try an extraneous issue, there could not be any *res-judicata* between the parties in respect of it (a).

The doctrine of constructive *res judicata* must be applied strictly and cannot be extended beyond the strict limits of the section (b).

A verdict between parties upon one question can have no binding effect in an issue joined between them on another, unless it is clear that the point in issue was the same in both cases. It is not sufficient that the two questions should be allied, it is essential that they should be identical (c). **Tafazul Husain v. Hira Lal Sahu**, 36 Ind. Cas. 650.

ROE and PRASAD, JJ.

References.—(a) 19 Ind. Cas. 686=41 C. 69=17 C.W.N. 877=19 C.L.J. 155; 15 Ind. Cas. 453=40 C. 29=16 C.W.N. 877=16 C.L.J. 9; 18 C. 647; 7 C.L.J. 504=12 C.W.N. 292; 7 M. 264=8 Ind. Jur. 135=2 Ind. Dec. (N.S.) 768; 20 C. 79=19 I.A. 234=6 Sar. P.O.J. 241=10 Ind. Dec. (N.S.) 53 (P.C.), R. (b) 24 C. 711=1 C.W.N. 665; 1 C.L.J. 248; 1 C.L.J. 337, R. (c) (1944) 13 M. & W. 137=2 D. & L. 236=13 L.J. Ex. 373=8 Jur. 912=67 R. 513=153 E.R. 57; (1909) P. 123=78 L.J.P. 62=100 L.T. 557=73 J.P. 193=53 S.J. 265=25 T.L.R. 291, R.

(25) S. 11—*Hindu widow—Suit by, to set aside an adoption—No oral evidence tendered—Courts below deciding suit on ground of estoppel—Privy Council deciding on merits on documentary evidence.* **Risal Singh v. Balwant Singh**, 13 A.L.J. 594=37 A. 496=30 Ind. Cas. 657. See Final Part, 1915, Col. 366.

(26) S. 11—*Suit for possession on partition—Decree for possession conditional on payment of a certain amount to defendant—Decree never executed and became barred—Second suit for*

Civ. Pro. Code (1908)—(Continued).

partition—Res judicata—Suit to enforce the decree—Maintainability. Gaman v. Imam Baksh, 77 P.R. 1915=164 P.W.R. 1915=31 Ind. Cas. 205. See Final Part, 1915, Col. 368.

(27) S. 11—Two suits involving the same questions—Tried together on the same evidence and disposed of by the same Court—Judgment in one suit following the judgment in the other, though separate decrees drawn up—Appeal only against one judgment and decree—Effect—*Res Judicata. Ramasami Chetty v. Karuppan Chetty, 29 M.L.J. 551=31 Ind. Cas. 216. See Final Part, 1915, Col. 368.*

(28) S. 11—*Res judicata—Judgment pronounced against the only persons interested—Person, whose title originated subsequently, if can question it—Adverse possession—Hindu temple—Miras office—Emolument attached—Enjoyment of emoluments, without office whether bars title to office—Presumptive representation, doctrine of, if can be strained to defeat legal right—Judgment when a nullity—Judgment and conveyance, difference between, as regards nullity. Suppa Bhattar v. Suppu Sokkaya Bhattar, 29 M.L.J. 558=18 M.L.T. 402=2 L.W. 1005=(1915) M.W.N. 829=30 Ind. Cas. 962. See Final Part, 1915, Col. 369.*

(29) S. 11—*Res judicata—Applicability as against co-defendants. Fakirohand Lalubhai v. Naginchand Kalidas, 17 Bom. L.R. 1106=40 B. 210=33 Ind. Cas. 423. See Final Part, 1915, Col. 369.*

(30) S. 11—"Claiming under," meaning of—Son if bound by father's act. See CUSTOMS (PUNJAB—ALIENATION), No. 1, 16 P.W.R. 1916.

(31) S. 11—Several suits decided at same time—Meaning of 'former' suit in S. 11. See CUSTOMS (PUNJAB—ALIENATION), No. 6, 48 P.R. 1916.

(31-a) Ss. 11, 13—Suit in foreign Court on cause of action tried and determined between the parties in a British Indian Court—Latter Court if may issue perpetual injunction to restrain proceedings in foreign Court—*Res judicata. See FOREIGN COURT, No. 2, 20 O.W.N. 1213.*

(31-b) Ss. 11, 47—*Suit on the basis of a decree, if maintainable—Decree for possession—Execution of decree barred by limitation.*

A, a Hindu widow, sued for possession of certain immoveable property which belonged to her husband as a separated Hindu. The suit was decreed and A became entitled to immediate possession of the property. A, seven years later, applied, to be put into possession but her application for execution of the decree was rejected as barred by limitation. A then brought the present suit upon the decree for possession of the property. The Munsif held that the plaintiff had been in possession of the property within twelve years next prior to the date of the suit, and decreed the claim. The lower appellate Court dismissed the suit holding that it was not maintainable.

Civ. Pro. Code (1908)—(Continued).

Held that the plaintiff having obtained a decree, and that decree not being enforceable by execution, an action was maintainable on the decree, neither S. 11 nor S. 47 of the Code of Civil Procedure operating as a bar to such suit. Lakhrani Kuar v. Bhanraj Singh, 14 A.L.J. 102=32 Ind. Cas. 634.

WALSH, J.

(32) S. 11, *Expl. II—Suit instituted in 1905, i.e., before the Code of 1908—Decision in previous suit of 1902—Res judicata—Retrospective operation of—Grant of Aghraharam subject to certain payments—Failure of purposes for which payments were made—Right to enforce the payments. Rajah Damara Kumara Thimmayannim Bahadur Yaru v. Swarnam Kamakshamma, 29 M.L.J. 535=31 Ind. Cas. 214. See Final Part, 1915, Col. 371.*

(33) S. 11, *Expl. IV—Res judicata—What are matters which ought to have been made ground of attack in a previous suit—First suit for declaration by several plaintiffs—Second suit for possession by one if barred—Conflict of authority, as to whether a plaintiff in a suit for possession must put forward all his titles or not, pointed out.*

The fact that in a previous suit plaintiff was one of several joint plaintiffs who were seeking merely a declaratory decree of their alleged reversionary rights to a certain land is no bar to a subsequent suit for possession by such plaintiff based upon his alleged exclusive title to the present possession of the land on the ground of his heirship to the last owner. Such subsequent suit is not barred either by S. 11 or O. II, r. 2 of the Code of Civil Procedure. In fact if the plaintiff had put forward the claim urged in the subsequent suit in the previous suit, it would have been inconsistent with the claim set up by the plaintiffs in such suit (a).

The question as to whether in a suit to recover possession of property a plaintiff is bound to support the claim made by him by bringing forward every title which he has, or claims to have in respect of such property, discussed (b). *Musammam Aishan v. Muhammad Din, 94 P.R. 1915.*

RATTIGAN, J.

References:—(a) 5 P.R. 1886; 68 P.R. 1915, R. (b) 2 C. 52; 3 C. 23; 4 A. 21; 3 B. 137; 25 B. 189; 31 M. 385; 146 P.R. 1890; 8 B.H.C.R. 69; 7 M. 352; 4 M. 308; 7 M. 264; 26 M. 760; 27 M. 102 (104); 22 M. 323; 2 A. 582; 6 A. 358; 1 A.L.J. 238, R.

(34) S. 11, *Expl. IV—Res judicata—Relief against added defendants based on alternative cause of action not claimed in first suit—Second suit barred.*

The principle underlying the rule of *res judicata* is the relief of parties from a multiplication of actions.

This was a suit for damages for breach of contract in which the defendant-vendor denied the contract, and on which denial the plaintiff joined the brokers to the transaction as co-defendants but asked for no relief against

Civ. Pro. Code (1908)—(Continued).

them. The contract was not proved and the suit was dismissed. The plaintiff thereafter filed a fresh suit for damages against the brokers.

Held that the suit was barred by *res judicata* under Expl. 4, S. 11 of the Code of Civil Procedure (Crouch, A.J.C., *contra*).

Per Crouch, A.J.C.—There is no rule in the Civ. Pro. Code which, in terms, justifies the joinder of alternative and inconsistent causes of action against different defendants; but, where a plaintiff has alternative rights of relief arising out of the same transaction against two persons, and some question, of fact is common to both causes of action he may join both defendants, and the Court may, "without any amendment," give judgment against either or both of the defendants according to their respective liabilities. This is the rule laid down in O. I, r. 8. *Prima facie* the rule is nothing more than a rule permitting the joinder of parties and the giving of judgment against the new defendant so far as concerns the common question of fact or law.

Per Crouch, A.J.C.—To hold that where a person is joined under O. I, r. 4 the plaintiff not only can but must include all grounds of attack against him under penalty of being debarred from ever obtaining relief to which he may prove entitled seems to me an extension of the law which is not authorised by the term of the Civ. Pro. Code or by practice or by any reported decision. *Shamumal v. Rijhumal*, 10 S.L.R. 29=36 Ind. Cas. 92.

PRATT, J.C. and CROUCH, A.J.C.

(35) S. 11, Expl. IV—*Res judicata*—*Execution proceedings*—*Failure of judgment-debtor to raise objections*. *Kalyan Singh v. Jagann Prasad*, 13 A.L.J. 828=37 A. 689=30 Ind. Cas. 523. See Final Part, 1915, Col. 971.

(36) S. 11, Expl. IV. See PARTITION, No. 3 20 C.W.N. 1177.

(97) S. 11, Expl. V—*Suits for partition*—*Decrees passed*—*Prior execution application dismissed on one ground*—*Implied adjudication as to another ground, whether can be inferred*—*Certain items of property left undivided*—*Subsequent execution application for division of same*—*Res judicata, if a bar*.

Two suits (O.S. No. 1 of 1889 and O.S. No. 1 of 1899) was filed for partition of immovable properties and the plaintiff in the former suit executed his decree and obtained possession of a moiety of the family properties in 1903. The decree-holders in the other suit applied for execution of their decree in 1906, but their application was dismissed on the ground that they sought to re-open entirely the partition effected in 1903 and the said order was affirmed on appeal by the High Court. The present application was brought in 1911, for a division of certain items of property alleged to have been left undivided in the execution proceedings in 1903.

Held that the real question before the High Court in the former application of 1906 was

Civ. Pro. Code (1908)—(Continued).

whether the previous partition of 1908 was liable to be re-opened at all and not as to the particular items which had to be divided, and the fact that it was mentioned in the grounds of appeal to the High Court in the previous proceedings that certain items of property were not divided could not have the effect of implied adjudication so as to debar the question of non-division from being raised in any subsequent execution application and that the present application was therefore not barred by *res judicata*. *Poduru Lakshmi Narayana v. Ponnada Pallamaraju*, 4 L.W. 101=(1916) 2 M.W.N. 118.

ABDUR RAHIM, O.C.J., SESHAGIRI AIYAR and PHILLIPS, JJ.

Reference :—24 M. 681, R.

(38) S. 11, Expl. VI and O. I, r. 8—*Scope of S. 11, Expl. VI*.

The first plaintiff in this suit sued for himself and for the other Agrabaramdars to eject defendants 1 and 2 from the suit sites and for delivery of possession of the said sites jointly to the plaintiff and the other Agrabaramdars (who were made defendants 3 to 13).

Another Agrabaramdar had previously brought a suit against the present defendants 1 and 2 and the prayer of that plaint was for establishing the joint right of the plaintiff therein (along with the other Agrabaramdars) in the suit sites and his exclusive right of way over the sites, and also for ejecting the defendants 1 and 2 from the suit sites and for delivery of joint possession of the entire suit sites to the plaintiff along with the defendants other than 1 and 2 and for an injunction as regards the right of way.

The present first plaintiff was the fourth defendant in the former suit. During the pendency of the present suit, another Agrabaramdar was added as the second plaintiff on the record.

Held that the substantial relief claimed in the present suit was included among the reliefs prayed for in the prior suit, that relief being the delivery of possession of the sites to all the Agrabaramdars, though the prior suit included one or two reliefs in which one of the Agrabaramdars alone was interested, and under Expl. VI to S. 11, Civ. Pro. Code, the two present plaintiffs (including the second plaintiff), cannot be allowed to re-open the right of the Agrabaramdars which was negatived in the former suit.

The weight of authority in Madras is in favour of giving a liberal construction to the Expl. VI to S. 11 of the Code; Expl. VI is not confined to cases in which permission to sue in a representative character is obtained under O. I, r. 8, Civ. Pro. Code. Expl. VI makes no reference to O. I, r. 8, of the Code (a).

The addition of an individual claim to a right of way in the former suit cannot prevent the decision therein as to the right claimed on behalf of all the Agrabaramdars, (which is also the right claimed in the present suit) from

Civ. Pro. Code (1908)—(Continued).

being *res judicata* in the present suit. Expl. VI to S. 11, Civ. Pro. Code, is not confined to the rights of a joint Hindu family or Malabar Tarwad or to rights of joint Trusteeship, etc. *Gudimolla Rangamma v. Panchangam Narasimhacharyulu*, 31 M.L.J. 26—(1916) 2 M.W.N. 258—35 Ind. Cas. 116.

SADASIYA AIYAR and MOORE, JJ.

References :—(a) 24 O. 885; 23 M. 28 (32)—7 M.L.J. 281; 2 M. 398; 11 M. 191; 14 M. 324—1 M.L.J. 539; 28 M. 457 (464)—14 M.L.J. 404; 8 M. 496, R.

(39) S. 11, O. II, r. 2—Application for partition of portion of property in Revenue Court—Suit for possession—Applicability of S. 11 and O. II, r. 2, Civ. Pro. Code. See U.P. ACT III OF 1901 (U.P. LAND REVENUE), No. 14, 14 A.L.J. 373.

(40) S. 11 and O. XX, r. 12—Scope—Mesne profits or damages, suit for—Title derived from a party, nature of—No issue raised or tried—No bar—Co-defendants. *Surendra Narayan Mitra v. Dikendra Prosad Mitra*, 29 Ind. Cas. 464—23 C.L.J. 215. See Final Part, 1915, Col. 375.

(41) S. 11, O. XLI, r. 23—Remand—Fresh preliminary point raised before trial Court.

Where a suit is remanded for decision on merits, a fresh preliminary point cannot be raised before the trial Court, subsequent to such remand (a). *Chunni Lal v. Habib Ali*, 35 Ind. Cas. 571.

PIGGOTT and LINDSAY, JJ.

Reference :—(a) 6 A. 269 (P.O.), R.

(41-a) S. 13. See FOREIGN COURT.

(41-b) See FOREIGN JUDGMENT.

(42) S. 13.—S. 14 of Act XIV of 1882—Suit on a foreign judgment brought in British India—Incompetency of British Courts to go into merits—Points worth considering.

Held, that, when a suit is instituted in British India on the judgment of Court of a Native State (Punchh State in this case) the British Court is precluded from inquiry into the merits of the case except on the points specified in paras. (a) to (f) of S. 13 of Act V of 1908, as concluding portion of S. 14 of Act XIV of 1882 has been omitted (a).

In this case none of the points raised could be governed by the said para (b). *Malk Shah v. Tara Singh*, 19 P.W.R. 1916—34 Ind. Cas. 255.

LESLIE JONES, J.

References :—(a) 102 P.R. 1892; 31 A. 17—A.W.N. (1893) 183, rendered obsolete. (b) 4 P.R. 1913—160 P.W.R. 1912, R.

(43) S. 13—Foreign judgment—Defendant's failure to answer interrogatories—Defence struck out—Judgment for plaintiff—Judgment whether given on the merits—Right to sue on the foreign judgment—Causes of action. *Peruri Yiswanna Reddi v. D.T. Keymer*, 27 M.L.J. 670—27 Ind. Cas. 386—39 M. 95. See Final Part, 1914, Col. 295.

Civ. Pro. Code (1908)—(Continued).

(44) S. 13. See FOREIGN JUDGMENT, No. 1, 9 Bur. L.T. 106.

(45) S. 13. See No. 31-a, *supra*.

(46) Ss. 13, 44, O. XXI, r. 7—Foreign judgment—Decree of Cochin Court—Transfer to British Indian Court for execution—Executing Court whether can question jurisdiction of foreign Court—Submission to jurisdiction when voluntary. *S. Veeraraghava Aiyar v. J.D. Muga Selt*, 27 M.L.J. 535—18 M.L.T. 479—(1915) M.W.N. 163—26 Ind. Cas. 287—39 M. 24. See Final Part, 1914, Col. 299.

(46-a) S. 15. See JURISDICTION.

(47) S. 15—Suit—Institution in Court of higher grade—Irregularity—Estoppel—Defendant when precluded from raising objection. See JURISDICTION (GENERAL), No. 2, 9 S.L.R. 164.

(48) Ss. 15, 16, 17, 18, 19, 20, 21—Meaning of 'place of suing'—Objection to place of suing, what amounts to. See MORTGAGE (GENERAL), No. 9, 19 M.L.T. 360.

(48-a) S. 16. See JURISDICTION.

(49) S. 16. See No. 48, *supra*.

(50) Ss. 16, 17—Properties in different jurisdiction—Successive suits for partition in different Courts whether barred. See LETTERS PATENT (MADRAS), No. 4, 3 L.W. 107.

(51) Ss. 16 and 107—Appellate Court—Power to expunge remarks.

The power of the High Court to expunge remarks appearing in the judgment of a lower Court will only be exercised in extraordinary circumstances, such as where the observations are pointedly seditious, blasphemous, or irrelevantly scandalous or indecent.

Quere :—Whether an appellate Court other than a High Court has power to expunge such remarks? *Ramabhadra Naidu v. Subramania Iyer*, 3 L.W. 283—33 Ind. Cas. 608.

SADASIYA AIYAR and MOORE, JJ.

(52) S. 16 (d)—Suit for maintenance—Prayer that maintenance be made a charge on property within jurisdiction—Court—Jurisdiction.

The plaintiff sued her daughter-in-law in the Poona Court for a declaration that she was entitled to a maintenance allowance of a certain amount for her life, and prayed that the amount claimed should be made a charge on the defendant's land in the Inam village in the Bhimthadi Taluka of the Poona District. The defendant lived in a Native State. The lower Court held that it had no jurisdiction to try the suit:

Held, that the Poona Court had jurisdiction to try the suit under S. 16, cl (d) of the Civ. Pro. Code, 1908, for the question to be decided was, whether or not the plaintiff was entitled to a right to, or interest in immovable property in the Bhimthadi Taluka by way of

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charge as security for the maintenance allowances which might be decreed. *Sitabai Raghunath Vaidya v. Laxmibai Vyankatesh Vaidya*, 18 Bom. L.R. 67 = 40 B. 337 = 32 Ind. Cas. 985. SCOTT, C.J., and BRAMAN, J.

(53) S. 17. See Nos. 48, 50, *supra*.

(54) S. 18. See No. 48, *supra*.

(55) S. 19. See No. 48, *supra*.

(55-a) S. 20. See JURISDICTION.

(56) S. 20—*Place of residence—Defendant living and carrying on business at one place—Mere possession of ancestral abode and lands elsewhere—Effect—Second appeal—Findings of fact by lower appellate Court—Duty of Chief Court.*

Where, though the defendants had an ancestral abode and some ancestral property at N, yet it was found that they had been for over forty years, up to the time when the suit was instituted, living and carrying on business at P, and where the circumstances of the case established that they had no intention of returning to N.

Held, that, for purposes of S. 20, Civ. Pro. Code, 1908, the defendants at the time of the commencement of the suit, actually and voluntarily resided and carried on business at P (a).

In hearing a second appeal, the first thing the Chief Court has to do is to see what are the findings of fact of the lower appellate Court, and if these findings of fact are not perverse; i.e., are based upon a consideration of all the evidence, to accept these findings and then to apply the law to them. *Guranditta Mal Dextiditta Mal v. Ram Das*, 112 P.R. 1916.

JOHNSTONE, C.J.

References:—(a) 2 Bom. L.R. 605, *Ref. to*; 1 A. 61; 3 A. 91; 14 B. 541 (552) and 18 B. 290 (293), *distinguished*.

(57) S. 20—*Suit on dishonoured hundi—Hundi drawn at one place and accepted at another—Acceptor and drawer made parties to suit—Institution of suit at place of drawer—Effect of arrangement between drawer and acceptor as against holder.*

A hundi was drawn at Lucknow upon a person at Bombay. It was presented for acceptance at Bombay and was duly accepted there. After the bill became due, it was presented for payment at Bombay, but was dishonoured. The acceptor refused payment on the ground that he had no funds of the drawer in his possession. The holder of the hundi thereupon brought the present suit at Lucknow against both the acceptor and the drawer. The main defence of the acceptor was that in pursuance of an understanding between himself and the drawer he was not to be liable on the acceptance unless the drawer kept him supplied with funds, which arrangement he alleged was well known to the plaintiff. In the lower Court the question of the knowledge of the plaintiff about the alleged arrangement was found against the acceptor. The

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latter further contended that the suit was not cognisable in Lucknow and that it was exclusively triable in Bombay, where the bill was accepted and where it was also dishonoured. *Held*, that the acceptor after his acceptance became the principal debtor of the plaintiff in connection with this transaction. The suit was brought not only against the acceptor but against the drawer also, who stood in the relation of a surety. The plaintiff was entitled to sue both these parties in the same suit and under S. 20, Civ. Pro. Code, 1908, he was entitled to institute the suit against both these defendants at Lucknow, the place where a part of the cause of action, viz., the drawing of the hundi, took place (a). *Held* also that, whatever arrangements there might have been between the drawer and the acceptor, they did not in any way affect the position of the plaintiff, in the absence of knowledge thereof on the part of the plaintiff, which the evidence in the case negatived. *Jlwan Lal Deosay v. Oudh Commercial Bank, Ltd., Lucknow*, 34 Ind. Cas. 191 = 3 O L.J. 132.

LINDSAY, J.C.

Reference:—(a) 57 P.R. 1900, R.

(58) S. 20. See No. 48, *supra*.

(59) Ss. 20, 21—*Jurisdiction—Suit for damages for breach of betrothal tried by wrong Court—How dealt with by appellate Court.*

The cause of action for a suit for damages for breach of a betrothal contract arises in part at the place where the contract was made; and consequently the Court of that place has jurisdiction to entertain such a suit (a).

Even if such Court has no jurisdiction to entertain the suit, the judgment of such Court ought not to be set aside by an appellate Court, unless such appellate Court was satisfied that there had been a failure of justice by reason of the suit being instituted in the wrong Court. *Bhag Singh v. Labh Singh*, 93 P.R. 1916.

RATTIGAN, J.

References:—(a) 57 P.R. 1874; 147 P.R. 1882, D.

(60) Ss. 20, cl (b) and 105, *scope of—Settlement of account between plaintiff and defendant's firm at Rangoon—Suit impeaching settlement in Paramakudi—One partner of defendant's firm residing in Paramakudi—Others residing in Rangoon—Leave under S. 20, Civ. Pro. Code, if and when can be granted—Appeal from order returning plaint—Leave to sue, if can be given in such appeal—Applicability of S. 105, Civ. Pro. Code, to orders and interlocutory orders—Proper Court, considerations to determine—Powers of High Court in revision under S. 115, Civ. Pro. Code.*

The plaintiff had borrowed from the defendant's firm a certain sum of money which he subsequently repaid and the accounts between the parties were then settled in Rangoon. The plaintiff afterwards brought this suit in

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Paramakudi Court impeaching the said settlement of account and claiming a sum of money as still due. The 1st defendant, one of the partners of the firm was a resident of Paramakudi but the other two partners were living in Rangoon. The plaintiff therefore applied for leave under S. 20, cl. (b) of the Code of Civil Procedure to institute the suit against all the partners. The District Munsiff passed an order refusing the leave prayed for and also another order returning the plaint for presentation to the proper Court. The plaintiff preferred an appeal against the latter order to the District Judge who granted the necessary leave and directed the suit to be heard by the Munsiff. On revision to the High Court.

Held that the case was covered by the provisions of S. 20, cl. (b) of the Civ. Pro. Code, as the defendants were impleaded as separate individuals and separate parties, and one of them was living within the jurisdiction of the Court in which the suit was sought to be instituted and the others were living outside such jurisdiction.

Held also that the principle of S. 105, Civ. Pro. Code, applied not only to decrees and interlocutory orders but also to orders and interlocutory orders which led up to the final order and that it was therefore competent to the District Judge to consider the order refusing leave preliminary to the reversal of the order returning the plaint (a).

Held further that the proper forum in the circumstances of the case was the Court in Rangoon where the settlement was come to, where the dealings took place and where all the witnesses and most of the parties were living.

The High Court cannot interfere in revision under S. 115, Civ. Pro. Code, with the order of the District Judge as there is no question of any exercise of jurisdiction not vested in him by law. **Alagappa Chetty v. Annamalai Chetty**, 4 L.W. 411—35 Ind. Cas. 74.

SESHAGIRI AIYAR, J

References:—(1865) 3 Moore P.O. (N.S.) 1 at p. 12; (1842) 4 Moore P.C. 1, R.

(61) S. 20, cl. (c)—“Cause of action”—**Meaning—Promissory note—Execution in one place and assignment in another—Suit by assignee in Court within whose jurisdiction assignment is made—Maintainability.**

The assignment of a promissory note by the payee to the plaintiff is a part of the cause of action within the meaning of S. 20, cl. (c), Civ. Pro. Code, so as to give jurisdiction to the Court within whose local limits it took place (a).

“Cause of action” includes every fact necessary to be proved, if traversed, in order to enable plaintiff to sustain his action and which, if not proved, will give the defendant an immediate right to judgment.

“Cause of action” means “the grounds set forth in the plaint as cause of action or in other words the *media*, upon which the plaintiff asks the Court to arrive at a conclusion in his

Civ. Pro. Code (1908)—(Continued).

favour” (b). **Manepalli Mangamma v. Manepalli Sathiraju**, 81 M.L.J. 816—5 L.W. 246, **OLDFIELD and KRISHNAN, JJ.**

References:—(a) (1888) 22 Q.B.D. 128; 21 M. 91; 8 M.L.J. 28; 21 M. 153—8 M.L.J. 92; 21 B. 126; 16 A. 165; 18 A. 403; 36 A. 564; 22 C. 451, R. (b) (1878) L.R. 8 O P. 107; (1897) 1 Q.B. 702 (707); 21 M. 153; 16 A. 165 (F.B.); 21 M. 91; 18 A. 131; 18 A. 432; 31 C. 274; 21 B. 126; 36 A. 564; 22 C. 451; (1888) 22 Q.B.D. 128; 22 C. 833; 16 O. 98, 102, R.

(62) S. 20 (c)—**Promissory note—Execution at one place and delivery at another place—Institution of suit in the Court at the latter place—Jurisdiction—Maintainability.**

Where a promissory note was executed at Fatehgarh and was delivered by post to the payee at Delhi where the payee was residing, and it was accepted in settlement of the payee's claim against the executant of the note.

Held, that, although the place of performance was not expressly prescribed by the instrument, the executant by delivering the note at Delhi impliedly promised to pay the money at that place (a), and that the Court at Delhi had, under S. 20, cl. (c) of the Code of Civil Procedure, jurisdiction to try the suit. **Muhammad Ishaq Khan v. Muhammad Islam-Ullah Khan**, 2 P.R. 1916—10 P.W.R. 1916—31 Ind. Cas. 698.

SHADI LAL and LESLIE JONES, JJ.

References:—(a) 1 B.L.R. 35, D.; 1 M.H.C. R. 202, R.

(63) S. 21. See Nos. 4, 48, 59, *supra*.

(64) Ss. 22 and 23—**Selection of forum by plaintiff—Objection on ground of expense or convenience.**

The plaintiff has a right to bring a suit in any Court which the law allows, and a strong case based either on some ground of expense or convenience must be made out in order to overrule the right of the plaintiff to select the forum of a suit. **Syed Husain v. Musammam Sajjad Begam**, 34 Ind. Cas. 686—3 O.L.J. 200.

LINDSAY, J.C.

(65) Ss. 22, 23, 151—“After notice to the other parties”, **interpretation of—Application of transfer, when to be made—Inherent power of Court.**

Held that:—

(1) The words used in S. 23 of the Civ. Pro. Code, 1908, are mandatory. The words “after notice to the other parties,” indicate that the notice must be given prior to the making of an application for transfer of a case and that a notice of the application issued by the Court to which the application is made is not what is intended.

(2) In a case where issues are settled, the application must be made at or before such settlement is made, and a delay in making such an application would render the application incompetent (a).

S. 151 of the Code of Civil Procedure does not empower the Court to wholly ignore the

Civ. Pro. Code (1908)—(Continued).

provisions of S. 93 (b). *Gulab Chand v. Sher Singh*, 150 P.W.R. 1916=11 P.R. 1917=16 P.L.R. 1917=35 Ind. Cas. 616.

BROADWAY, J.

References:—(a) 65 P.W.R. 1914=25 Ind. Cas. 723, D. (b) 25 Ind. Cas. 267=20 O.L.J. 488=19 O.W.N. 885; 34 B. 467 at p. 488=4 Ind. Cas. 108=11 Bom. L.R. 1014, F.; 20 Ind. Cas. 758; 28 Ind. Cas. 804=19 O.W.N. 1021; 27 Ind. Cas. 455=27 M.L.J. 645, D.

(66) S. 23. See Nos. 64, 65, *supra*.

(67) S. 24—*Right to begin—Notice to show cause—Transfer of suit—Balance of convenience, test—Suit instituted at Aligarh, bulk of the property being there—Witnesses living in Bareilly.*

An application for transfer of a case was made in the High Court which ordered a notice to issue to the opposite party to show cause why the case should not be transferred. The opposite party appeared on the day fixed for hearing. *Held*, that the applicant had a right to begin.

In order to entitle an applicant to get a suit instituted in the Court within whose jurisdiction the bulk of the property lies, transferred to a Court within whose jurisdiction the witnesses live, the test is that he must make out a strong case of the balance of convenience.

The practice in England is identical. *Subba Bibi v. Maqbul Hussain*, 14 A.L.J. 242=29 Ind. Cas. 613.

WALSH, J.

(67-a) S. 24—*Transfer of suit—Transfer from regular file of Munsiff to Small Cause file of Subordinate Judge—Jurisdiction of District Judge.*

Where a District Court acting under S. 24, Civ. Pro. Code, transferred a suit pending in the District Munsiff on the original file to the Small Cause file of a Subordinate Judge such transfer cannot be questioned by a party to the suit on the ground that the right of appeal which he had from an adverse decision by the District Munsiff could not be exercised by him from a decision of a Subordinate Judge on the Small Cause side. An order of transfer under S. 24, Civ. Pro. Code, is a course which a District Judge has a right to take and the party instituting a regular suit in a District Munsiff's Court is always liable to the contingency of action being taken under the said section. *Uma Charan Sen Gupta v. Chinta Roy*, 36 Ind. Cas. 881.

FLETCHER and RICHARDSON, JJ.

(68) S. 24—*Small Cause Court—Suit filed—Transfer to Munsiff's Court—Appeal—Revision.* See SMALL CAUSE SUIT, No. 1, 14 A.L.J. 705.

(69) S. 24. See TRANSFER OF SUIT, No. 1, 28 O.L.J. 295.

(70) Ss. 24, 97, 98, 99, 46, 150 and O. XXI, r. 10—*Temporary Court without assignment of definite local jurisdiction—Execution of decrees of such Court—Attachment of immovable property in places not assigned*

Civ. Pro. Code (1908)—(Continued).

to its local jurisdiction—Validity—Decree holder's remedy—Jurisdiction of such Court within the compound of its own Court house.

A temporary Subordinate Judge's Court was established at Masulipatam, but no local limits were fixed for its jurisdiction, the District Judge of Kistna having been empowered to fix such local jurisdiction as he thought fit to do under S. 10, Madras Civil Courts Act (III of 1878). A suit for partition and possession with mesne profits was transferred by the District Court to the Temporary Sub-Court at a time when the District Court had not fixed any local limits for the temporary Court's jurisdiction. The Sub-Judge decreed the suit including the relief of mesne profits.

The decree-holder applied for attachment of certain immoveable properties of the defendant for recovering the mesne profits. The places where the immoveable properties were situated were not even then assigned to the local limits of the Sub-Judge's jurisdiction.

Held, the Sub-Judge had no jurisdiction to entertain the application, but under S. 89 (b), Civ. Pro. Code, he had power, on the application of the decree-holder, to send the decree for execution to the Court which has territorial jurisdiction over the place where the properties sought to be attached are situated (a).

The practice in cases where temporary Courts are established without the assignment of any definite local jurisdiction has been that execution against immoveable properties in respect of the decrees passed by such Courts is effected in the Courts to which has been assigned local jurisdiction over the situs of such property, the decrees being transferred to those Courts for the said purpose. Such transfer may become unnecessary when the temporary Courts cease to exist and their business is again taken up by the permanent Courts. (See S. 97, cl. 6.) No doubt every Court has local jurisdiction within the area of its house and the compounds attached to it and can arrest persons found within those limits in execution of its own decrees. (See also O. XXI, r. 11 (1).) But a temporary Court without assigned local limits outside its Court-house has no further power in execution even of its own decrees.

Territorial jurisdiction is a condition precedent to the execution of a decree (b).

S. 150, Civ. Pro. Code, merely provides for the whole business of one Court being transferred to another Court, as for instance, where, owing to a change of venue being made by a local Government, it loses jurisdiction over a certain area, while S. 24, Civ. Pro. Code, contemplates the transfer of a particular case or cases pending at a particular time by a special order of a superior Court. *Gamarti Venkatachellam v. Gamarti Sithayamma*, 31 M.L.J. 22.

SADASIVA AIYAR and MOORE, JJ.

References:—(a) 37 M. 452 (473)=26 M.L.J. 189, F. (b) 17 O. 699, R.

(71) Ss. 24, 141. See LEGAL PRACTITIONERS ACT (1879), No. 10, 1 Pat. L.J. 576.

CIV. PRO. CODE (1908)—(Continued).

- (73) Ss. 24, 150—*Case transferred to temporary Court having no definite local jurisdiction decreed by that Court—Attachment of property not within its jurisdiction—Decree-holder's remedy.*

A suit for partition of immoveable properties for recovery of a half share therein and for mesne profits on the file of the District Court was transferred for disposal to a temporary Court established in that place without any definite local jurisdiction. The suit was decreed. The plaintiff put in an execution petition for the attachment of certain immoveable property of the defendants for recovery of the mesne profits so decreed. But the places where the immoveable property sought to be attached were situated had not been even then assigned to the local limits of the temporary Court's jurisdiction. *Held* that the said temporary Court had no jurisdiction to execute the decree and that the proper course for the decree-holder was to have applied under S. 89 of the Code to have the decree transferred for execution to the Court having jurisdiction over the properties sought to be attached (a).

Sadasiva Aiyar, J.—S. 150 relates to the business generally of a Court arising over the whole area or in defined particular area within its jurisdiction being transferred to another Court owing to the change of venue effected by legally competent notification of the Local Governments, while S. 24 contemplates the transfer of case or cases pending at a particular time by a special order of a superior Court.

Moore, J.—Territorial jurisdiction is a condition precedent to the execution of a decree (b). *Yenkatachallam v. Sithayammn*, 35 Ind. Cas. 296.

SADASIVA AIYAR and MOORE, JJ.

References:—(a) 37 M. 462, F. (b) 17 C. 699, F.

- (78) S. 24 (4)—*Suit instituted in Court of Sub-Judge invested with Small Cause Court powers—Transfer to Munsif's Court—Powers of Munsif. See ACT IX of 1887 (PROVL. S.O. COURTS), No. 1, 14 A.L.J. 649.*

(73-a) S. 85. See COSTS.

- (74) S. 85—*Interest on costs—Judgment not allowing—Decree if can include.*

A Court inserting interest on costs for the first time in the decree is within its jurisdiction. The power to award interest on costs is discretionary and may be exercised when framing the decree.

Where the pleader of a party signed a decree before it was signed by the Court and no objection was taken as to the inclusion of costs in appeal, it is hardly open to the party subsequently to object to such inclusion. *Kishori Lal v. Badri Das*, 35 Ind. Cas. 218.

RAVIQ and PIGGOTT, JJ.

- (75) S. 85—"Costs would abide the result", meaning of—*Discretion. Godavarthi Peria v. Godavarthi Lakshmi Devamma*, 24 Ind. Cas. 96—39 M. 476 (Foot note). See Final Part, 1914, Col. 806.

(76) S. 87. See No. 70, *supra*.

CIV. PRO. CODE (1908)—(Continued).

- (77) Ss. 37, 88—*Decree for delivery of property, mesne profits and costs—Transfer of jurisdiction—Execution-application to what Court to be made—Application not presented in "proper Court"—Whether a step-in-aid of execution and saves limitation—Art. 182 (5), Limitation Act (1908).*

In this case a decree was passed by the District Munsiff's Court, Rajahmundry, in 1908, for delivery of property and for mesne profits and costs. In 1905 the jurisdiction over the village where the property was situated was transferred to the Tanuku Munsiff's Court.

The decree so far as the delivery of the property was concerned was executed in 1908 in the Tanuku Munsiff's Court. Another execution application presented to the Tanuku Court in 1909 was dismissed on 4-1-1910. On 4-5-1912 the jurisdiction was again transferred from Tanuku to the Kovvur Munsiff's Court. On 20-9-1912 the original decree-holder merely applied to the Rajahmundry Court for transmitting the unsatisfied portion of the decree to the Kovvur Court. On 1-8-1913, his heirs also applied to the Rajahmundry Court for transmission of the decree to Kovvur and for recognising them as legal representatives of the deceased decree-holder. On the dates of the presentation of these two applications, the (defendants) judgment-debtors did not reside within the jurisdiction of the Rajahmundry Court. The present execution petition was presented to the Kovvur Court on 18-11-1918. *Held* that the Rajahmundry Court having ceased to have jurisdiction, the two preceding applications ought to have been made to the Kovvur Court, and not having been made to the "proper Court" cannot save limitation.

Where the Court which passed the decree has ceased to have jurisdiction to execute it, the only Court which can execute the decree is the Court which at the time of making the application for execution would have jurisdiction to try the suit in which the decree sought to be executed was passed (a).

A petition, although it is a step-in-aid of execution, will not save limitation unless it is presented to the proper Court (b). *Penugonda Rattam v. Korasika Thatha*, 81 M.L.J. 90—20 M.L.T. 327—35 Ind. Cas. 237.

SADASIVA AIYAR and MOORE, JJ.

References:—(a) 37 M. 462—26 M.L.J. 189; (1914) M.W.N. 896, R. (b) 37 M. 281, R.

- (78) S. 38. See Nos. 70 and 77, *supra*.

(79) S. 39. See No. 70, *supra*.

(79-a) S. 42. See EXECUTION OF DECREE.

(80) S. 42. See EXECUTION OF DECREE, No. 4, 14 A.L.J. 415.

- (81) Ss. 43, 47, 104, cl. (h), 145—*Appeal—Small Cause Court—Decree, execution of—Surety—Order directing the arrest of a surety if appealable. Adhar Chandra Gope v. Pulla Bahary Saha*, 20 C.L.J. 129—27 Ind. Cas. 10—19 C.W.N. 1085—30 Ind. Cas. 684. See Final Part, 1914, Col. 808.

Civ. Pro. Code (1908)—(Continued).

(82) S. 44. See No. 46, *supra*.(83) S. 44, O. XXI, r. 7—*Civ. Pro. Code, (1889), S. 229-B—Decree—Execution—Decree passed ex parte by foreign Court—Executing Court can go into the question whether the foreign Court had jurisdiction—Decree passed by foreign Court in absentem in a personal action is a nullity.*

A British Court executing a foreign decree has power to enquire whether the foreign Court had jurisdiction to pass the decree.

A decree pronounced in *absentem*, in a personal action by a Court of a foreign state, the absent party not having submitted himself to its authority, is a nullity. *Jivappa Tamappa Bijapur v. Jeerji Murgappa*, 18 Bom. L.R. 486 = 40 B. 551 = 36 Ind. Cas. 363.

BACHELOR and SHAH, JJ.

(84) S. 46—*Attachment by precept—Objection to execution based on want of transfer, if can be taken during the hearing of an appeal—Simultaneous execution against property, if permissible—Extension of time, petition for, presented before expiry of two months—Order passed after expiry of the said period—Attachment, if ceases to be effective.*

An objection to the jurisdiction of an executing Court to order the sale of certain immovable property attached by it under the precept of another Court based on the want of transfer of the decree to that Court for execution, will not be allowed to be taken up for the first time during the hearing of an appeal against the order for sale.

There is nothing in law to prevent a decree being simultaneously executed in more places than one against the property of the judgment-debtor (a).

Under S. 46, Civ. Pro. Code, an attachment under precept is not invalidated by the fact that the order extending the statutory period of two months during which the attachment will remain in force is passed after the expiry of the said period, provided that the application for extension of time is put in before the expiry of the said two months. In such a case the order relates back to the date of the petition and has retrospective effect (b). *Sivakolundu Pillai v. Ganapathi Ayyar*, 3 L.W. 336 = 34 Ind. Cas. 302.

SADASIYA AIYAR and MOORE, JJ.

References:—(a) 14 M.I.A. 539, *Considered*; 1 C.L.J. 316, R. (b) 13 W.R. 3, F.

(85) S. 46. See No. 70, *supra*.

(85-a) S. 47. See EXECUTION OF DECREE.

(86) S. 47—*Purchaser of property not directly mentioned in and affected by decree, whether a legal representative of judgment-debtor—Claim petition—Appeal—Second appeal.*

A person who purchases property which is not directly mentioned in and affected by a decree is not a legal representative of the judgment-debtor and a claim petition filed by such

Civ. Pro. Code (1908)—(Continued).

a purchaser cannot be treated as a petition under S. 47, Civ. Pro. Code. *Arasayee Ammal v. Sokkalinga Mudali*, 3 L.W. 289 = (1916) M.W.N. 287 = 38 Ind. Cas. 84.

SADASIYA AIYAR and MOORE, JJ.

References:—29 C. 813; 24 C. 62, D.

(87) S. 47—*Money-decrees against the same judgment-debtor in two suits by two separate creditors—Execution sale in one suit and attachment of immovable properties in the second—Auction-purchaser in the first suit claiming properties attached in second suit—Purchaser, whether legal representative of the judgment-debtor—Appeal—Second appeal.*

Two persons A and B obtained separate money-decrees against C. In execution of A's decrees certain immovable properties belonging to C were brought to sale and purchased by D. B then executed his decrees and had the property purchased by B attached. D thereupon filed a claim petition objecting to the said attachment and being unsuccessful before the District Munsif, appealed to the District Judge. This appeal being dismissed, he preferred a Civil Miscellaneous Second Appeal to the High Court.

Held that both the appeal to the District Court and the Second Appeal to the High Court were incompetent, inasmuch as D was not the representative of C in the suit of B. *Thangavelu Mudalliar v. Mahomed Ibrahim Sahib*, 3 L.W. 377 = 34 Ind. Cas. 759.

SADASIYA AIYAR and MOORE, JJ.

Reference:—34 M. 417, R.

(88) S. 47—*Civ. Pro. Code (1882), S. 244—Objections to decrees raised and decided against in execution—Separate suit, if barred.*

Courts ought not to place a narrow construction on the language of S. 244 of the Code of Civil Procedure, 1882 (corresponding to S. 47 of the new Code), as it is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible (a).

One Ram Nawaz Singh obtained a decree for sale under S. 88 of the Transfer of Property Act against one Fakir Chand, on 29th March 1898. On 4th January 1902 an order absolute for sale was made and this was confirmed on appeal by the High Court on 18th December 1903. The decree-holder having died in the meanwhile, his representatives applied for execution of the decree. On 18th May 1904, the present plaintiff, the representative of the judgment-debtor who was then dead, preferred certain objections to the execution of the decree. Some of those were allowed and the others were disallowed as not having been proved. On 23rd January 1907 the present suit was instituted in respect of the very objections which had been disallowed in the execution proceedings of 1904, impleading therein two new parties A and G. In the trial Court the plaintiff partly succeeded but on appeal the High Court dismissed the suit. On appeal to the Privy Council.

Civ. Pro. Code (1908)—(Continued).

Held, that the questions raised could have been and were raised in the execution proceedings of 1904 and whether raised or not the present suit was barred by S. 244 of the Code of Civil Procedure, 1882, that the addition of new parties was to get over the bar of S. 244, Civ. Pro. Code, and that the dismissal of the suit by the High Court was proper. *Amir Chand v. Bakshi Harihar Pershad Singh*, 80 M.L.J. 238—8 L.W. 257—32 Ind. Cas. 354 (P.C.).

VISCOUNT HALDANE, LORDS PARMEOR and WRENBURY, SIR JOHN EDGE and MR. AMER ALI.

References:—(a) 19 I.A. 166—19 C. 688, *Appr.*

(89) S. 47—*Defendants inter se—Application.*

Where a decree has been satisfied, the claim of judgment-debtors *inter se* to the possession of the properties temporarily taken possession of by the Court cannot be determined under the provisions of S. 47, Civ. Pro. Code, but only by a separate suit. There is no decree under the purview of the section to be taken cognizance of. *K. Anavarda Khan Pani Sahib v. Mislai Khan Pani Sahib*, (1916) M.W.N. 468—31 M.L.J. 44—35 Ind. Cas. 179. SADASIVA IYER and MOORE, JJ.

(90) S. 47—*Attachment of property in execution—Dispute between judgment-debtor and decree-holder regarding amount of property attached—Allegations of collusion between Amin and decree-holder—Duty of executing Court to enquire.*

Where a judgment-debtor presented to the executing Court an application in which he alleged that the peon of the Court armed with a warrant of attachment went to the threshing floor and attached approximately 2,800 maunds of grain valued at Rs 9,500 or more, and that the decree-holders in collusion with the Court-peon made away with the bulk of the property which had been attached, and that the peon put up for sale only 74 maunds and prayed for an enquiry into those allegations, and where the said Court declined to make an inquiry into the allegations and referred the judgment-debtors to a regular suit.

Held, that the matter was one which should be enquired into under S. 47 of the Code of Civil Procedure. *Gajadhar Prasad Singh v. Babu Arjun Das*, 1 Pat. L.J. 558—36 Ind. Cas. 280. CHAMIER, C.J. and SHARFUDDIN, J.

(90-a) S. 47—*Question raised not between parties to suit—Bar of suit.*

Where the question in a case is not between parties to the suit but between the judgment-debtor therein and his partner in the holding, the provision of S. 47 of the Code cannot operate as a bar to the maintainability of the suit. *Ram Khelawan Pande v. Asgar Ali*, 36 Ind. Cas. 681.

ROE and PRASAD, JJ.

(91) S. 47—*Suit, dismissal of, on the ground that proper remedy was by execution, if legal—Court trying a suit incompetent to determine the*

Civ. Pro. Code (1908)—(Continued).

matter in execution, whether sufficient reasons for not treating suit as application—Specific Relief Act, S. 23—Specific performance, stranger to contract, whether entitled to—Practice—Costs—Negligent conduct of case in lower Courts—Case not properly set out and proper evidence not produced—Success in appeal—Right to costs. *Lakshmanan Chetty v. Muthiah Chetty*, 2 L.W. 755—18 M.L.T. 247—30 Ind. Cas. 785. See Final Part, 1915, Col. 880.

(92) S. 47—*Decree silent as to future mesne profits though asked for in plaint—Subsequent suit for future mesne profits—Res judicata.* *M. Sa U v. Nga Melk*, U.B.R. (1915), 2nd Qr., p. 81—31 Ind. Cas. 103. See Final Part, 1915 Col. 381.

(92-a) S. 47. See ESTOPPEL, No. 7 a, 32 Ind. Cas. 757.

(93) S. 47. See FRAUD, No. 4, 34 Ind. Cas. 911.

(94) S. 47. See Nos. 1-a, 31-b and 81, *supra*, and Nos. 130, 163 and 271, *infra*.

(95) S. 47, 52—*Legal representatives—Separate suit barred.*

Certain property was sold in execution of a money decree passed against A and B who had been impleaded in the suit as the legal representatives of their brother. The property was purchased by the defendant. A then brought a suit to recover possession of the property: *Held* that the suit was barred by the provisions of S. 47 of the Code of Civil Procedure. *Dulla v. Shih Lal*, 14 A.L.J. 846—36 Ind. Cas. 281.

WALSH and SUNDAR LAL, JJ.

Reference:—12 A. 313, F.

(96) Ss. 47, 73—*Appeal—Execution application—Provision in new Code for striking off—Till then pending—Rateable distribution.* *Yenkataperumal Raja Bahadur Varu v. Venkata Reddi*, (1915) M.W.N. 334—17 M.L.T. 447—29 M.L.J. 96—29 Ind. Cas. 231—39 M. 570. See Final Part, 1915, Col. 389.

(97) Ss. 47, 115 and O. XXI, r. 93—*Execution sale set aside—Order to refund purchase-money to third party purchaser, whether one relating to execution, discharge or satisfaction of a decree—Appealability—Practice—Civil miscellaneous appeal, conversion of, into a revision petition—Poundage, order to refund, to auction-purchaser—No notice to judgment-debtor—Acting illegally and with material irregularity—Jurisdiction—Poundage whether can be considered as having been paid to judgment-debtor on the setting aside of auction sale.*

An order under O. XXI, r. 93, Civ. Pro. Code, for repayment of purchase-money to a third party purchaser in a Court auction-sale which is subsequently set aside at the instance of a judgment-debtor, is not a question between the parties to the suit, relating to the execution, discharge, or satisfaction of the decree, as it does not affect the rights and liabilities of the decree-holder and judgment-debtor *inter se*, and is consequently not appealable. Where, after an execution sale had been set aside at the

Civ. Pro. Code (1908)—(Continued).

Instance of the judgment-debtor, the Court, on the application of the third party purchaser and without any notice to the judgment-debtor, ordered the latter to refund to the former the poundage fees paid by him, *held* that the Court had acted illegally and with material irregularity in the exercise of its jurisdiction and that consequently the order ought to be set aside. (The Civil Miscellaneous Appeal was converted into a Revision Petition.)

Quere.—Whether, in a case where an execution sale is set aside at the instance of judgment-debtor, he can be considered to be the person to whom the poundage money has been paid. *Krishna Bhupati Deva Garu v. Venkataswamy*, 8 L.W. 105—(1916) M.W.N. 109—35 Ind. Cas. 285.

SADASIYA AIYAR and MOORE, JJ.

(98) Ss. 47, 144 and 151, *scopes of—Inherent powers of Court, extent of—Application for restitution, when lies—Suit, when can be converted into application under S. 47, Civ. Pro. Code—Limitation, bar of—Court sale, confirmation of—Suit to recover property wrongly attached and sold—Sale, if should be set aside first—Indian Limitation Act (IX of 1908), Art. 166.*

An application for restitution lies only where a decree passed in a former suit is varied or reversed subsequently.

S. 151 of the Civ. Pro. Code cannot enlarge the scope of S. 144 of the same Code, and an application for a relief which has nothing to do with restitution cannot be converted into an application for restitution under the provisions of the said section.

A suit can be converted into an application under S. 47 of the Code only if such application would not be barred by limitation on the date of the suit.

A judgment-debtor must institute appropriate proceedings to set aside a Court sale held in execution of a decree before he can claim the properties sold as his own and the period of limitation for such proceedings is 30 days from the date of sale as prescribed by Art. 166 of the Indian Limitation Act. *Goplisetti Narayanaswamy Maldu v. Chhina Venkata Raju*, 4 L.W. 400—34 Ind. Cas. 774.

SADASIYA AIYAR and MOORE, JJ.

(99) Ss. 37, 145, O. XXXIV, r. 14—Security for performance of decrees—Method of enforcing security. See EXECUTION OF DECREE, No. 3, 14 A.L.J. 385.

(100) S. 47, O. XXI, rr. 2, 16—Transfer of decrees—Application by transferee under s. 16—Nature thereof—Order on such application—Appeal—Whether lies—Payment made out of Court, not certified—Non-recognisability by executing Court.

In execution of a decree, the transferee of the decree cannot apply merely for recognising him as transferee but should also apply for execution of the decree (*Vide* O. XXI, r. 16, C.P.C., 1908). (a).

Civ. Pro. Code (1908)—(Continued).

The dismissal of an execution petition by a transferee decree-holder, for default after an order in his favour has been passed, does not weaken the effect of the order, and the order is an order passed in a matter relating to the satisfaction and execution of the decree and is an appealable order under S. 47, C.P.C.

Payments made to a decree-holder out of Court cannot, unless certified, be recognised by an executing Court whether the payments were made before or after the transfer of the decree by the decree-holder to another (b). *Bolla Brahmada v. Ruddaraju Venkataraju*, 33 Ind. Cas. 71.

SADASIYA AIYAR and MOORE, JJ.

References:—(a) 14 M.L.J. 393, F. (b) 33 Ind. Cas. 962—3 L.W. 186—19 M.L.J. 124—(1916) M.W.N. 138; 36 M. 357; 29 M. 312, F.; 19 M. 280, D.; 7 Ind. Cas. 55—12 C.L.J. 312, Diss.

(101) S. 47 and O. XXI, r. 7. See EXECUTION OF DECREE, No. 14, U.B.R. (1916), 2nd Qr., p. 119.

(102) S. 47, O. XXI, r. 58—Legal representative brought on record after death of judgment-debtor setting up title of third person—Order, appealability of.

The order on a petition by the legal representative brought on record after the death of the judgment-debtor during the pendency of the execution proceedings the said judgment-debtor who set up the title of a third person is not one coming within S. 47, C.P.C., but falls under the scope of Order XXI, r. 58 of the Code and is not appealable. *Pestl Kayillakath Mahmmed Haji v. Alam Ibrahim Haji*, 31 Ind. Cas. 393.

ABDUR RAHIM and SPENCER, JJ.

References:—23 M. 195, 39 C 298, F.; 7 M. 255, Diss.

(103) S. 47, O. XXI, r. 58—Decree, execution of—Legal representative of the deceased judgment-debtor—Property attached, if a part of the assets of the deceased—Decision, if appealable. *Fakir Chandra Gain v. Giribala Dasgupta*, 22 C.L.J. 804—31 Ind. Cas. 321. See Final Part, 1915, Col. 383.

(104) S. 47, O. XXI, r. 66—Proceedings in connection with the proclamation of sale—Objections of judgment-debtor rejected—Question whether market-value of property is correct relates to execution—Appeal.

A decree for sale was passed under O. XXXIV, r. 5 of the Code which was put into execution. A notice was thereupon issued to the judgment-debtor under O. XXI, r. 66, with a view to drawing up a proper sale-proclamation. The judgment-debtor appearing put forward certain objections and prayed for a postponement of execution proceedings on certain grounds. The Court summarily rejected his objections.

Held (per Walsh, J.) that the judgment-debtor's objections having been dismissed by the Court below, the decision was one under S. 47 of the Code, and an appeal lay to the High Court as from a decree. *Shalam Lal v. Reshan Lal*, 14 A.L.J. 363—35 Ind. Cas. 280.

PIGGOTT and WALSH, JJ.

Civ. Pro. Code (1908)—(Continued).

(105) S. 47 and O. XXI, rr. 89, 92 (8)—*Execution of decrees—Sale of immovable property—Application to set aside sale by third party—Application dismissed—Fresh suit not barred—Admission by pleader ignored.*

S. 47 or cl. 8 of r. 92, O. XXI, Civ. Pro. Code, does not bar a suit by a person whose objection under r. 89 has been disallowed when he was neither a party to the suit in which the decree was passed, nor to the execution proceedings which followed the decree.

A Court is not bound by the admission made by the pleader of a party, where the evidence on record clearly shows that the admission was made wrongly. *Bhan Singh v. Pirthmi Chand*, 104 P.L.R. 1916—86 Ind. Cas. 212.

SHAH DIN, J.

(106) S. 47 and O. XXI, r. 90—*Execution—Order of sale not in accordance with decree—Sale set aside.*

Where a decree directed the sale of A and B schedule properties first and if there was any deficit then the sale of C and D schedule properties, and it appeared that certain items in the B schedule did not find a place in the sale proclamation. *Held* that the sale must be set aside in an application under S. 47 to the executing Court without a separate suit and that the sale must be treated as held, if not without jurisdiction, at any rate, with material irregularity in the exercise of the jurisdiction of the Court.

Under the proviso to r. 90 of O. XXI, the Court must be satisfied that the applicant had sustained substantial injury by reason of the irregularity or fraud complained of and some casual connection must be shown between the irregularity and the inadequacy of the price which the properties fetched at the sale.

O. XXI, r. 90, must be read with S. 47, Civ. Pro. Code. Proceedings to set aside the sale on the ground of material irregularity or fraud in publishing or conducting the sale involve questions relating to the execution, discharge or satisfaction of the decree and hence fall under both S. 47 and O. XXI, r. 90. Proceedings to set aside Court auction sales on any other tenable ground also involve questions relating to execution, etc., and hence fall under S. 47, though they may not fall under O. XXI, r. 90. *Palaniappa Udayar v. Arumuga Pandaram*, (1916) M.W.N. 256—88 Ind. Cas. 692.

SADASIVA AIYAR and MOORE, JJ.

(107) S. 47, O. XXI, r. 90—*Execution—Insolvency—Sale after adjudication—Receiver not a party—Application to set aside the sale—Provincial Insolvency Act, ss. 84, 85 and 84—Bona fide purchaser—Notice.*

One A was adjudged insolvent on 17-8-1911. In execution of a decree obtained against him on 21-1-1911 certain properties were attached. The Receiver of the Insolvent's estate applied to the Court on 2-8-1912 to stay the sale on the ground that A had been declared an insolvent. But the sale nevertheless took place and the property was purchased by the 2nd respondent.

Civ. Pro. Code (1908)—(Continued).

The Receiver thereafter applied to the Court to set aside the sale.

Held, that the application came within the scope of S. 47, Civ. Pro. Code, and a second appeal lay against the order passed thereon:

Held also, that the sale was altogether irregular, and that the Court, in holding the sale after it had been brought to its notice that the judgment-debtor had been adjudged an insolvent, acted, if not without jurisdiction, at any rate with material irregularity in the exercise of its jurisdiction.

Held further, that the 2nd respondent acquired no title to the property as the judgment-debtor had at the time of the sale no right, title or interest which could be sold, and that neither S. 84 nor S. 85 of the Provincial Insolvency Act affected the case. *Anantarama Iyer v. Vettath Kuttimalu Kovilamma*, 19 M.L.T. 357—8 L.W. 504—80 M.L.J. 611—84 Ind. Cas. 829.

SADASIVA AIYAR and MOORE, JJ.

(108) S. 47, O. XXI, r. 90—*Execution sale of property of ward under Court of Wards—Ward not entitled to bring application to set it aside. See BEN. ACT IX OF 1879 (COURT OF WARDS), No. 2, 20 C.W.N. 862—84 Ind. Cas. 86.*

(109) S. 47, O. XXI, r. 90. See *SETTING ASIDE SALE*, No. 2, 38 Ind. Cas. 574.

(110) S. 47, O. XXI, r. 92, cl. (8)—*U. P. Government Rules 90, 82—Execution proceeding transferred to Collector—Suit for setting aside sale—Nature of—Fraud—Procedure.*

A suit will lie to get rid of a decree which has been obtained by fraud: and if the decree has been vitiated by fraud, the execution proceedings become null and void and will be set aside by the Court.

The provisions of S. 811, Civ. Pro. Code, 1882, are reproduced in O. XXI, r. 90, Civ. Pro. Code, 1908, with this important modification that an application for setting aside a sale can now be made, not only on the ground of material irregularity but also on the ground of fraud in publishing or conducting the sale. Consequential alterations have been made in the provision of O. XXI, r. 92, Civ. Pro. Code, 1908, so that the prohibition contained in the 3rd clause of that rule has a wider scope than that of the corresponding provision of the Code of 1882.

The execution of a certain decree was transferred to the Collector under S. 68, Civ. Pro. Code, 1908. The property was attached, sold and purchased by the decree-holder. The objection of the judgment-debtors before the Collector, after confirmation of sale that the decree-holder had fraudulently kept them in ignorance of the pendency of the execution proceedings having been overruled, a civil suit for recovery of the property was filed instead of preferring an appeal to the Commissioner as contemplated by r. 45 of the Rules of the Local Government. *Held* that the suit was barred by O. XXI, r. 92 (8), Civ. Pro. Code, 1908. *Held also* that the suit could not be treated as an application under

Civ. Pro. Code (1908)—(Continued).

S. 47, Civ. Pro. Code, 1908, as the Court in which the suit was instituted was not the Court executing the decree at the time when the decree was made over to the Collector. *Nazir Hussain v. Kanhaiya Lal*, 35 Ind. Cas. 473.

PIGGOTT and LINDSAY, JJ.

(111) S. 47 and O. XXI, r. 95—*Suit for possession, maintainability of*—Civ. Pro. Code, S. 47, effect of—*Questions relating to possession of property after sale, meaning of.*

Held, that a decree-holder auction-purchaser can maintain a suit for possession irrespective of the remedy provided by O. XXI, r. 95, Civ. Pro. Code, and S. 47 does not bar such a suit.

Held further, that questions relating to the possession of property after sale has taken place cannot be deemed to be questions connected with the execution, discharge or satisfaction of decree, within the meaning of S. 47, Civ. Pro. Code. *Khanjan Singh v. Anup*, 18 O.C. 345=33 Ind. Cas. 367.

PANDIT KANHAIYA LAL, A.J.C.

(112) S. 47, O. XXI, r. 100—*Excessive execution of decree—Application by judgment-debtor for recovering the excess—Limitation—Procedure.* See LIMITATION ACT (1908), No. 274, 14 A.L.J. 401.

(113) S. 47, O. XXI, r. 101—*Execution sale—Objection by judgment-debtor and by third party—Order—Appealability.*

An order on the objection by judgment-debtor as well as by the third party to an execution sale of immoveable property is appealable, though such order disposed of the objection by third party also. *Murugesu Mudali v. Sama Goundan*, 31 Ind. Cas. 102.

SADASIVA AIYAR and NAPIER, JJ.

(114) S. 47, O. XXI, r. 103—*Scope of S. 47—Property of exonerated defendants sold in auction and purchased by decree-holder—Application of such defendants to set aside sale dismissed—Appeal whether lies—Objection to amendment on the ground of limitation whether can be allowed in second appeal for the first time.* *Sivasamba Iyer v. Kuppan Samban*, 29 M.L.J. 629=32 Ind. Cas. 769. See Final Part, 1915, Col. 385.

(115) S. 47 (1)—*Suit for declaration that decree obtained by defendant against plaintiff was satisfied and for injunction restraining execution if maintainable.*

A suit for a declaration that a decree obtained by the defendant against the plaintiffs in a certain original suit was satisfied and for an injunction restraining the defendant from executing that decree is not maintainable as the question involved in that suit would come under cl. (1) of S. 47 of the Code of Civil Procedure (Act V of 1908).

S. 47 is a statutory prohibition against matters relating to execution of a decree being agitated by a separate suit. *Manjunatha Chetty v. Appaya alias Manuel Souza*, 31 M.L.J. 439=36 Ind. Cas. 988.

SESHAGIRI IYER and BAKEWELL, JJ.

Civ. Pro. Code (1908)—(Continued).

(116) S. 47 (1)—*Construction of decree by executing Court—Absence of patent ambiguity—Alteration of decree under guise of interpretation.*

A decree like any other document is open to construction and it must be construed so as to conform with the judgment. The remedy by construction is only appropriate if the language is ambiguous. If the language is plain and there is no ambiguity, the proper remedy for a variance between the decree and the judgment is to apply for the amendment of the decree. The executing Court should not make alteration in the decree under the guise of interpretation, but must execute it as it stands. *Maharaj Kumar Shoshikanta Acharjya Chowdhury v. Raja Sarat Chandra Roy Chowdhury*, 36 Ind. Cas. 500.

CHATTERJEE and RICHARDSON, JJ.

References:—18 O. 108 (P.C.)=5 Sar. P.C.J. 582=9 Ind. Dec. (N.S.) 72; 28 O. 353 (P.C.)=28 I.A. 57=3 Bom. L.R. 318=8 Sar. P.C.J. 14; 28 I.A. 95=28 A. 181=3 Bom. L.R. 51=5 C.W.N. 197=7 Sar. P.C.J. 792; 21 I.A. 39=21 O. 504=6 Sar. P.C.J. 408=10 Ind. Dec. (N.S.) 966; 22 W.R. 330, R.

(117) S. 47, sub-S. (3), O. XXI, r. 16—*Assignee's application for execution opposed by attaching creditor of decree—Matter if appealable.*

S, a purchaser of a decree, having applied for execution after substitution of his name as a decree-holder, M, a creditor of the judgment-debtor, who had attached the decree opposed the application alleging the S's purchase was fraudulent and *benami*. The first Court upheld the objection, but the appellate Court found S's purchase to be good and valid.

Held—that the order came within the purview of sub-S. (3) to S. 47 of the Civ. Pro. Code, even though (M's objection apart) the matter came under O. XXI, r. 16 of the Code.

Provision of S. 47, sub-S. (3) distinguished from the corresponding provision of S. 244 of the old Code. *Mohini Mohan Majumdar v. Surendra Ch. Dey*, 20 C.W.N. 679=32 Ind. Cas. 524.

D. CHATTERJEE and BEACHROFT, JJ.

Reference:—11 O.W.N. 433, Not F.

(117-a) S. 48. See EXECUTION OF DECREE.

(118) S. 48, if would govern applications for execution of mortgage decrees passed when the previous Code of 1882 was in force—S. 6, General Clauses Act (X of 1897)—*Rights and remedies under a repealed Act—Acknowledgment*—S. 19 of the Limitation Act (1908).

In support of an application for execution made in 1913 for realisation of the balance of the decretal amount due on a mortgage decree made absolute in 1898, S. 6 of the General Clauses Act, 1897, which provides that the repeal of an enactment shall not affect any right acquired under the enactment repealed or affect any legal proceeding or remedy in respect

Civ. Pro. Code (1908)—(Continued).

of any such right, was relied on, and it was contended that S. 48 of the Code of Civil Procedure (1908) did not apply as the decree was passed when the previous Code of 1882 was in force, and inasmuch as S. 280 thereof did not apply to mortgage decrees, the application was not time-barred.

Held, that the application was governed by S. 48 of the present Code of 1908 and was time-barred as it could not be said that the decree holder acquired any right under the Code of 1882 within the meaning of S. 6 of the General Clauses Act, 1897 (a).

Held further, that, assuming that there was an acknowledgment of liability within the meaning of S. 19 of the Limitation Act by the judgment-debtor in March 1902, it would give the decree-holder only three years from the time of such acknowledgment within which the decree-holder would be entitled to apply for further execution of the decrees.

That the passing of the Code of 1908 could not be held to give retrospective operation to the acknowledgment of 1902 in such a way as to give the decree-holder a fresh period of 12 years within which to apply for further execution.

The words "a fresh period of limitation" in S. 19 of the Limitation Act do not refer to the term of 12 years prescribed by S. 48 of the Code of Civil Procedure. *Mahanth Krishna Dayal Gir v. Must. Sakina Bibi*, 20 C.W.N. 952=1 Pat. L.J. 214=34 Ind. Cas. 27.

CHAMIER, C.J. and JWALA PRASAD, J.

References :—(a) 40 C. 704=17 C.W.N. 622; 17 C.W.N. 829, F; 32 A. 499, Diss.

(119) S. 48—*Two or more judgment debtors—Fraud or force of one judgment-debtor whether extends time as against the other co-judgment debtors—Policy of Limitation Act and Civ. Pro. Code—Construction*. P. Abdul Khadir v. A. Ahmad Shalwa Raythar, 38 M. 419=80 Ind. Cas. 423. See Final Part, 1915, Col. 387.

(190) S. 48, O. XX, r. 11—*Application under O. XX, r. 1 (2)—Civ. Pro. Code (Act XIV of 1882), S. 210—Order recording application—Decree amended—Execution of decree—Limitation*.

Where a petition under S. 210 (Old Civ. Pro. Code), signed by all the parties and within the time allowed under Art. 175 was recorded, held that it was equivalent to an order granting the application and that it must be taken as an order amending the decree. An application for execution will not be barred by S. 48, Civ. Pro. Code, if it is within 12 years from the time when according to the amended decree the decree would be executable. No formal amendment of the decree is necessary. *Perumal Nalcker v. Sheik Dawood Rowther*, 34 Ind. Cas. 398.

SADASIYA AIYAR and MOORE, JJ.

References :—11 C. 148; 7 M. 152, F.

(190-a) S. 48, O. XXXIV, rr. 4, 5—*Mortgage decrees passed before the new Code—Necessity*

Civ. Pro. Code (1908)—(Continued).

for a final decree before further execution—Application for order absolute—Limitation Act (IX of 1908), Arts. 181, 182.

There is nothing in the language of O. XXXIV, rr. 4, 5 of Act V of 1908 which expressly says that mortgage decrees passed before the new Code came into operation must be regarded in the nature of preliminary decrees and that, therefore, it would be necessary to have a final decree passed before there can be any further execution.

The fact that the application that was made after the new Code came into operation did not pray expressly for a final decree but asked for execution, could not affect the decree which was already in force and alter its nature.

To a case of this kind S. 48 of the new Civil Procedure Code applies and the decree-holder would be entitled to get an order absolute for sale within a period of 12 years from the date of the decree (a).

Art. 182 of the Limitation Act and not Art. 181 governs such a case. If the application for execution is made within 12 years of the decree and 3 years from the date of the last application, it is not barred by limitation. *Balaji Rao v. Harirama Chetty*, 32 Ind. Cas. 39.

ABDUR RAHIM and SPENCER, JJ.

References :—(a) 29 Ind. Cas. 237=17 M.L. T. 424, F.

(121) S. 48, cl. (a)—*Limitation—Mortgage decrees on consent—Time, running of—Personal decrees*.

When there are two decrees in a suit, a preliminary decree and a final decree, for the purpose of cl. (a) of sub-S. (1) of S. 48 of the Code of Civil Procedure, the two together must be taken to be a single and indivisible decree, the date of which is the date of the final decree. It is the final decree which makes the preliminary decree operative and effectual and renders it enforceable in execution (a). *Shiba Durga v. Gopi*, 23 C.L.J. 573=33 Ind. Cas. 180.

RICHARDSON and ROE, JJ.

Reference :—21 C. 818 (823), R.

(121-a) S. 50. See EXECUTION OF DECREES.

(122) Ss. 50, 52, 151—*Property of deceased Zemindar whether assets in the hands of his legal representative—Decree against a party as the legal representative of a deceased person—Extent of his liability—Liability to account for profits also—Burden of proof—S. 101, Transfer of Property Act, scope of—Mortgage becoming entitled to equity of redemption—Merger—Non-existent right—Attachment—Duty of Court—Widow's right to dispose of income so as not to be available for her husband's creditors.*

Moore, J.—The property of a deceased Rajah must be regarded as assets in the hands of his legal representative for the purpose of S. 50, Civ. Pro. Code (a).

Civ. Pro. Code (1908)—(Continued).

Where a decree is passed against a party as the legal representative of a deceased person, it is for the decree-holder in the first instance to prove that some assets came to the legal representative, and the onus is then shifted on the latter to show how the assets were applied. Once it is admitted or proved that the legal representative has come into possession of assets belonging to the estate of the deceased, it is for him to satisfy the Court as to the extent of the assets received and to account for them (b).

The rents and profits received by him are assets just as much as the real estate and the legal representative is bound to account also for the same (c).

The earlier part of S. 101, Transfer of Property Act, states the doctrine of merger. An extinguishment of the debt will ordinarily take place, where the mortgagee becomes also absolute owner of the equity of redemption, for then the equitable estate becomes merged in the legal. The effect of the proviso to the section which states the exception to the rule of merger, is (1) to enable the person in whom the two titles are united to keep the incumbrance alive, and (2) to declare that the incumbrance should continue to subsist, where the result would be for his benefit. Ordinarily the only object and advantage of keeping an incumbrance alive is that it may be used against the holder of a subsequent incumbrance (d).

Sadasiva Aiyar, J.—The doctrine that a widow could, by her conduct, treat the savings out of the income of her husband's estate as her separate property and that then it would become property at her absolute disposal so that her alienations thereof could not be questioned by her husband's reversioners, cannot be extended so as to give her the right to treat all the income as her absolute property not available to her husband's creditors (e).

Quere—Whether, where a non-existent right has been attached, the Court is bound to bring it to sale at the instance of the decree-holder, and is not entitled under S. 151, Civ. Pro. Code, to stop the sale altogether on that account. *Rajah of Kalahasti v. Sree Mahant Prayag Dassjee Yaru*, 30 M.L.J. 891—(1916) 2 M.W. N. 91—35 Ind. Cas. 224.

SADASIVA AIYAR and MOORE, JJ.

References:—(a) 30 M. 454; 32 M. 429, R. (b) 21 M.L.J. 1096, F. (c) 15 W.R. 285, Appr.; (1888) 38 Ch. D. 609, R.; 19 A. 235; 26 M. 792, D. (d) 29 M.L.J. 583, Appr.; 40 U. 89; 38 B. 369, R. (e) 19 A. 235, Diss.

(123) Ss. 50, 60—*Legal representative, liability of, for debts—Punjab Colonisation of Government Lands Act (V of 1912), S. 18—Decree against Government tenant—Tenancy not liable to attachment or sale—Crops grown by heir of deceased tenant, whether property of deceased and as such liable to attachment or sale.*

The crops grown on a tenancy by the heir of a deceased tenant are the result of (a) the tenancy, (b) the labour or management of the heir and (c) of such capital as the heir may have

Civ. Pro. Code (1908)—(Continued).

expanded. Therefore, as the tenancy is not liable to sale or attachment under S. 18 of the Punjab Act V of 1912 in the hands of the tenant or his heir, the crops grown or reaped or standing after the tenant's death cannot be said to be the property of the deceased and cannot, as such, be liable to attachment and sale in the hands of the heir under S. 60 of the Civ. Pro. Code. *Kadar Nath v. Ganesha Mal*, 84 P.W.R. 1916—33 Ind. Cas. 741.

SHADI LAL and LESLIE-JONES, JJ.

(124) S. 51, O. XXI, r. 30 and O. XL, r. 1—*Decree for money—Execution—Rents and profits not liable to attachment—Appointment of receiver—Legality—Hindu widow—Land assigned for maintenance—Receiver appointed to deal with its income—Propriety—Just and convenient.* *Lahana Bai v. Harakchand*, 11 N.L.R. 113—31 Ind. Cas. 285. See Final Part, 1915, Col. 389.

(125) S. 52—*Execution of decree—Petition praying for relief not granted by decree—If saves limitation. See LIMITATION ACT (1908), No. 287, (1916) 2 M.W.N. 128.*

(126) S. 52. See Nos. 95, 122, *supra*.

(127) S. 53—*Debt for family purposes—Decree against manager alone—Liability of shares of other co-parceners in execution of the decree. See HINDU LAW (DEBTS), No. 1, 18 Bom. L.R. 52.*

(127-a) S. 54 See EXECUTION OF DECREE.

(128) S. 54—*Scope and application of—Partition decree.*

S. 54 of the Civ. Pro. Code only applies when the decree is for the partition of land by what is known as metes and bounds, that is to say, where land held jointly but assessed to Government Revenue as a whole is to be divided up into two or more plots or portions between the sharers to be held by them thenceforth separately, in which case the plots or portions are thereafter separately assessed. *Po Win v. Ma Tin*, 8 L.B.R. 338—36 Ind. Cas. 385.

FOX, C.J. and HARTNOLL, J.

(129) S. 54 and O. XX, r. 18. See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 6, 30 Ind. Cas. 309.

(129-a) S. 55. See ARREST.

(129-b) S. 55. See EXECUTION OF DECREE.

(130) Ss. 55, 47, 145, 115—*Judgment-debtor released on security in order to enable him to apply to be adjudged insolvent—Failure of judgment-debtor to so apply—Application by decree-holder to forfeit security bond refused—Appeal whether lies—Revision.*

A decree-holder arrested the judgment-debtor in execution of his decree, and the latter, on signifying his desire to apply for the protection of the Insolvency Court, was released on the surety's undertaking to produce him within one month after the date of the security bond. The

Civ. Pro. Code (1908)—(Continued).

judgment-debtor did not apply to be declared insolvent, and the decree-holder applied to the Court to proceed against the surety. The surety showed cause by stating that the judgment-debtor was too ill to appear in Court, and the Court was satisfied with the surety's explanation and ordered that the bond would not be forfeited. *Held*, the decree-holder's remedy against this order was by way of appeal and not in revision.

Held also that S. 145 of the new Civ. Pro. Code amplified very considerably the provisions which were contained in S. 253 of the old Code; and S. 47 of the new Code extended to a case like the present. *Nga Kye v. Nga Kyn*, U.B. R. (1916), 1st Cr., 108—10 Bur. L.T. 15—34 Ind. Cas. 247.

SAUNDERS, J.C.

Reference :—15 A. 183, D.

(181) S. 55 (4) and S. 145—*Liability of surety—Termination of liability—Surety if may waive previous notice to judgment-debtor—Civ. Pro. Code, S. 145, if applies to security for production of judgment-debtor.*

Under S. 55, sub-S. 4 of the Civ. Pro. Code the liability of the surety continues till proceedings under the decree have come to an end and a surety is not released by the mere filing by the judgment-debtor of a petition of insolvency or by the dismissal of an execution application.

S. 145 (c) of the Civ. Pro. Code includes a case where security is given for the production of the judgment-debtor who is arrested in execution of a decree and who is released on furnishing security and on expressing his intention to apply to be declared insolvent.

It is quite open to the sureties to waive the benefit of a clause in such surety bond providing for the issue of notice to the judgment-debtor as a condition precedent to the sureties' obligation to produce him. *Sundara Reddi v. Yaradaraaja Pillai*, (1916) 2 M.W.N. 273—34 Ind. Cas. 407.

SADASIVA IYER and MOORE, JJ.

(181-a) S. 60. See ATTACHMENT.

(181-b) S. 60. See EXECUTION OF DECREE.

(182) S. 60—*Agriculturist—House used for keeping implements—Whether saleable.*

The judgment-debtor was a zamindar of a small plot of land; he was an agriculturist and agriculture was his chief occupation and means of livelihood. He occupied two houses, one of which he used as a residential house and the other for keeping implements of husbandry. The houses stood on land belonging to himself. The decree-holder attached one of these houses in execution of a decree. *Held*, that the house was one belonging to an agriculturist and was not saleable in execution of decrees. *Shafian v. Hamid-ul-lah Khan*, 14 A.L.J. 240—38 Ind. Cas. 727.

TUDBALL, J.

(183) S. 60—*Ex-proprietary tenant—House, mortgage of—Appurtenance to holding.* *Budhi*

Civ. Pro. Code (1908)—(Continued).

Mai v. Bhati, 13 A.L.J. 846—30 Ind. Cas. 549. See Final Part, 1915, Col. 890.

(184) S. 60—*Permanent tenancy with condition of forfeiture on transfer—Holding if saleable in execution.* *Keshab Chandra Pramanik v. Ajahar Ali Biswas*, 19 C.W.N. 1182—28 Ind. Cas. 887—23 C.L.J. 428. See Final Part, 1915, Col. 890.

(185) S. 60. See No. 129, *supra*.

(186) S. 60 (c)—*Exemption from attachment of agriculturist's house—Agriculturist, who is—Plea claiming exemption must be set up and proved by judgment-debtor.*

The agriculturist whose house is protected from attachment by S. 60 (c) of the Code is one belonging to the class of common agriculturists that are known in Bengal, whose main source of livelihood is by cultivation, i.e., the raiyat who tills the field.

The plea that he is an agriculturist within the meaning of the section has got to be set up and proved by the judgment-debtor. *Ashmatulla Sakkar v. Ram Mahmud Chowdhury*, 20 C.W.N. 874—35 Ind. Cas. 843.

FLETCHER and WALMSLEY, JJ.

(187)—Ss. 60 (n), 51 (d), O. XL, r. 1—*Right to future maintenance—Whether attachable—Receiver whether can be appointed in execution for realising such maintenance—S. 6 (d) and (h), Transfer of Property Act—Meaning of 'debt.'*

Moore, J.—A mere right to future maintenance is not liable to attachment and sale. The prohibition contained in S. 60 (n), Civ. Pro. Code, is presumably based on grounds of public policy (a).

A receiver cannot be appointed in execution to collect the future maintenance and apply it in satisfaction of the decree.

S. 51 (d), Civ. Pro. Code, merely declares in general terms the powers of a Court to enforce execution, one of which is by the appointment of a receiver. R. 1 of O. XL of the Civ. Pro. Code gives power only to that Court, in which the suit is brought or by which the property has been attached, to appoint a receiver. The said right to receive future maintenance is not property and cannot be attached.

The maintenance allowance granted in this case is 'not a 'debt.' A debt must be specific, existing and definite, and not merely a sum of money which may or may not become payable at some future time, and the payment of which depends upon contingencies which may or may not happen (b).

Sadasiva Aiyar, J.—Whatever the law in England, Courts in India are bound by the Transfer of Property Act, the clear implication of S. 6, cls. (d) and (h) of that Act being that a right to receive future maintenance cannot be validly alienated. A transfer not recognised by the Transfer of Property Act as legally effective cannot create any right in the alleged transferee (c). *Falikandy Mammad v.*

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Chingoran Keloth Yalla Appa alias Krishnan Nair, 30 M.L.J. 361—34 Ind. Cas. 381.

SADASIVA AIXAR and MOORE, JJ.

References :—(a) 20 M.L.J. 97; 12 O.L.J. 147, F.; 12 C.L.J. 180; 15 W.R. 188; 27 O. 38; (1884) 27 Ch. D. 160; (1909) 1 K B. 688; (1899) 1 Q B. 551, R.; 30 M. 279; 9 M.L.J. 113; 34 M. 7; 22 M.L.J. 204; 28 C. 483, D. (b) 14 M. I.A. 40; 27 O. 38; R. (c) 16 M. 429; 38 M. 308 (309), R.

(138) S. 63—*Rateable distribution—When to be made*. **Ma Nyeln Hla v. U Aung Gyl**, 8 Bur. L.T. 201—29 Ind. Cas. 21—8 L.B.R. 204. See Final Part, 1915, Col. 391.

(138-a) S. 63, O. XXI, r. 90—*Execution sale of property also under attachment in execution of superior Court's decrees—Impeachment of sale—Irregularities*.

A sale held in contravention of the first clause of S. 63 is not a nullity, but is merely irregular.

More notice of an attachment by a superior Court to the Court which ordered the sale cannot oust the jurisdiction and the sale cannot be treated as a nullity (a)

The title of a purchaser at a Court sale, not himself in fault cannot be impaired at law nor in equity by showing any mere error or irregularity in the proceedings. Errors and irregularities must be corrected by a direct proceeding. If not so corrected they cannot be made available by way of collateral attack on the purchaser's title.

There cannot be a collateral impeachment of a Court sale and a direct impeachment is possible only to the parties to the proceedings or persons interested therein in the manner prescribed by the Code. Persons not parties to such proceedings cannot impeach a Court sale merely on the ground that the sale was in contravention of S. 63 of the Code (b). **Narayanan Nambudri v. Tawker J. Megagi Selt**, 32 Ind. Cas. 927.

SKINIVASA IYENGAR, J.

References :—(a) 22 B. 88, Appr. (b) 22 B. 88; 35 C. 61, R.; 4 A. 359, Not F.; 18 B. 458; 22 M. 295, F.

(138-b) S. 64. See ATTACHMENT.

(138-c) S. 64. See EXECUTION OF DECREE.

(139) S. 64—*Attachment—Portion of property attached sold previously—Remaining portion, not sufficient to satisfy decree—Right to proceed against portion sold—One judgment-debtor paying more than his share—No right to claim charge over property—Right to claim contribution*.

Where a portion of the property attached was sold and where the decree holder had been unable to realise the amount of the decree out of the portion left unsold: held that the decree-holder would be entitled to proceed against the portion sold.

The fact that one of the judgment-debtors paid more than his share of the decree obtained against himself and others, could in no way

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create a charge in his favour over the property sold. His right is simply to get a money contribution (a). **Babu Bindeshri Pershad Chand v. Babu Giridhar Das**, 34 Ind. Cas. 91.

RICHARDS, C.J. and RAFIQUE, J.

(140) S. 64. See TRANSFER OF PROPERTY ACT, No. 43, 30 Ind. Cas. 238.

(141) Ss. 64, 73, O. XXVIII, r. 11—*Attachment in execution—Transfer of attached property by judgment-debtor—Invalidity of transfer against subsequent decree-holder—Object of S. 64, Civ. Pro. Code*.

Where an attachment has been made in execution of a decree, a transfer by the judgment-debtor of the property attached is void under S. 64, Civ. Pro. Code, against a person who subsequent to the transfer has obtained a decree against him and seeks to proceed against that property in execution.

The objects of S. 64 is clearly to prevent fraud on decree-holders and to secure intact the rights of attaching creditors as well as of creditors who have obtained their decree and are entitled to satisfaction out of the assets of the judgment-debtor, and it is immaterial whether their decree had or had not been passed before the time when the transfer was effected. **Kali Kumar Saha v. Kali Prasanna Majumdar**, 33 Ind. Cas. 492.

HOLMWOOD and IMAM, JJ.

Reference :—16 B. 91, R.

(141-a) S. 64, O. XXI, rr. 52, 53, 54, 55—*Attachment—Order when takes effect*.

As an order of attachment is not effective until it has been duly promulgated, such an order takes effect only from the date of actual promulgation and not from the date the order itself was made. **Slimrick Lal Bhakht v. Radharman Kalladha**, 32 Ind. Cas. 276.

ROE, J.

(142) S. 64, O. XXI, r. 54—*Attachment of immoveable property—Procedure under O. XXI, r. 54, adopted—Effect—Attachment complete—Information called for by Collector for notification in Touzi Register—Fresh attachment in consequence thereof—Previous attachment still valid—Redundancy—Effect—Purchase pending attachment—Effect—Void purchase—No lien for purchase-money*.

A purchase made of property while it was under attachment is void, within the meaning of S. 64, Civ. Pro. Code, 1908, against all claims enforceable under the attachment, and the purchaser has not got even a charge or lien over the property to the extent of purchase-money paid by him to his vendor. No relief can be given to him in respect of any right accruing to him out of a purchase which is in itself void.

An attachment of immoveable property is complete if the procedure contemplated in O. XXI, r. 54, is adopted.

An entry in the *Touzi* Register is no part of the procedure contemplated in O. XXI, r. 54. It is sufficient that the attachment was

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proclaimed in the Collector's Office. Mere redundancy does not nullify a previous attachment.

The mere fact that a fresh attachment was ordered and served as the result of the report of the Collector's *amla* that the description given in the order of attachment was insufficient for notification by entry in the *Tousi* Register does not nullify the previous attachment nor does it render it void (a). **Ramkhelawan Singh v. Sunder Raut**, 34 Ind. Cas. 34.

SHARFUDDIN and ROE, JJ.

References:—(a) 6 A. 39; 5 N.W.P.H.C. 70, R.

(142-a) S. 64 and O. XXI, r. 54—*Attachment in execution—Transfer of Property after attachment—Equities between decree-holder and auction-purchaser.*

The object of S. 274, Civ. Pro. Code, 1882, corresponding to O. XXI, r. 54, of the present Code in describing particular ways for notifying the attachment is to give notice to the judgment-debtor not to alienate the property and to the public not to accept any alienation from him. As between the decree-holder and auction-purchaser the failure to issue such a notice may or may not be a mere irregularity, but as between the decree-holder or auction-purchaser on the one hand and an alienee on the other, different equities would come into operation, if no prohibitory order is issued to the judgment-debtor, prohibiting him from transferring the property (a).

An alienation effected during an attachment is only voidable at the instance of the decree-holder. But if the decree-holder does not choose to avoid it and expressly permits it to be notified at the time of the sale, he cannot be allowed subsequently to plead its invalidity owing to its having been effected during the attachment. **Lala Bhagwan Das v. Chaudhuri Ahmad Jan**, 36 Ind. Cas. 732.

STUART and KANHAIA LAL, A.J. CS.

References:—(a) 7 A. 702=A.W.N. (1885) 179, R.; 18 Ind. Cas. 715, *Expl.*

(143) S. 64, O. XXI, rr. 54 and 59—*Transfer of property after attachment—Right of transferee to apply for setting aside sale on payment.*

The effect of S. 64 of the Code is not to invalidate for all purposes the transfer of property which has been previously attached. The effect is of a limited character. A private alienation of the property after attachment is not null and void against all the world, but only against the creditor who obtained the attachment.

When an application is made in conformity with r. 89 of O. XXI of the Code, it cannot be said that any question arises as to a claim enforceable under the attachment within the meaning of S. 64. Therefore a transferee of the property attached in execution of a decree may apply under O. XXI, r. 89 of the Code for setting aside the sale on payment of the amount specified in the rule. **Gosta Behari**

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Blawas v. Sankar Nath Mukerjee, 86 Ind. Cas. 510.

MOOKERJEE and CUMING, JJ.

References:—14 M.L.A. 543=10 B.L.R. 134=17 W.R. 318=2 Suth. P.C.J. 569=3 Sar. P.C.J. 81=20 E.R. 888; 2 B.L.R. 49=11 W.R. 10; 29 C. 154=12 M.L.J. 73=4 Bom. L.R. 238=29 I.A. 9=6 C.W.N. 209, R.

(144) S. 64, O. XXXVIII, r. 10, *scope of—Attachment before judgment, effect of.*

The object of provisions in S. 64 of the Code of Civil Procedure is to secure to the creditor protection of his rights obtained by the attachment against all subsequent acts of his debtor which may imperil his obtaining the fruits of his decree through the attachment which has been effected. A creditor can only attach the right, title and interest of his debtor at the date of attachment, and he has no ground for complaining if prior to his attachment the debtor has created an obligation against him touching the property.

The provision in O. XXXVIII, r. 10 of the Code is not limited to rights *in rem*.

A conveyance, therefore, of a property executed after its attachment before judgment by a creditor, in pursuance of a contract dated before the attachment, should prevail, inasmuch as it was merely carrying out an obligation which was incurred prior to the attachment. **Madan Mohan De Sarkar v. Rebatl Mohan Poddar**, 29 C.L.J. 115=21 C.W.N. 158=34 Ind. Cas. 953.

WOODROFFE and RICHARDSON, JJ.

(145) S. 65—*Certified purchaser—Suit for possession by person claiming title under him—Defendant's plea of real ownership—Maintainability—Benamidar—Civ. Pro. Code, 1882, S. 316.* **Hiralal v. Mt. Gopika**, 11 N.L.R. 130=31 Ind. Cas. 58. See Final Part, 1915, Col. 393.

(145-a) S. 66. See **EXECUTION OF DECREE.**

(145-b) S. 66. See **SALE.**

(146) S. 66 (=S. 317, old Code)—*Court auction—Benami purchase—Suit by real owner for declaration of title—Maintainability.*

No suit lies for a declaration that the plaintiff is entitled to certain properties on the ground that they had been purchased by the defendant in a Court sale *benami* for the plaintiff and that the defendant had no right at all in those properties, even though the defendant has subsequent to the purchase, recognised the title of the plaintiff. S. 66 of the Code of Civil Procedure, 1908, is merely declaratory of the real meaning of S. 317 of the Code of 1882 (a).

Per **Srinivasa Iyengar, J.—Obiter.** S. 66 of the Civ. Pro. Code, 1908, is merely a regulation of procedure. It does not purport to take away or affect any right which the real owner had, but like Limitation Acts, prevents a particular person from bringing a suit against the certified

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purchaser on certain grounds. **Chidambaram Chettiar v. Subbramaniam Aiyar**, 8 L.W. 86—(1916) M.W.N. 220—32 Ind. Cas. 484.

COUTTS-TROTTER and SRINIVASA IYENGAR, JJ.

References :—(a) 28 M.L.J. 251; 23 A. 34; 23 A. 175; 31 B. 61, F.; 12 Bom. L.R. 1044, F.

(146-a) S. 66—*Civ. Pro. Code, Act XIV of 1882, S. 317—Private transferee of certified purchaser, suit against, for confirmation of possession.*

S. 317, Civ. Pro. Code, 1882, is no bar to a suit against any person claiming through or under the certified purchasers. So a suit against private transferee of certified purchaser for confirmation of possession is maintainable (a).

S. 66, Civ. Pro. Code, 1908, is more comprehensive than S. 317, Civ. Pro. Code, 1882. **Johan Buksh v. Mohammad Tahlil**, 32 Ind. Cas. 963.

SHARFUDDIN and TRUNON, JJ.

References :—(a) 26 C. 950; 23 C. 669; 19 C.L.J. 390, F.

(147) S. 66—*Purchase by manager of infant with infant's money—Plea of section to defraud said infant.*

The manager of an infant used the money of the infant for the purpose of buying property on the infant's behalf at an execution sale. He admitted that the infant was the real purchaser, but he maintained that he was able to deprive the infant of the property because of S. 307 of Act XIV of 1882. *Held* that the conduct of the manager was fraudulent and S. 317, Act XIV of 1882, did not furnish any answer to the infant's claim. **Noni Gopal Basu v. Tarekh Chandra Ghosh**, 30 Ind. Cas. 212.

JENKINS, C.J. and CHATTERJEE, J.

(147-a) S. 66—*Claim through sale prior to auction sale—Bar of suit by such purchaser.*

S. 66 of the Code applies only when the plaintiff's claim is based upon the auction-purchase. Where the title of the plaintiff is not derived from the auction sale but is independent of and prior to the sale the section does not apply.

It is only an innocent purchaser for value, not in any way a party to any fraud, who can claim the benefit of a purchase in bad or irregular proceedings in execution of a decree. A defendant who has obtained possession by fraud cannot set up a title acquired by fraud as an answer to a suit against him. **Ram Khelawan Pande v. Angar Ali**, 36 Ind. Cas. 681.

ROE and PRASAD, JJ.

References :—14 C. 18—13 I.A. 106—10 Ind. Jur. 428—4 Bar. P.O.J. 746—7 Ind. Dec. (N.S.) 13 (P.O.) ; 15 C. 557, R.

(148) S. 66—*Benami purchases at execution sales—Purchase with joint funds by a member of a joint Hindu family. Mankaram Singh v. Balraj Singh, 18 O.C. 160—30 Ind. Cas. 279. See Final Part, 1915, Col. 394.*

(148-a) S. 66. See **BENAMI TRANSACTION**, No. 5-a, 32 Ind. Cas. 865.

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(148-b) S. 66. See **MORTGAGE (GENERAL)**, No. 54, 32 Ind. Cas. 171.

(149) S. 66 and O. XXI, r. 94, scope of—*Court auction—Benami purchase—Release by purchaser in favour of beneficiary—Nature of right conveyed—Crim. Pro. Code, S. 144, order under, if bars prior suit for confirmation of possession.*

A document whereby a benami purchaser at a Court auction renounces his claim to the property purchased without conveying any title thereto is a release deed pure and simple and not an assignment of the rights of the releasor, and a person claiming under such a document cannot be regarded as himself the purchaser by 'the purchase certified by the Court' treating the name of the benamidar as a mere alias for him.

The principle of the decision in 35 C. 551 is not applicable to transactions in which the law requires the name of the actual purchaser to be certified in a document by the Court.

O. XXI, r. 94, and S. 66, Civ. Pro. Code, cannot be construed in different ways.

S. 66, Civ. Pro. Code, does not apply to cases of contest between two persons, each claiming to be the real beneficiary under an admittedly benami Court auction-purchase.

An order passed by a Magistrate under S. 144, Crim. Pro. Code, is not conclusive as to possession and is no bar to a suit for confirmation of possession instituted before such order is served upon the plaintiff. **Ramaswami Aiyar v. Yenkapallur**, 8 L.W. 233—(1916) M.W.N. 184—33 Ind. Cas. 1000.

AYLING and NAPIER, JJ.

(150) S. 66 and O. XXI, rr. 97 to 103, scope of—*Ejectment suit—Benamidar—Certified purchaser, if can recover possession.*

In a suit in ejectment, a benamidar is not allowed to recover possession, though he is the holder of a certificate of sale, and the suit is necessitated by resistance or obstruction in execution (a).

S. 66, Civ. Pro. Code, is designed to protect only the person who has obtained a sale certificate and has acquired possession under it; it has no application to a purchaser who seeks to oust another from possession.

A real purchaser is entitled to take action under O. XXI, rr. 97 to 103, Civ. Pro. Code. **Gullapalli Venkataramayya v. Koonapara Venkatarama**, 4 L.W. 609—31 M.L.J. 877.

SESHAGIRI IYER and PHILLIPS, JJ.

References :—(a) 22 B. 672, D.; 34 M. 143, R.

(150-a) S. 73. See **EXECUTION OF DECREE**.

(151) S. 73—*Plaintiff's application for rateable distribution refused—Plaintiff's revision petition dismissed—Suit under S. 73, Civ. Pro. Code, to recover portion of assets—Limitation—S. 14 and Arts. 62, 120, Limitation Act (1908)—Deduction of time spent in prosecuting revision petition. Balraj Singh v. Ramdoss*, 16 M.L.T.

Civ. Pro. Code (1908)—(Continued).

509—27 M.L.J. 640—26 Ind. Cas. 219—39 M. 62. See Final Part, 1914, Col. 824.

(152) S. 78. See Nos. 96, 141, *supra*.

(153) Ss. 78, 47—Civ. Pro. Code, S. 78, order under—Nature of—Appealable when falls under S. 47.

An order under S. 78, Civ. Pro. Code, ordinarily embodies expressly or impliedly that (1) the application of the creditor is generally valid, (2) that fund in Court is available towards satisfying his claim, and (3) he is entitled to a particular portion of it.

When the objection to the order under S. 78 is based on the invalidity of the execution application or on the character of the fund in Court, the question is between the judgment-debtor and individual creditors, not the creditors as a body, and the decision on it is really given under S. 47 although ostensibly under S. 78 and an appeal lies thereon.

Where, therefore, the 1st Court rejected a claim for rateable distribution on the ground that the fund in Court belonged to the judgment-debtor as a separated member while the decree was against his family property.

Held an appeal lay against the order. S. Venketakrishna Pattar v. R. Venkatakrishna Pattar, 31 M.L.J. 620—20 M.L.T. 588—5 L.W. 354.

OLDFIELD and KRISHNAN, JJ.

(154) S. 78, O. XXI, r. 65—Consent decrees—Execution sale—Auctioneer nominees of parties—Purchase-money received by auctioneer whether "receipt of assets"—Rateable distribution.

A consent order is a mere creature of agreement and carries out the agreement between the parties. It is nevertheless an order of the Court and possesses one at least of the essential characteristics of an order made by a Court of justice, namely, it is an order capable of execution by the Court(a).

The employment of agents for the conduct of an execution sale is clearly contemplated by r. 65 of O. XXI of C.P.C. The fact that the Court appoints a nominee of the parties to a consent decree to conduct the sale without attachment and notice does not render it the less a sale by Court(b).

When a sale has been held by a Court in execution under O. XXI, r. 65, receipt of purchase-money by the agent is, for purposes of S. 78, equivalent to receipt of assets by the Court.

The policy which underlies S. 78 obviously is to fix the point of time when the entire body of persons entitled to claim rateable distribution should be finally ascertained; that point of time is the moment when the entire purchase-money has been paid by purchaser. It is immaterial whether the purchase-money has been actually paid into the treasury or into the hands of a person employed by the Court to hold the sale. John Caraplet Galstann v. Woomesh Chandra Bannerjee, 35 Ind. Cas. 850.

MOOKERJEE and CUMING, JJ.

Civ. Pro. Code (1908)—(Continued).

References:—(a) 72 L.T. 708; 9 B. & C. 840, R. (b) 16 C.W.N. 894, D. (c) 15 C.W.N. 872, D.

(155) S. 78 (1), (c)—Surplus sale-proceeds, distribution amongst attaching creditors—Money standing to the credit of one suit, application for transfer to another suit if to be made in former—Practice—Certificates of Accountant-General and Registrar, Original Side, required with application. Kumar Krishna Mitter v. Amulya Charan Mitter, 19 C.W.N. 845—31 Ind. Cas. 616. See Final Part, 1915, Col. 396.

(156) S. 80—Suit against Government—Notice of suit—Agent of Government threatening injury to property—Suit instituted before expiry of two months from the date of the notice.

~ The plaintiff gave a notice of suit to Government under S. 80 of the Civ. Pro. Code on the 2nd May 1912. In the meanwhile, the Mamlatdar threatened to demolish the property which was the subject-matter of the suit. The plaintiff, thereupon, filed the suit on the 19th June 1912, praying for a declaration that a piece of land in front of his house belonged to him and for a perpetual injunction restraining the defendant from interfering with his enjoyment of it. It was objected that the suit was bad as having been brought within two months from the date of the notice.

Held, that the suit was not barred by the provisions of S. 80 of the Civ. Pro. Code, 1909, as the plaintiff had to precipitate the institution of the suit owing to the threat held out by the defendant's agent to demolish the property in suit during the currency of the notice. The Secretary of State v. Gulam Rasul Ghasudin Kuwari, 18 Bom.L.R. 243—40 B. 392—34 Ind. Cas. 685.

BATCHELOR and SHAH, JJ.

(157) S. 80—Act done under powers conferred by Crim. Pro. Code. Bachcha Singh v. Jafar Beg, 13 A.L.J. 788—30 Ind. Cas. 173. See Final Part, 1915, Col. 400.

(158) S. 80—Suit against Manager, Encumbered Estates, Sind—Failure to give notice—Withdrawal—Subsequent suit—Time spent in former suit—Deduction—Computation of period of limitation. See BOM. ACT X OF 1876 (REVENUE JURISDICTION), No. 1, 9 S.L.R. 167.

(159) S. 86—Ruling Chief, suit against—Consent of Governor-General in Council refused—Privilege pleaded—Pleading on merits also, whether amounts to a waiver of privilege—Submission to jurisdiction. Narayana Moothed v. Dewan of Cochin, 2 L.W. 637—(1915) M.W. N. 584—29 M.L.J. 667—30 Ind. Cas. 511—39 M. 661. See Final Part, 1915, Col. 401.

(160) Ss. 86, 87, O. V, r. 3—Suit against the Raja of Cochin in representative capacity—Whether sanction necessary even where he is pro forma defendant—Fixed annual allowances—Small Cause Court. Kunhan Moothad v. Banerji, 18 M.L.T. 163—(1915) M.W.N. 640—30 Ind. Cas. 351. See Final Part, 1915, Col. 401.

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(161) S. 87. See No. 160, *supra*.

(161-a) S. 89. See APPEAL.

(161-b) S. 89. See ARBITRATION.

(161-c) S. 89. See AWARD.

(162) S. 89, O. XXIII, r. 3, and Sch. II—*Suit—Reference to arbitration without intervention of Court—Application to file award in Court—Procedure.*

~ During the pendency of a suit, the parties to it referred the matters in dispute between them to arbitration without the intervention of the Court. The award having been delivered, the plaintiff applied to the Court, under O. XXIII, r. 3, to record the award and to pass a decree in accordance therewith. The defendant disputed the legality of the award on the grounds (1) that the arbitrators had exceeded their jurisdiction and (2) that they had refused an opportunity to the defendant to call witnesses:

Held, that the plaintiff had adopted a wrong procedure in applying under O. XXIII, r. 3; that he was bound to apply to the Court under second schedule to the Civ. Pro. Code, and that on such an application the defendant was entitled to raise his objections and be heard upon them.

O. XXIII, r. 3, only refers to the adjustments of suits wholly or in part by any lawful agreement or compromise.

No application can be made to obtain a decree on an award except as provided for in S. 89 of the Civ. Pro. Code.

Under S. 89, the provisions of the second schedule govern all arbitrations in a suit or otherwise except such arbitrations as are specially excluded. An arbitration between the parties to a suit without an order of the Court has not been excluded and must, therefore, come under the provisions which deal with arbitration without the intervention of the Court. *Shavaksha Dinsha Davar v. Tyab Haji Ayub*, 18 Bom. L.R. 559—40 B. 386.

MACLEOD, J.

(162-a) S. 92. See HINDU LAW (RELIGIOUS ENDOWMENTS).

(162-b) S. 92. See RELIGIOUS ENDOWMENT.

(162-c) S. 92. See RIGHT OF SUIT.

(163) S. 92—*Temple subject to the Devasthanam Committee—Scheme, if can be framed by the Court—Jurisdiction—Religious Endowments Act (XX of 1863), scope of—Statutory body, if becomes functus officio by reason of constitutional changes—Hindu Temple—One of the trusteeships hereditary—Additional trustees, power to appoint—Reg. VII of 1817—Board of Revenue, if can divest itself of its superintendence by handing over management to hereditary trustees—Nature of powers possessed by Board—Visitation jurisdiction—Religious Endowments Act, S. 14, if exhaustive—Civ. Pro. Code, 1908, S. 92, remedy under, if*

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cumulative—Court's power to frame a scheme, limitation to.

A Court has power to frame a scheme in respect of a temple subject to the superintendence of a Temple Committee.

The English and Indian authorities bearing on the question considered.

A statutory body does not become *functus Officio* by reason of changes in its constitution (a).

Per Wallis, C. J.—The effect of Ss. 3 and 7 to 12 of Act XX of 1863 is to transfer to the Temple Committee the powers exercised by the Board of Revenue under Reg. VII of 1817 in the case of temples in which the nomination of the Trustee, Manager, or Superintendent was vested in, or subject to the confirmation of Government, Ss. 4 to 6 dealing with cases in which the right of appointment was not vested in the Government.

Ss. 14 and 18 of Act XX of 1863 do not empower the Court to frame a scheme for the management of the temple affairs (b).

It was clearly the intention of the Legislature that the extensive powers conferred on the Board of Revenue by Reg. VII of 1817 should, after the enactment of Act XX of 1863, be exercised by the Temple Committees. Courts should therefore be very slow to construe the latter Act in such a manner as to impede the due exercise of those powers.

By merely making one of the trusteeships in a temple hereditary, the Board of Revenue did not deprive itself of its authority to appoint additional trustees.

A temple managed by three trustees, one of whom is hereditary and the other two nominated by the Temple Committee, falls under S. 3 of Act XX of 1863.

In the case of temples managed by a statutory body, the Court is entitled to assist that body and introduce certain changes which it is not open to that body to introduce or which are admitted by them to be desirable (c).

Per Seshagiri Aiyar, J.—It is not competent to the Board of Revenue under Reg. VII of 1817 to divest themselves of all responsibility for management by handing over the affairs of a Devasthanam to hereditary trustees.

The remedy by suit given to the public under S. 14 of Act XX of 1863 is not exhaustive but only a limited right and does not interfere with the general right of the subject under S. 92, Crim. Pro. Code. The two remedies are cumulative.

The power of settling a scheme is not within the competence of the Temple Committee. A Civil Court alone has this power and the jurisdiction of the Civil Court has not been ousted by the creation of the Temple Committee. In formulating the scheme, however, Courts should not unduly interfere with the powers entrusted to Committees.

It cannot be said that a Court has no power to frame a scheme simply because a statutory body had certain powers conferred upon it suited to the exigencies of the situation at the

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time of the creation of that body. It would be disastrous in this country if Courts were to refuse to intervene on the ground that a statutory body has been created to exercise supervision over the trust.

The powers delegated to the Board under Reg. VII of 1917 and on Temple Committees under Act XX of 1863 are analogous to those of visitors in England.

Nature of visitatorial powers considered. *Sitharama Chetty v. Ramanujam Chetty*, 3 L.W. 43=80 M.L.J. 29=19 M.L.T. 25=32 Ind. Cas. 211=39 M. 700.

WALLIS, C.J. and SESHAGIRI AIYAR, J.
References:—(a) 84 M. 1, Not F. (b) 26 M. 861, F. (c) (1896) 1 Ch. 879, F.

(164) S. 92—Administration suit—Suit by one executor against another to take account—Suit triable by the Subordinate Judge—If questions relating to charitable bequests should arise, directions could be taken by Advocate-General or the Collector from the District Court—Practice and Procedure.

One of the executors appointed by a will sued his co-executor in the Court of a Subordinate Judge of the First Class, praying that the defendant should be held responsible for all sums of money lent by him to his friends and relations or proved to have been mismanaged during the period of his sole management, and for a permanent injunction restraining the defendant from managing without the consent of the plaintiff and from preventing the plaintiff from managing. The Subordinate Judge found that the property under the will was worth about Rs. 89,500 out of which private legacies amounted to Rs. 19,500 and the rest Rs. 70,000 were to be used for purely charitable and religious purposes. He, therefore, held that the suit should have been brought under the provisions of S. 92 of the Civ. Pro. Code, into the District Court, and dismissed the same. On appeal, the Joint Judge held that the suit was properly brought in the Court of the First Class Subordinate Judge and sent it back for trial on the merits. The defendant having appealed:

Held, that the suit having been a general administration suit brought by one trustee against another with whose conduct he was dissatisfied, was one which could be entertained by the Subordinate Judge of the First Class.

Per Curiam.—"If any question relating to charitable bequests should arise in the present case before the Subordinate Judge, his proper course would be to give notice to the Advocate-General in order that that officer might decide whether any action should be taken under S. 92 of the Civ. Pro. Code in order to get any of the specific relief referred to in that section. It would be quite possible for the Subordinate Judge to continue the administration of the estate up to the point of separating the funds appropriated for particular charities as to which schemes would have to be framed, and holding these funds in the possession of a Receiver until the Advocate-General or the

Civ. Pro. Code (1908)—(Continued).

Collector had obtained the directions of the Court, if such were necessary with reference to the disposal of those funds under some suitable scheme. Such directions of course would have to be taken from the District Court under S. 92." *Bapuji Jagannath v. Govindlal Kasandas Shah*, 18 Bom. L.R. 885=40 B. 439=84 Ind. Cas. 167.

SCOTT, C.J. and HEATON, J.

(165) S. 92—Scheme suit—Ancient temple—Founder not known—Temple in possession of large Inam grants—Rights and ceremonies same as in public temples—Subsidiary temple, a public temple—Funds of both mixed up—Whether public or private—Caste or section of caste, whether can own temple—S. 589, if applicable to such a temple—Section of a caste, if a section of the public—Addition to temple funds and use of temple and its funds for caste purposes, if make the temple private—Past user of a temple, if binding on Court framing scheme—Suit under S. 589 of Act XIV of 1882—Trustees, whether can be removed—*Nattukkottai Chetties*, origin and settlement of.

The first settlement of the *Nattukkottai Chetties* in the Madura District was at "Ilayathakudi" and the term "Ilayathakudi Nagarthars" comprises the whole community of *Nattukkottai Chetties*.

The several branches of the *Nattukkottai Chetty* community are each known by the name of the temple to which it is particularly attached and the term "Ilayathakudi Kovil Nagarthars" comprises those families only whose principal place of worship is at Ilayathakudi.

The grant of Inam lands to a temple is strong evidence of its public character (a).

Where an ancient temple whose founder was not known, was shown to have been in possession of large Inam grants from the pre-British Sovereigns, and was open to public worship, and the rites and ceremonies observed in it were the same as those observed in admittedly public temples and where it was also shown that a temple subsidiary to the suit temple was admittedly a public temple and the funds of the two were mixed up.

Held (1) that the temple was a public temple,

(2) that private ownership of such a temple should be strictly proved, and

(3) that the action of the managers of the temple in excluding two local zamindars who had quarrels about property with the temple was no sufficient proof that the temple was private.

A caste or section of a caste can own a temple (b).

S. 589, Civ. Pro. Code (XIV of 1882), is applicable to a temple which is the subject of a public charitable trust even though managed by a caste (c) & (d).

A particular section of a caste which consists of several families not shown to be otherwise than very distinctly related to one another is a section of the public within the meaning of S. 92, Civ. Pro. Code.

Civ. Pro. Code (1908)—(Continued).

The facts (1) that the Nattukkottai Chetties levied a poll-tax among themselves and added largely to the income of the temple, (2) that the temple was used for the public meetings of the caste and (3) that the funds of the temple were spent on buildings and other expenditure on behalf of the caste are no evidence that the temple is private property.

The past user of a temple is not binding on the Court framing a scheme under S. 92, Civ. Pro. Code, but in framing a scheme, the past user may well be taken into consideration and need be departed from only wherever necessary.

Quere—Whether in a scheme suit under S. 539 of the old Code the Court deciding after the coming into force of the new Code can order the removal of trustees for misconduct. *Muthiah Chetty v. Perianan Chetti*, 4 L.W. 298—34 Ind. Cas. 551.

WALLIS, C.J. and PHILLIPS, J.

References:—(a) 24 M. 243, R. (b) 11 B. 584, *relied on*. (c) 8 B. 432, R. (d) 23 M. 82, R.

(166) S. 92—Public charitable trust—Hindu widow succeeding her husband as trustee—Alienation by her of the office—Effect—No vacancy—Suit by reversioners for her removal, possession of properties, etc.—Previous sanction of Advocate-General not obtained—Suit not maintainable—Mere assertion of private right—Does not bar applicability of S. 92.

V and others, the reversioners of a deceased Hindu, who claim to be entitled to the office of the trustee of certain public charitable trust, instituted a suit for a declaration that they are the present trustees of the endowment and as such, entitled to conduct the charities, that the alienation made by the widow of the last male holder of the office in favour of others is void and does not affect their rights. The plaint also contained a prayer that, if necessary, the widow may be removed from her office of the trustee and also one for possession of the properties, account books, etc. *Held* that the suit could not be maintained without the sanction required by S. 92, Civ. Pro. Code, 1908 (a).

The alienation of the office by the widow, though a breach of trust, did not create a vacancy in the office.

Until the widow is removed from the office, the plaintiffs have no right to get in. There was no vacancy at the date of suit. Therefore the present suit is one for the removal of an existing trustee and must be brought with the sanction of the Advocate-General as required by S. 92, cl. (2), Civ. Pro. Code, 1908, and not otherwise.

The mere fact that the plaintiffs claim a right to the office of trustee cannot be said to bar the application of S. 92, Civ. Pro. Code. *Mullangi Venkatasubamma v. Mullangi Venkatarangam Chetty*, 31 M.L.J. 280—4 L.W. 264—36 Ind. Cas. 878.

ABDUR RAHIM, O.C.J. and SESHA-GIRI AIYAR, J.

References:—(a) 28 M. 197; 6 C.L.J. 621; 15 I.A. 1 (10); 20 C.W.N. 118; 85 A. 98, R.

Civ. Pro. Code (1908)—(Continued).

(167) S. 92 (old S. 589)—Ss. 14 and 18 of Act XX of 1863—Necessity for sanction under both—Alienees of temple properties—Not necessary parties to suit under S. 92.

Although under S. 589 of the Code of Civil Procedure there was a difference of opinion whether in a suit brought under that section sanction should not also be obtained under S. 14 of Act XX of 1863, these doubts have been set at rest by S. 92 of the new Code, as sub-cl. (9) makes it clear that the provisions of the section are mandatory and that no suit could be brought for any of the reliefs specified in the section except under the conditions laid down in the section, saving at the same time the jurisdiction of the District Courts under the Religious Endowments Act.

S. 92, Civ. Pro. Code, and S. 14 of Act XX of 1863 are not mutually exclusive. A plaintiff has an option to bring his suit under either section for any relief common to both (a).

Under S. 92, the alienees were not necessary parties, and in a suit like the present no relief can be granted as against them. *Subramania Aiyar v. Venkatachala Vadhyar*, (1916) 2 M. W.N. 351—4 L.W. 444.

AYLING and SRINIVASA AIYANGAR, JJ.

Reference:—(a) 37 M. 184, F.

(168) S. 92—Claim for account against strangers, incompetent.

Where a suit is filed under S. 92 of the Code of Civil Procedure, the relators have no right to claim accounts and enquiries from third persons. The relators have no *locus standi* as against third parties. They can only claim accounts and enquiries from trustees (a). *Tikamdas v. Gokaldas*, 10 S.L.R. 12—36 Ind. Cas. 598.

HAYWARD, A.J.C.

References:—(a) 36 B. 29; 37 B. 95; 85 B. 470, R.

(169) S. 92—Mutt—Suit for declaration of plaintiff's personal right as mahunt—Right of suit—Burden of proof—Succession.

A suit for declaration of plaintiff's personal right as the duly constituted mahunt of a mutt is not barred by S. 92 of the Civ. Pro. Code.

In the case of a mutt the succession to the gaddi is governed by the custom and rules of the section to which the mutt belongs which the plaintiff has to prove in each case unless the custom is admitted. *Ganga Ram v. Ram Saran*, 34 Ind. Cas. 502.

RICHARDS, O.J. and SUNDAR LAL, J.

Reference:—9 A. 1 (P.G.), F.

(170) S. 92—Prosecution of appeal by one of several plaintiffs.

In a suit brought under S. 92 of the Code, the necessity for the co-operation of another person is restricted by the language of the section to the institution of the suit. No such co-operation is required for the prosecution of an appeal from a decree passed in such a case. Where in a suit brought under S. 92 one alone of several plaintiffs survived, the surviving plaintiff alone can carry on an appeal from a decree

Civ. Pro. Code (1908)—(Continued).

passed in the suit. *Parveshwar Das v. Gir-dhari Lal*, 30 Ind. Cas. 240.

LINDSAY, J O. and KANHAIYA LAL, A J.O.
References.—24 Ind. Cas. 369—26 M.L.J.
587—(1914) M.W.N. 587, R

(171) S 92—*Suit instituted under the Dis-trict Court transferred to Subordinate Judge empowered—Subsequent notification limit-ing jurisdiction of Subordinate Judge.*

A suit instituted under S 92, Civ. Pro Code in a District was transferred to the Subordinate Judge empowered by the Local Government to try such suits. A subsequent notification limited the jurisdiction of the Subordinate Judge to a specified local area.

Held that under the circumstance the sub-ordinate Judge is competent to try and dispose of the suit. *Ganapathi Asari v. Sundaram Chetti*, 31 Ind. Cas. 397.

ABDUR RAHIM and SPENCER, JJ.

Reference.—(a) 41 O 866, D & F.

(172) S. 92—*Suit relating to charity—Con-sent of Advocate-General to institution of suit—Premature decision of necessity for consent.*

Whether in a suit relating to charities the consent of the Advocate General is required or not depends upon the facts that may be proved at the trial. Where a plaintiff alleged that a Scheme in respect of charity property was obtained by fraud and was not binding on the plaintiff, it would be premature to dismiss the suit without entering into the facts of the case, on the ground that the consent of the Advocate General was required to the institu-tion of the suit. *Nandaram Das v. Hari Charn Gangopadhyaya* 36 Ind Cas. 29.

FLETCHER and TEUNON, JJ.

(173) S 92—*Sanction obtained by more than two persons—Suit by any two of them—Main-tainability.* *Madala Bagavannarayana v. Yadapalli Perumallacharulu*, 29 M.L.J. 231—31 Ind. Cas. 236. See Final Part, 1915, Col. 404.

(174) S. 92—Grant whether to temple or Arahakas Construction—Scheme. See GRANT, No. 8, 31 M L J. 202.

(175) S 92. See TRUST ACT, No 3, 33 Ind. Cas. 677.

(176) S. 92 See No. 13, *supra*.

(177) Ss 92 and 115—*Public trust, cause of action as to—Practice of District Courts to enquire first whether subject matter of trust is public—Public trust if may be declared, when suit dismissed for want of cause of action—Costs if payable out of trust estate when no cause of action—Find-ings in the judgment, immaterial to the decision, if appealable—S. 115, Civ. Pro. Code, revision under, of decree for costs.*

Where the plaintiffs' suit is dismissed for want of cause of action, the defendant has no right of appeal against some findings of fact which are not in his favour (a).

Civ. Pro. Code (1908)—(Continued).

It has generally been the practice of the District Courts to enquire first into the question whether the trust is a public trust or not and this is probably a convenient course. Under S. 92, Civ. Pro. Code, no cause of action arises save in a case of alleged breach of a trust for a public purpose or where the directions of Court are deemed necessary for the administration of such trust.

Where the plaintiffs after obtaining sanction from the Advocate General instituted a suit against the defendant for his removal from the management of a trust which was alleged by the plaintiffs to be a public trust and the defence was that the trust was not a public trust and that there was no misfeasance and the District Judge found that the trust was indeed a public trust but that the defendant had not been guilty of misfeasance and so dis-mitted the suit for want of cause of action with costs to be paid out of the trust estate to the plaintiffs because the defence was that the trust was not a public trust

Held—that when the Judge has come to the decision that there was no cause of action for the suit he could not record a decision binding on the parties that the trust was a public trust and he could not make an order for the pay-ment of costs from the estate as a public trust.

Held further, that the order for costs out of the estate was without jurisdiction within the meaning of S 115, Civ Pro. Code *Brij Behari Lal v Shivanath Prasad*, 20 O.W.N. 1954—35 Ind Cas. 337.

SHARFUDDIN and ROE, JJ.

References.—(a) 18 O 647, 7 A 606 (F.B.), F.

(178) S. 92, O. I, r. 3—*Suit for removal of trustee and for recovering possession of trust property from alienee—Alienae whether neces-sary party—Relief against alienee.* *All Haffiz v. Abdur Rahaman*, 41 O. 1135—32 Ind. Cas. 801. See Final Part, 1915, Col. 407.

(179) S. 92, O I, r 8—*Suit re public trust—Consent of Advocate-General—Right to worship idol.*

A suit relating to a public trust should not be brought except with the consent of the Advocate General unless the plaintiffs have a special claim or claim a special interest under and by virtue of the trust.

When the interest which the plaintiffs have as member of the public is not sufficient to enable them to maintain a suit under S. 92, Civ.Pro. Code, 1908, without the consent of the Advocate General, they cannot by saying that they represent the whole of the Hindu popu-lation get a sufficient interest to sue apart from S. 92 *Grija Prasunno Roy v. Becharam Patra*, 35 Ind. Cas 846

FLETCHER and TEUNON, JJ.

(180) S. 92 and O. I, r. 10—S 92, nature of suit under—Public trust—Suit by two worshippers with the sanction of the Advocate-General—Death of one plaintiff, if causes suit to abate—Court's power to add

Civ. Pro. Code (1908)—(Continued).

parties—Sanction of Advocate-General if necessary for such addition.

A suit brought under S. 92 of the Code of Civil Procedure, 1908, is a representative suit.

As soon as a suit is instituted by two persons with the previous sanction of the Advocate-General, all the worshippers become parties thereto as a representative suit, and the subsequent death of one of the plaintiffs does not cause the suit to abate. The Court has ample power under O.I. r. 10, Civ. Pro. Code, to add other worshippers as additional parties and the previous sanction of the Advocate-General is not necessary for such addition. *Parameswaram Manpu v. Narayanan Namboodri*, 3 L.W. 805 = (1916) M.W.N. 402 = 31 M.L.J. 279 = 40 M. 110 = 34 Ind. Cas. 384.

SADASIVA AIYAR and MOORE, JJ.

References:—37 A. 296, Note F.

(181) S. 92 and O. XXII, r. 11—*Suit for removing trustee and for declaration of invalidity of sale in favour of alienees from trustee—Voluntary transferee—Transferee for consideration but not in good faith—Transferee for consideration and in good faith—Distinction—Limitation Act, ss. 10, 28 and Arts. 120, 134—Applicability—S. 64, Trust Act—Appeal by alienees—Death of trustee pending appeal—Whether appeal abates—Meaning of 'right to sue'—Test—Whether alienees or trespassers can be joined as parties to suit under S. 92, Civ. Pro. Code.* *Ghetikulam Prasanna Venkatachala Reddiar v. Srikranga Ammal*, 26 M.L.J. 537 = (1914) M.W.N. 581 = 34 Ind. Cas. 369 = 38 M. 1064 = 33 Ind. Cas. 45. See Final Part, 1914, Col. 330.

(182) S. 95—'May apply to the Court'—*Arrest before judgment—Compensation—Counter-petition filed—No application—Award of compensation, if legal—Expense or injury caused to the defendant, meaning of—Reputation, injury to, and humiliation, damages for, whether legally awardable.*

The defendant in a certain case was arrested before judgment and produced in Court. He then filed a counter-petition, wherein, after traversing the allegations of the plaintiff as to the necessity for the arrest, he claimed compensation for improper arrest. This was awarded to him. Objection having been taken to the validity of the order owing to non-compliance with the provisions of S. 95, Civ. Pro. Code:

Held, that the award of compensation was perfectly legal and was not vitiated by the absence of an application as contemplated by S. 95 of the Civ. Pro. Code.

The words 'the expense or injury caused to the defendant' in S. 95, Civ. Pro. Code, are not confined to cases where special damage is shown or where the defendant has suffered some special injury that can be measured in money. General damages can be awarded under the section for injury to the reputation or the humiliation caused of necessity by the

Civ. Pro. Code (1908)—(Continued).

arrest. *Subraya Davay v. Venkatarama Aiyer*, 3 L.W. 90 = (1916) M.W.N. 76 = 32 Ind. Cas. 592.

COUTTS-TROTTER, J.

(182-a) S. 96. See APPEAL.

(189) S. 96 and O. IX, r. 6 and O. XVII, r. 2—*Ex parte decrees—Duty of defendant—Consideration of question of such non-appearance in second appeal.*

Where the defendant in a suit failed to appear on the adjourned date of hearing, it is the duty of the Court to hear sufficient evidence on the plaintiff's side to justify the granting of the relief claimed and pressed for. After the passing of the decree the defendant is entitled to apply to the Court which passed the decree for an order setting it aside, and that is his only remedy, though he may challenge the decree by way of appeal upon the ground that the evidence which the plaintiff had adduced was not sufficient to justify the decree. But in such appeal the defendant cannot go into any question connected with his non-appearance at the hearing. The defendant is not entitled to have the remedy by way of application for restoration in the first Court together with a right to raise the same question by appeal against the decree itself. *Mussamat Hummi v. Aziz ud-din*, 36 Ind. Cas. 277.

RICHARDS, C.J. and BANERJI, J.

(184) S. 96 (2), O. XLI, r. 27—*Construction—Ex parte decrees—Appeal—Power of appellate Court to direct production of additional evidence wrongly excluded by lower Court.*

A narrow construction ought not to be put upon the right of appeal against an *ex parte* decree which is conferred by S. 96 (2), Civ. Pro. Code. The appellate Court has power under O. XLI, r. 27, to direct the production of additional evidence which has been wrongly excluded by the original Court. And there is nothing in the Code to suggest that the powers of an appellate Court in hearing an appeal from an *ex parte* decree are more limited. *Kodumal v. H. H. Sir Aga Khan Sultan Mahomed Shah*, 9 S.L.R. 191 = 34 Ind. Cas. 498.

PRATT, J.C. and BOYD, A.J.C.

References:—30 M. 54, F.; 17 B. 738; 23 O. 738, R.

(185) S. 97—*Preliminary decrees—Final decrees—Appeal against preliminary decree only, although final decree could be appealed against in time—Avoidance of payment of Court-fees—Court-Fees Act.*

The plaintiffs obtained, on the 30th July 1913, a preliminary decree in a mortgage suit. A final decree was passed in the suit on 25th August 1913 requiring the plaintiffs to pay Rs. 8,000. The plaintiffs appealed on the 6th November 1913, against the preliminary decree only, on a Court-fees stamp of Rs. 10, although their objection was as regards Rs. 2,000 of the amount which they were required to pay by the final decree:

Held, that, inasmuch as the dates permitted the appellants to challenge both the preliminary

Civ. Pro. Code (1908)—(Continued).

decree and the final decree within the time allowed by law for appeal against the preliminary decree, the Court could not permit them to avoid the provisions of the Court Fees Act by getting what might or might not be an effective reversal of the final decree by a circuitous method when the direct method was open to them. *Dattaraya Ramachandra Savale v. Ajmuddin Fakruddin*, 18 Bom. L.R. 76—33 Ind. Cas. 146.

SCOTT, C.J., and HEATON, J.

(186) S. 97—*Preliminary decree—Final decree—Combined appeal against both—Legality.*

S. 97, Civ. Pro. Code, 1908, does not prevent a party from filing a combined appeal against a preliminary and final decree, if the dates permit him to do so. *Balwantising Ramchandra v. Sakharam Maucharam*, 33 Ind. Cas. 137.

SCOTT, C.J. and SHAH, J.

(187) S. 97. See No. 1-b, *supra*.

(187-a) S. 98. See APPEAL.

(188) S. 98—Reference to third Judge when to be made. See LETTERS PATENT (CALCUTTA), No. 4, 23 O.L.J. 592.

(188-a) S. 99. See APPEAL.

(189) S. 99—*Misjoinder of parties—Second appeal—Grounds of.*

Having regard to S. 99 of the Civ. Pro. Code, a second appeal is not competent on the ground of misjoinder of parties. *Shah Nawaz v. Shah Nawaz*, 118 P.L.R. 1916.

SCOTT-SMITH, J.

(190) S. 99 O. XXXII, r. 3 (4)—*Suit against a minor without formal appointment of guardian ad litem, r. 7—Reference to arbitration by next friend or guardian ad litem without leave of Court.*

Although a formal appointment of a guardian ad litem is necessary in a suit against a minor under O. XXXII, r. 8, when a suit against minors has been properly defended by the person who has a prior right under r. 3 (4) to be appointed guardian ad litem, and no ground is shown which would justify a Court in excluding him from the guardianship ad litem, the want of formal appointment is only an irregularity that is curable under S. 99 of the Code of Civil Procedure.

There is no provision in the Civ. Pro. Code for the formal appointment of a next friend in a suit by a minor.

If a next friend or guardian ad litem refers a suit to arbitration without the leave of the Court a suit will lie to set aside any decree based on an award of the arbitrators in such reference without leave. *Silam Kalla v. Silam Sitama*, 9 Bur. L.T. 158—33 Ind. Cas. 941.

PARLETT, J.

(190-a) S. 100. See APPEAL (SECOND APPEAL).

Civ. Pro. Code (1908)—(Continued).

(191) S. 100—*Practice—Taking up big original suits after 5-30 p.m.—Prejudice.*

A District Munsif called a big original suit pending on his file after 5-30 P.M. one day, and as the defendants were absent, he examined one witness for the plaintiff and gave him a decree. This decree was upheld on appeal. In second appeal it was contended by the defendants on the strength of an affidavit filed by them that they were ready to go on with the case that day, and waited in Court till 5-30 P.M., that they were then told by their vakil that there was no likelihood of their case being taken up that day and that they might go home, that on the strength of that assurance they had gone home, that in their absence the case was called, that their vakil then represented the above facts to the Court as also his inability to cross-examine the plaintiff's witness and an adjournment was prayed for which however was refused and that in consequence they were prejudiced in the conduct of the case. The plaintiff filed a counter-affidavit by his vakil in the Court of First Instance that it was usual for the District Munsif to take up big original suits only after 5-30 P.M., that the defendants had no witnesses ready that day and had told him at an earlier hour of the day that they were going to apply for an adjournment but that he was not aware of the circumstances under which the defendants left the Court-house that day.

Held that, though it was very irregular on the part of a Court to take up for trial and dispose of heavy original suits at that late hour, and though such a practice was neither fair to the parties nor to the witnesses nor to the Court itself or anybody else, and a Court in doing so would not be acting in the best interests of justice, in the present case, having regard to the fact that the defendants were not ready to go on with the case and had not instructed their vakil to cross-examine the plaintiff's witnesses, and having further regard to the circumstance that they had not filed any affidavit before the lower appellate Court explaining the facts and showing how they were prejudiced, this was not a matter in which the High Court would interfere in second appeal. *Muruga Pillai v. Krishnamurthi Chetty*, 8 L.W. 368—34 Ind. Cas. 547.

COUTTS-TROTTER and SESHAGRI AIYAR, JJ.

(192) S. 100—*Second appeal—Finding of fact binding in.*

In a suit for possession the lower appellate Court differing from the Court of first instance found that the lands in suit belonged to the defendants and were in their possession for more than twelve years, that the plaintiffs had not proved their possession within the period of limitation, and dismissed the suit. In second appeal the decision was reversed: *Held*, that the findings of fact arrived at by the lower appellate Court were binding in second appeal.

Duties of a Court of first instance and a Court of appeal indicated. *Shree Fujan v. Sobhat*, 14 A.L.J. 1066—36 Ind. Cas. 427.

RICHARDS, C.J. and RAFIQ, J.

Civ. Pro. Code (1908)—(Continued).

(192-a) S. 100—*Second appeal—Findings of fact—Mixed question of law and fact—Review.*

Where the reasons set out in a judgment are findings of fact and they are set out in detail and summarised in the statement as an affirmative proposition, the affirmative proposition if not entirely a finding of law, is a mixed finding of fact and law; the conclusion arrived at can be reviewed in second appeal, if the conclusion is one which could not be arrived at upon the findings of fact upon which it is based without a misdirection in law. *Nasir Ali v. Kher Chand*, 36 Ind. Cas. 996.

WALSH and STUART, JJ.

(193) S. 100 (c)—*Second appeal—Substantial error or defect of procedure—Deciding a case upon part only of the evidence—Commissioner's report, rejection of.*

A second appeal lies against the decree of the lower appellate Court on the ground of a substantial error or defect in the decision of the case upon the merits, when it is shown that the Court has decided the case upon part only of the evidence after rejecting the Commissioner's report. *Tirthabai v. Bepin*, 23 C.L.J. 600—34 Ind. Cas. 30.

SANDERSON, C.J., and MOOKERJEE, J.

(193 a) S. 102. See APPEAL (SECOND APPEAL).

(194) S. 102—*Second appeal—Suit for damages for cutting trees—Small Cause nature—Estates Land Act, ss. 12 and 213—Breach of the provisions of that Act—Jurisdiction—Suit, whether cognisable by the Revenue Court.*

A suit for damages for wrongfully cutting and carrying trees is one of a Small Cause nature, even though it involves a question of title and is on that account tried on the regular side (a).

Such a suit is not excluded from the cognisance of the Small Cause Court by any of the exceptions in the second schedule of the Provincial Small Cause Courts Act (b).

S. 12 of the Madras Estates Land Act merely recognises the right of an occupancy ryot to use, enjoy and cut down trees in his holding. A suit for damages for cutting trees is not a suit for damages for breach of any of the provisions of the Estates Land Act, and cannot be brought within the scope of S. 213, so as to make it cognisable by a Revenue Court. *Narayanappa alias Buchanna v. Yenkataraman*, 20 M.L.T. 281—4 L.W. 245—(1916) 2 M.W.N. 215—36 Ind. Cas. 202.

SPENCER and KRISHNAN, JJ.

References:—(a) 21 B. 248; 24 C. 558, *Appr.*; 15 M. 98, *F.* (b) 26 M. 176, *R.*

(194-a) S. 102—*Execution—Sale under Small Cause Court decree, suit to set aside, dismissed—Second appeal.*

S. 102 is wide enough in its terms to cover the cases of suits of the nature cognisable by Courts of Small Causes whether they are tried by the Courts of Small Causes or by Courts in their ordinary original jurisdiction. So no

Civ. Pro. Code (1908)—(Continued).

second appeal lies against the order by a Court of ordinary jurisdiction refusing to set aside a sale in execution of a decree of a Small Cause Court. *Sami Ram Appa v. Vairavan Chettiar*, 32 Ind. Cas. 712.

ABDUR RAHIM and SPENCER, JJ.

References:—(a) 12 M. 116; 30 B. 118—7 Bom. L.R. 641, *F.*

(195) S. 102—*Suit for damages—Suit of Small Cause nature—Claim under Rs. 500—Second appeal, not competent.*

The plaintiff sued for cancellation of a *kabooli* executed by him in favour of defendant, No. I and for damages against defendants I and II for Rs. 250. In second appeal to the High Court, he gave up his claims against the 1st defendant and only pressed his claim for damages against the 2nd defendant.

Held, that as against the 2nd defendant the suit was cognisable by a Court of Small Causes, exclusively and therefore a second appeal was not competent. *Ramtahal Sahu v. Ganno Sahu*, 34 Ind. Cas. 909.

MULLICK, J.

(196) S. 102—*Nature of suit how to be determined. See ACT IX OF 1887 (PROVINCIAL SMALL CAUSES COURTS), No. 24, 12 N L.R. 47.*

(197) Ss. 102, 115—*Suit for rent and damages for breach of contract—Second appeal—Error of law—Revision. See BEN. ACT VIII OF 1885 (TENANCY), No. 65, 23 C.L.J. 557.*

(198) S. 102, O. XLI, r. 23 and O. XLIII, r. 1, cl. (u)—*Order of remand—Suit of Small Cause nature—Appeal from order.*

As one appeal only is allowed according to S. 102, Civ. Pro. Code, and under O. XLIII, cl. (u) in a suit of Small Cause nature, no appeal lies from an order of remand passed in an appeal from a decree made in such a suit, for O. XLI, r. 23 of the Code allows an appeal from an order of remand only in a case where an appeal would lie from the decree of an appellate Court. *Sarup v. Kunder*, 36 Ind. Cas. 296.

RAFIQ, J.

(199) S. 102, O. XLI, r. 23, O. XLIII, r. 1 (u)—*Appeal—Order of remand—Suit of a nature cognisable in Small Causes Court, Haradobas Agarwalla v. Ananda Sheik*, 32 C.L.J. 97—30 Ind. Cas. 894. See Final Part, 1915, Col. 409.

(200) S. 104. See No. 81, *supra*.

(200-a) S. 104. See APPEAL.

(201) S. 104, O. IX, rr. 8, 9, O. XLIII, r. 1—*Order by Judge on the Original Side of the High Court refusing to restore case dismissed for default of a judgment and if appealable—O. XLIII, r. 1, if applies to appeals from one Judge of the High Court to others. See LETTERS PATENT (CALCUTTA), No. 3, 20 C.W.N. 594.*

Civ. Pro. Code (1908)—(Continued).

(302) S. 104 (d) (f), Sch. II, Art. 17—Order rejecting award for misconduct—Appeal—Revision. See AWARD, No. 9, 107 P.W.R. 1916.

(308) S. 104, sub-S. (1) (f) and sub-S. 2 and Sch. II, para 30—Award without intervention of Court—Application to file the same under Civ. Pro. Code, Sch. II, para 20—Part invalid—Order of lower appellate Court rejecting the application—No second appeal—No revision. *Ahmad Din Anisul-Rahman v. Atlas Trading Company of Delhi*, 66 P.R. 1915—146 P.W.R. 1915—81 Ind. Cas. 80. See Final Part, 1915, Col. 410.

(308-a) S. 105. See APPEAL.

(304) S. 105—Ex parte decrees—Order setting aside—Appellability of—Service grants—Resumption

An order setting aside an *ex parte* decree cannot be questioned in an appeal filed against the final decree under S. 105, Civ. Pro. Code

In the absence of any allegation of the specific service for which the land was originally granted, a suit for resumption of such lands is not maintainable. *Muhammad Ali Muhammad Khan Bahadur v. Shaikat Ali*, 84 Ind. Cas. 718.

HOLMS, S.M.

(305) S. 105. See No. 60, *supra*.

(306) S. 105, O. XXI, r. 66 (4)—No appeal from orders under O. XXI, r. 66 (4), Civ. Pro. Code.

There is no appeal against an order given in a proceeding under O. XXI, r. 66 (4), Civ. Pro. Code (a). *Chatterji v. Karpan Chetty*, 8 L.B.R. 850—36 Ind. Cas. 409.

FOX, C.J. and PARLETT, J.

Reference:—(a) 16 C.W.N. 970, F.

(307) S. 105, O. XXII, r. 9 (2)—Validity of order under O. XXII, r. 9 (2), if can be questioned under S. 105. See HINDU LAW (DEBTS), No. 4, 14 A.L.J. 610.

(308) S. 105, O. XLIII, r. 1—Order setting aside *ex parte* decree—Whether appeal lies.

Under the Civ. Pro. Code, while an appeal lies (O. XLIII, r. 1 (d)) against an order refusing to set aside a decree passed *ex parte*, no appeal lies against an order setting aside such a decree; and, adverting to S. 105 (1) of the Code, any error, &c., made by a Court in setting aside an *ex parte* decree is not an error, &c., "affecting the decision of the case" and therefore cannot be "set forth as a ground of objection in the memorandum of appeal." *Fagal v. Musammatt Hashmati*, 40 P.R. 1916—81 Ind. Cas. 914—183 P.W.R. 1916.

JOHNSTONE, C.J.

Reference:—25 A. 280, F.

(309) S. 107. See No. 51, *supra*.

(309-a) S. 107 and O. XLI, r. 28—Remand—Wider powers under new Code—Remand not confined to disposal on preliminary issue.

Civ. Pro. Code (1908)—(Continued).

Under the Code of 1908 the powers of a Court of appeal are much wider in respect of remand than the powers of a Court of appeal under the Code of 1883. An appellate Court has power to remand a case even when it has been decided on merits and is not restricted to the disposal of a case on a preliminary issue. Where important questions were disallowed during the examination of the witnesses and as such there was no proper trial of the case in the Court of first instance it is competent to the Court of appeal to remand the case. *Suthir Bala Dutta v. Chandra Kumar*, 86 Ind. Cas. 818.

CHATTERJEE and NEWBOULD, JJ.

References:—12 Ind. Cas. 684—15 O.L.J. 258; 7 Ind. Cas. 75—12 O.L.J. 368; 32 Ind. Cas. 791—43 O. 938—20 C.W.N. 547, R.

(210) S. 107, O. XLI, rr. 23 and 25—Appeal Court if may remand cases otherwise than under—Addition of parties on appeal and amendment of plaint, if justify remand.

The appellate Court has power to amend a plaint by adding new parties, and when this has been done, the added as well as the original defendants have a right to file fresh written statements and to have the whole case reopened. In such circumstances the appellate Court has power to remand the case for trial, independently of rr. 23 and 25 of O. XLI of the Civ. Pro. Code.

The general power, given by S. 107 of the Code to the appellate Court, of remanding cases for trial by the original Court, is not governed or limited by O. XLI alone, but it is subject to such conditions and limitations as may be prescribed in the Rules and Orders, and the amendment of a plaint and addition of parties in a Court of appeal is one of the conditions prescribed in the Rules and Orders. *Miah Uzir Ali Sardar v. Savai Behara*, 20 C.W.N. 547—43 C. 938—32 Ind. Cas. 791.

HOLMWOOD and IMAM, JJ.

Reference:—41 C. 108, R.

(211) S. 107 (1) (b) and (2), O. XLI, r. 23—Scheme and arrangement of the Code—Lower appellate Court—Powers of reversal and remand—Remand on preliminary point.

The Code consists (1) of that which is termed "the body of the Code," and (2) of the Rules.

The body of the Code is fundamental and is unalterable except by the Legislature; the rules are concerned with details and machinery and can be more readily altered. Thus the body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. It follows that the body of the Code is expressed in more general terms, but it has to be read in conjunction with the more particular provisions of the Rules.

S. 107 (1) (b) Civ. Pro. Code, is subject to the conditions and limitations prescribed by the Rules. In the case of a lower appellate Court, the power of reversal and remand is limited to the position described in O. XLI, r. 23 of the Code. *Mani Mohan Mandal v. Ramtaran Mandal*, 43 C. 148—38 Ind. Cas. 829.

JENKINS, C.J. and N.R. CHATTERJEE, J.

Civ. Pro. Code (1908)—(Continued).

- (212) S. 107, cl. 2 and O. I, r. 10, O. XXXIV, r. 1—*Appellate Court to bring all parties on record—Wilful omission of necessary party—Decree for sale.*

Under O. I, r. 10 and S. 107, cl. (2), Civ. Pro. Code, 1908, the appellate Court should see that all necessary parties are brought on record before deciding an appeal.

A decree for sale in a suit in which a necessary party under O. XXXIV, r. 1, was knowingly omitted from the array of parties in appeal cannot be allowed to stand. *Yellammal v. Lakshmu Ammal*, 31 Ind. Cas. 814.

SADASIVA AIYAR and NAPIER, JJ.

(212-a) S. 109. See APPEAL—TO PRIVY COUNCIL.

- (213) S. 109—*Application for leave to appeal to His Majesty in Council—Substantial question of law—Position of person who has obtained Succession Certificate to collect the debts—Limitation Act (1908), Art. 62, S. 10.*

In a suit by persons entitled to portion of the estate of a deceased against the holder of a Succession Certificate, the trial Court held that Art. 62 of the Limitation Act applied and that the suit was barred. The High Court affirmed the decree. The plaintiffs applied for special leave to appeal to His Majesty in Council. *Held*, that the status of the holder of the Certificate and whether he was not a trustee was a 'substantial question of law'. *Najm-un-nissa Bibi v. Amina Bibi*, 14 A.L.J. 143=38 A. 188=33 Ind. Cas. 345.

RICHARDS, C.J. and RAFIQ, J.

(214) S. 109—Remand for decision on the merits—Not a final order—No appeal to Privy Council. See APPEAL—TO PRIVY COUNCIL, No. 1, 19 O.C. 86.

(215) Ss. 109 and 110—*Value of subject-matter in the Court of First Instance less than Rs. 10,000—Value of subject-matter in dispute on appeal to His Majesty in Council exceeds Rs. 10,000—Certificate, if can be granted—Involving 'directly or indirectly, some claim or question to, or respecting property of like amount or value,' meaning of. Subramania Aiyar v. Sellammal*, 2 L.W. 1057=(1915) M. W.N. 941=18 M.L.T. 450=30 M.L.J. 317=99 M. 843=31 Ind. Cas. 296. See Final Part, 1916, Col. 413.

(216) Ss. 109 (c) and 110—*Appeals to the King in Council—Batch suits—Amount or value of the subject-matter of each suit less than Rs. 10,000—Aggregate value of the subject-matter of all the suits more than Rs. 10,000—Common judgment—Leave to appeal, whether can be granted. Ramchandra Raju v. Appayya*, 2 L.W. 916=30 Ind. Cas. 895. See Final Part, 1916, Col. 413.

(217) S. 109 (c) and O. XLV, rr. 2 and 3—*Appeal to Privy Council—Special leave, when granted by the High Court. Ayya Raghunatha Thathachariar v. Thirumalai Echambadi Thiruvengadachariar*, 2 L.W. 992=18 M.L.T.

Civ. Pro. Code (1908)—(Continued).

366=(1915) M.W.N. 916=31 Ind. Cas. 46. See Final Part, 1916, Col. 413.

(217-a) S. 110. See APPEAL—TO PRIVY COUNCIL.

- (218) S. 110—*Leave to appeal to Privy Council—Claim for declaration and injunction—Valuation of claim discretionary—Trial of suit by Second-class Subordinate Judge—The real value of the claim can be shown by plaintiff.*

The plaintiff brought a suit for declaration and injunction in the Court of the First-class Subordinate Judge at Broach, valuing his claim at Rs. 135. The case was later on transferred to the Court of the joint Second-class Subordinate Judge. The claim was decreed by both the lower Courts; but it was dismissed by the High Court. The plaintiff having applied for leave to appeal to the Privy Council, the defendant contended that, as the plaintiff had elected to value his suit at Rs. 135 and conducted it in the Court of the Second-class Subordinate Judge, the limit of whose pecuniary jurisdiction was Rs. 5,000, he could not contend that the subject-matter of the suit was worth Rs. 10,000:

Held, overruling the contention, that the claim being one for declaration and injunction, the plaintiff, by suing in the Second-class Subordinate Judge's Court, seemed to have made neither directly nor indirectly any sort of representation to the defendant as to the real or market value of the property to be affected, as distinguished from the fiscal value which, as the law allowed him to do, he placed upon the relief which he was seeking. *Mohanlal Nagji v. Bai Kashi*, 18 Bom. L.R. 469=40 B. 477.

BACHELOR and SHAH, JJ.

Reference:—15 Bom. L.R. 1021, D.

- (219) S. 110—"Involved," meaning of—*Application for leave to appeal to Privy Council—Question of law involved in appeal, nature of.*

A question of law will not be deemed to be involved in an appeal under S. 110, Civ. Pro. Code, if it be not necessary to decide it for the disposal of the appeal and if such question is likely to arise only in certain contingencies.

The word "involved" as used in S. 110 implies a considerable degree of necessity. *Ghisa Singh v. Gajraj Singh*, 19 O.C. 181=36 Ind. Cas. 807.

KENDALL and MAHOMED ALI, A.J.CS.

(220) S. 110—Appeal by claimant to Privy Council—Subject-matter of appeal, if mortgage-debt or property claimed—Appealable value. See MORTGAGE SUIT, No. 1, 20 C.W.N. 1279.

(221) S. 110. See Nos. 215, 216, *supra*.

(222) Ss. 110, 115—Letters Patent appeal—Judgment of reversal passed by single Judge of High Court cancelled—Effect—Position of Judge sitting alone—Whether his decision can be revised under S. 115, Civ. Pro. Code—Leave to appeal to Privy Council. See LETTERS PATENT (CALCUTTA), No. 8, 48 C. 90.

Civ. Pro. Code (1908)—(Continued).

(228) S. 110 and O. XLV, r. 8—*Leave to appeal to Privy Council—Decision of lower Courts affirmed by Chief Court—Question of fact—No substantial question of law—Leave not to be granted.*

Where the decree of the Chief Court affirmed the decision of the Court immediately below, the decision of both Courts being based solely on the facts which were held to be established, and where the petition for grant of a certificate for leave to appeal to His Majesty in Council did not disclose any question of law except one of limitation relating to one of several plots of land in dispute which plot was of a value below Rs. 10,000

Held that no substantial question of law was involved in the appeal and that the case was not 'otherwise' a fit one for appeal under O. XLV, r. 8, Civ. Pro. Code. *Vir Singh v. Tirath Ram*, 64 P. R. 1916=15 P. L. R. 1917=85 Ind. Cas. 581.

RATTIGAN and LESLIE JONES, JJ.
References.—33 A. 94; 23 A. 227 (P. G.), R.

(224) S. 110 and O. XLV, r. 8 (1)—*Leave to appeal to Privy Council—Value of subject-matter above Rs. 10,000—Necessity for some substantial question of law being involved*

Where, in respect of the subject-matter of a proposed appeal to the Privy Council, the High Court modified the decree of the lower Courts as regards a portion of it, while confirming the decree as regards the other portions, leave should not be granted unless the proposed appeal involved some substantial question of law. The misconstruction of a portion of the evidence relating to particular facts cannot be treated as a substantial question of law within the meaning of S. 110, Civ. Pro. Code. *Mulraj-lakshmi Venkayamma Rao v. Venkatadri Appa Rao*, 30 Ind. Cas. 372.

SADASIVA AIYAR and NAPIER, JJ.
References.—25 Ind. Cas. 305=16 M. L. T. 262=(1914) M. W. N. 695=1 L. W. 779=27 M. L. J. 451=20 O. L. J. 375=27 M. 443=19 C. W. N. 97=16 Bom. L. R. 853, F. 23 Ind. Cas. 532=36 A. 325=12 A. L. J. 451, D.

(225) S. 110, para 2—*Appeal to Privy Council—Property in dispute, value of—Valuation, how to be determined—Valuation in the plaint, whether estops the plaintiff—Admission, if rebuttable.*

Under the second paragraph of S. 110 of the Code of Civil Procedure, the date of the decree or final order from which the appeal to His Majesty in Council is to be made is the material date, and as such the valuation of the property at the date of the institution of the suit is immaterial.

The fact that the plaintiff valued his suit in the Court of the first instance at a sum less than Rs. 10,000 and paid Court-fees accordingly, does not debar him from raising the point that the property which is in dispute in the appeal to His Majesty in Council is in fact valued at more than that sum. At the most it could only be taken as an admission, and it was

Civ. Pro. Code (1908)—(Continued).

one that might be rebutted by subsequent evidence. *Surendro Nath v. Dwarka Nath*, 24 O. L. J. 350=14 C. 119=21 C. W. N. 530=85 Ind. Cas. 605.

SANDERSON, O. J. and MUKERJEE, J.

(226) S. 110 (2)—*Property involved over ten thousand in value—Interest of appellant. Jaikaran v. Janki Sahu*, 13 A. L. J. 1075=39 Ind. Cas. 369 See Final Part, 1915, Col. 415.

(227) S. 113, G. XLVI, r. 1—Reference under S. 113—Whether can be made if appeal lies—S. 113 controlled by O. XLVI, r. 1. See PRE-EMPTION, No. 18, 130 P. R. 1916.

(227 a) S. 115. See REVISION.

(228) S. 115—*Presidency Small Cause Court—Judgment of the Full Bench—Question of limitation—Revision.*

The High Court has no power under S. 115, Civ. Pro. Code, to revise the decision of the Full Bench of the Presidency Small Cause Court on the question of limitation merely because it is alleged to be erroneous. *Kuppusawmy Iyengar v. Narayana Iyengar*, 19 M. L. T. 24=3 L. W. 36=32 Ind. Cas. 3

SADASIVA AIYAR and NAPIER, JJ.

References.—16 M. L. T. 498, confirmed; 2 L. W. 1115, 21 M. L. J. 1020, 2 L. W. 230, overruled; 41 O. 323, F.

(229) S. 115—*Limitation point of—Judgment of appellate Court not dealing with it—Material irregularity.*

The mere fact that the judgment of an appellate Court does not deal with a point of limitation arising in the case does not amount to a material irregularity in the disposal of a case so as to merit interference by the High Court in revision. *Duraisami Udayan v. Kadiraman Rowthen*, 3 L. W. 176=32 Ind. Cas. 785.

SESHAGIRI AIYAR, J.

(230) S. 115—*Revisional jurisdiction—High Court—Decision of District Court—Bombay District Municipalities Act (Bom. Act III of 1901), S. 160, cl. 3*

An application under the revisional jurisdiction of the High Court does not lie from the decision of a District Court under cl. 3 of S. 160 of the Bombay District Municipalities Act, 1901. *The Municipality of Belgaum v. Rudrappa Subrao Sutar*, 18 Bom. L. R. 340=40 B. 509=34 Ind. Cas. 21.

BACHELOR and SHAH, JJ.

(231) S. 115—*Crim. Pro. Code, S. 476—Proceedings taken while a suit is pending—If material irregularity*

Where in the course of a civil suit before the District Munsif, the petitioner made a statement which the Court has reason to believe to be untrue as it contradicted a statement made by him in its presence before the case was taken up and the Court proceeded against him under S. 476 immediately after the statement was

Civ. Pro. Code (1908).—(Continued).

made without waiting for the completion of civil suit.

Held, per Sadasiva Iyer and Oldfield, J.J., (Seshagiri Iyer, J. contra): That the Court was not bound to wait till substantive proceedings were over before it could initiate action under S. 476, Crim. Pro. Code, and that its failure to do so did not constitute material irregularity in the exercise of its jurisdiction under S. 115 (c) of the Civ. Pro. Code.

Per Seshagiri Iyer, J.—Under S. 476, Crim. Pro. Code, proceedings must be taken at or immediately after the termination of the trial of the suit or case and the action taken before the suit is closed although not without jurisdiction is a material irregularity in the exercise of jurisdiction.

Per Oldfield, J.—An accused is not entitled as of right to insist on all his evidence being taken in the substantive proceeding, before sanction is granted against him. And there is nothing in the wording of S. 476, Crim. Pro. Code, inconsistent with this conclusion.

Per Sadasiva Iyer, J.—The words of S. 476 are very wide and an order under it may be based on materials which have not been strictly made legal evidence.

Per Seshagiri Iyer, J.—Before a person is asked to stand his trial, it must be fairly clear to the sanctioning authority that there is a probability of a conviction being had. *Klug-Emperor v. Karri Venkanna Patrudu*, 20 M. L.T. 252=4 L.W. 888=31 M.L.J. 440=(1917) M.W.N. 130=17 Cr. L.J. 615=36 Ind. Cas. 493.

OLDFIELD, SADASIVA IYER and SESHAGIRI IYER, J.J.

(392) S. 115—*Decree confirmed in appeal—First Court, if can amend its own decree subsequently—Jurisdiction—Practice.*

Where a decree is confirmed in appeal, the decree liable to be amended is only that of the appellate Court and not that of the Court of first instance. Consequently where the appellate Court has passed its decision, the only Court competent to amend the decree is the appellate Court and the first Court has no jurisdiction to entertain any application for amendment of the decree of the appellate Court (a). *A. Bhagirathi Nethiar Amma v. M. M. Meenakshi Nethiaramma*, 4 L.W. 225=31 M.L.J. 438=(1916) 2 M.W.N. 249=36 Ind. Cas. 891.

SESHAGIRI IYER, J.

Reference:—(a) 24 M. 646, D.

(393) S. 115—*Error of law as to jurisdiction—Jurisdiction depending on finding of fact—Documentary evidence—Misconstruction—Revision.*

If an appellate Court by an error of law finds jurisdiction in the Civil Courts, ordering jurisdiction to the Civil Courts, interference in revision under S. 115 is permitted (a).

But where the jurisdiction depends on a finding of fact, unless that finding of facts rests on no evidence whatever, revision under S. 115 is not legally permissible.

Civ. Pro. Code (1908).—(Continued).

Even if the lower appellate Court has misconstrued a portion of the documentary evidence or ignored important evidence in the case, it is not a fit case for interference under S. 115 (b). *Karri Narasayya v. Thavala Nagarwara Rao*, 31 Ind. Cas. 309.

SADASIVA AYYAR, J.

References:—(a) 24 M.L.J. 113, F. (b) 28 Ind. Cas. 553; 25 Ind. Cas. 891; 26 Ind. Cas. 67, R.

(284) S. 115—*Failure to take into account proposition of law—Revision.*

Revision lies if there is failure on the part of the lower Court to take into account a proposition of law as to which there can be no doubt. *Maung Pa Kyaw v. Janall*, 35 Ind. Cas. 436.

MAUNG KIN, J.

Reference:—2 L.B.R. 393, F.

(294-a) S. 115—*Revision—Erroneous order re payment of Court fee.*

Where an erroneous order is made re payment of Court fees the party affected by the order need not wait for a dismissal of his claim by disobeying the Court's order and then move the High Court, either by way of appeal or revision. The High Court can interfere with the order of the lower Court in exercise of the powers conferred by S. 115 of the Code. *Dodda Sannekappa v. Sakravva*, 36 Ind. Cas. 831.

SRINIVASA AYYANGAR, J.

References:—7 Ind. Cas. 92=12 C.L.J. 211=14 C.W.N. 932, F.

(395) S. 115—*Appellate Court—Decision regarding jurisdiction of original Court to try suit—When open to revision—Failure to exercise jurisdiction vested in it by law—Acted illegally—Meaning of the phrase—Appellate Court—Nature of proceedings before—Powers and duties.* *Ylppuluri Atohayya v. Kauchumarti Venkata Sestaramachandra Rao*, 13 M.L.T. 60=24 M.L.J. 112=18 Ind. Cas. 555=39 M. 195 (F.B.). See Final Part, 1913, Col. 351.

(396) S. 115—*Limitation Act (1908), S. 15 and Art. 182—Auction-purchaser—Application for delivery—Obstruction to the same—Dismissal of petition—Suit for declaration that properties are liable to be delivered—Second application for delivery within three years of the decree in second appeal, but more than three years after first application, if barred—Revision—Jurisdiction—Objection that a suit was wrongly conceived, whether can be taken for the first time in revision.* *Thomas Pillai v. Muthuraman Chetty*, 2 L.W. 609=30 Ind. Cas. 264. See Final Part, 1915, Col. 418.

(397) S. 115—*Presidency Small Cause Court, decision of, if subject to revision by the High Court—Jurisdiction—Presidency Small Cause Courts Act (XV of 1889), Ss. 19-A and 89—Right to apply for new trial, whether in the nature of an appeal—Order returning a plaintiff for presentation to proper Court—Application for new trial not made—Revision to High Court, if competent.* *Nageer Meera Sahib v.*

Civ. Pro. Code (1908)—(Continued).

Seokulal Sengupta, 2 L.W. 719—18 M.L.T. 254—(1915) M.W.N. 907—30 Ind. Cas. 488. See Final Part, 1915, Col. 418.

(388) S. 115—*Presidency Small Cause Courts Act* (XV of 1882), S. 41—*Erroneous decision on a question of law—Revisability by High Court—Extent of High Court's powers—S. 25, Act IX of 1887 (Provl. S. C. Courts)*. **Yankata-ramanjulu Naidu v. Ramaswami Naidu**, 2 L.W. 709—18 M.L.T. 164—29 M.L.J. 353—(1915) M.W.N. 728—30 Ind. Cas. 353. See Final Part, 1915, Col. 419.

(389) S. 115—*Revisional jurisdiction—High Court—Order granting temporary injunction—Case—Bombay Reg. II of 1927, S. 5—High Courts' Act* (24 and 25 Vic., c. 104), S. 2—*General Repealing Act* (XII of 1873). **Bal Atrani v. Deepsing Barla**, 17 Bom. L.R. 1097—40 B. 86—33 Ind. Cas. 358. See Final Part, 1915, Col. 421.

(340) S. 115—*Applicability when there is remedy by way of appeal and second appeal*. See **ABATEMENT**, No. 2, (1916) M.W.N. 301.

(341) S. 115—*High Court's power of interference in revision*. See **ACT IX OF 1887 (PROVL. S. C. COURTS)**, No. 7, 20 O.W.N. 1080.

(342) S. 115—*Decision of Subordinate Judge on the Small Cause side—Appeal—Revision—Procedure*. See **ACT III OF 1907 (PROVINCIAL INSOLVENCY)**, No. 55, 31 Ind. Cas. 15—5 L. W. 220.

(342-a) S. 115. See **BEN. ACT VIII OF 1885 (TENANCY)**, No. 51-c, 32 Ind. Cas. 982

(343) S. 115—*Decision of Revenue Court—Revision to High Court if competent*. See **MAD. ACT I OF 1908 (ESTATES LAND)**, No. 42, 3 L.W. 158.

(344) S. 115—*Tenant at fixed rates—Suit for arrears of rent—Presumption—Second appeal to District Judge—Revision*. See **U.P. ACT II OF 1901 (AGRA TENANCY)**, No. 5, 14 A.L.J. 281.

(345) S. 115—*Award filed—Objections taken to award—Date fixed for final disposal a day after filing objections—Application for adjournment rejected—Decree in accordance with award—Material irregularity—Revision*. See **AWARD**, No. 5, 14 A.L.J. 425.

(346) S. 115—*Competency of revision when there is no appeal*. See **EXECUTION OF DECREE**, No. 1, 3 L.W. 34.

(347) S. 115—*Collector refusing to make reference—Order, if, may be revised by the High Court—Mandamus*. See **LAND ACQUISITION ACT** (1894), No. 9, (1916) 2 M.W.N. 348.

(348) S. 115. See **REVISION**, No. 3, 31 M. L.J. 827.

(349) S. 115. See **REVISION**, No. 4, 34 Ind. Cas. 508.

(350) S. 115—*Civil Court taking action under S. 476, Crim. Pro. Code—Interference of High Court in revision under S. 499, Crim. Pro. Code*

Civ. Pro. Code (1908)—(Continued).

—*Legality—High Court's interference under S. 115, Civ. Pro. Code, when justifiable—Sanction to prosecute—Whether notice necessary*. See **SANCTION TO PROSECUTE**, No. 3, U.B.R. (1915), 3rd Qr., p. 88.

(351) S. 115—*Sanction for prosecution for perjury—Omission to specify the statements for which prosecution was ordered—Material irregularity—Revision*. See **SANCTION TO PROSECUTE**, No. 2, 14 A.L.J. 814.

(352) S. 115—*Application for sanction dismissed by Presidency Small Cause Court—Revisional powers of High Court—S 195, Crim. Pro. Code*. See **SANCTION TO PROSECUTE**, No. 1, 49 C. 597.

(353) S. 115. See Nos. 13, 97, 180, 177, 197 and 222, *supra*, and No. 274, *infra*.

(354) S. 115, O. I, r. 10, cl. (9), and O. XXIII, r. 3—*Powers of Courts in striking off and adding parties—Dismissing suit for non-prosecution, when plaintiffs compromise with only some of the defendants—Court if bound to pass a decree embodying the terms of the compromise under O. XXIII, r. 3—Appeal if lies, when no decree passed—Alternative remedy by way of revision under S. 115, Civ. Pro. Code, if lies—Erroneous application of section of law, if open to revision under S. 115, Civ. Pro. Code*.

In a suit for dissolution of partnership and for accounts, the plaintiffs, having received a large sum of money from some of the defendants, filed a compromise petition and asked for dismissal of the suit. The other defendants objected to the dismissal of the suit, praying that they might be made plaintiffs and allowed to continue the suit, and the plaintiffs, if necessary, might be made defendants. The Court held that it had no power under the new Civ. Pro. Code to make the transposition of parties asked for, and hence dismissed the suit for non-prosecution. The objecting defendants then asked the Court to draw up a decree so that they might appeal, but the Court did not draw up any decree.

Held—That the Court had ample powers under the new Civ. Pro. Code to make transposition of parties and it ought to have done that.

That it was not bound to pass a decree under O. XXIII, r. 3, and no appeal lies against the order of dismissal.

That the lower Court, having failed to exercise the discretion vested in it under O. I, r. 10, failed to exercise a jurisdiction vested in it in refusing to make the transposition prayed for, and hence that order is liable to be set aside on revision by the High Court. **Brojendra Kumar Das v. Gobinda Mohan Das**, 20 C.W. N. 752—34 Ind. Cas. 186.

D. CHATTERJEE and BEACHCROFT, JJ.
References :—2 Bom. H.C.R. 310; 7 B. 167; 30 B. 677, F.

(355) S. 115, O. III, r. 1, Sub. II, cl. 15 (1)—*Award filed in Court—Judgment pronounced in terms of award before expiry of ten days for*

Civ. Pro. Code (1908)—(Continued).

filing objections—Material irregularity—Revision—Bogus award—Duty of Court—Statement that a party agreed to the award—Effect—Admission whether conclusive—S. 81. Evidence Act—Court when must act *nunc pro tunc*—Pleader's authority to refer to arbitration. See AWARD, No. 10, 9 S.L.R. 183.

(256) S. 115, O. XX, r. 18 and O. XXVI, r. 13—*Partition suit—Compromise—Application for appointing a Commissioner to work out the shares, whether a step in the suit or in execution—Limitation, bar of, whether applicable to such an application—Practice—Court erroneously treating a petition in suit as one in execution—Appeal against the order, if competent.* *Srinivasa Mudali v. Ramasami Mudali*, 2 L. W. 693=18 M.L.T. 145=(1915) M.W.N. 745=30 Ind. Cas. 380. See Final Part, 1915, Col. 428.

(356-a) S. 115, O. XXI, r. 89—*Execution sale—Mere payment without application to set aside sale—Application if to be in writing—Amendment of petition—Revision.*

Mere payment without an application under O. XXI, r. 89 of the Code of Civil Procedure to set aside the sale is not sufficient (a).

It is, however, not necessary that the application to set aside the sale should be in writing. An oral application is sufficient (b).

Where a person with the object of setting the sale puts in a petition stating that he has paid the money into the treasury and the petition contains no formal prayer to set aside the sale, there is nothing to prevent the Court from allowing the petitioner to amend the petition by adding a formal prayer (c).

The High Court will not in a petition filed under S. 115 of the Civ. Pro. Code allow an unstamped memorandum, filed under the Civil Rules of Practice to notify a payment, to be stamped as a petition and to be amended by containing prayers to set aside the sale under O. XXI, r. 89, nearly 15 months after the application is barred. *Parat Yeethi Seethi v. Ambala Yeethi Kolathur*, 32 Ind. Cas. 45.

KUMARASWAMI SASTRI, J.

References:—(a) 13 Ind. Cas. 404=9 A.L.J. 12, F. (b) 22 Ind. Cas. 291=14 M.L.T. 534=(1914) M.W.N. 62, F. (c) 25 Ind. Cas. 883=2 L.W. 665, F.

(356-b) S. 115, O. XXIII, r. 1—*Suit withdrawn with liberty to bring fresh suit when plaint not defective.*

An order made by the lower appellate Court allowing an appellant to withdraw his suit with liberty to bring fresh suit on his petition alleging that some persons not named in the petition were necessary parties but had not been made parties could not be sustained since it could not be shown from the records that the plaint was, in reality, defective. *Upendra Chandra De v. Girish Chandra De*, 32 Ind. Cas. 402.

D. CHATTERJEE and BEACHCROFT, JJ.

(357) S. 115, O. XXIII, r. 1—*Absence of formal defect—Withdrawal of suit—Revi-*

Civ. Pro. Code (1908)—(Continued).

There is no general jurisdiction given by Civ. Pro. Code for allowing a party to withdraw except under the provision of O. XXIII, r. 1, Civ. Pro. Code.

If there is no formal defect in the case, the plaintiff cannot be allowed to withdraw the suit with liberty to bring fresh suit. If the plaintiff is allowed in such a case, the High Court will set aside the order. *Ramchandra Dar v. Hachunika Fakir*, 35 Ind. Cas. 843.

CHATTERJEE and MOWBOULD, JJ.

Reference:—16 C.W.N. 1037, Appr.

(257-a) S. 115, O. XLI, r. 10, cl. (2)—*Application for restoration of appeal rejected—Review—Order refusing to set aside order rejecting appeal—Appeal—Review rejected—Revision.*

Where an appeal was rejected under O. XLI, r. 10, cl. (2) of the Code of Civil Procedure, 1908, an application for the restoration of the appeal to the file may be treated as an application for review of the order rejecting the appeal.

No appeal lies from an order refusing to set aside an order rejecting an appeal under O. XLI, r. 10, cl. (2) (a).

Where the lower appellate Court is of opinion that in its view there is no ground for a review of its order rejecting an appeal under O. XLI, r. 10, cl. (2), Civ. Pro. Code, the High Court ought not to interfere with that order in the exercise of its revisional jurisdiction. *Mejajenessa Bibi v. Shelkh Didary*, 32 Ind. Cas. 86.

RICHARDSON and IMAM, JJ.

References:—(a) 30 A. 143=A.W.N. (1908) 53=5 A.L.J. 109=3 M.L.T. 221, R.

(358) S. 115 and Sch. II—Art. 158, *Limitation Act (1908)—Award—Objections filed in time—Refusal to hear by Court as being filed out of time—Revision, competency of—Jurisdiction.* *Nanjunda Chetty v. Ramasamy Chetty*, 2 L. W. 1115=31 Ind. Cas. 536. See Final Part, 1915, Col. 426.

(359) S. 115, Sch. II, r. 16—*Decree based on arbitration award, appeal from, and revision of.*

Rule 16 of the 2nd schedule of Civ. Pro. Code, 1908, lays down that there shall be no appeal from a decree which is in accordance with the award. But if it can be shown that the lower Court acted without jurisdiction or acted with material irregularity in dealing with the award, it would be open to the High Court on a proper case being made out to revise such an order. *Aramanal Rajagopala v. Aramanal Rangasami*, 31 Ind. Cas. 458.

ABDUR RAHIM and SPENCER, JJ.

Reference:—39 C. 167 (184) (P.C.), F.

(260) S. 115 and Sch. II, para. 16—*Decree in accordance with award—Appeal—Revision when maintainable—Court if can advise arbitrators.* See AWARD, No. 2, 11 P.W.R. 1916.

(261) Ss. 117, 151, O. XLI, r. 10—*Security for costs—Appeal from an order in insolvency—Jurisdiction of Appellate Court—S. 8 (2) (b), Presidency Towns Insolvency Act (III of 1909)—Practice. In the matter of Guberhone Seal, an insolvent; Sm. Lakhyria Das v.*

Civ. Pro. Code (1908)—(Continued).

Sm. Rajkishori Dasl, 20 O.W.N. 140=28 C. L.J. 24=48 O. 248=82 Ind. Cas. 8. See Final Part, 1915, Col. 426.

(362) S. 122, Bombay, r. III—O. III, r. 2. See POWER OF ATTORNEY, No. 2, 18 Bom. L.R. 821.

(363-a) S. 122, O. IX, r. 18—*Limitation Act*, 1908, S. 5—*Application to set aside ex parte decree—High Court's powers under S. 122, Civ. Pro. Code.*

S. 5 of the Limitation Act, as it stands, does not, and cannot, possibly extend the applications to set aside *ex parte* decrees. But the High Court has jurisdiction under S. 122, Civ. Pro. Code, 1908, to frame a rule making its provisions applicable to periods of limitation prescribed in the Act for presenting applications of this nature. **Seenuimall Goundan v. Palani Goundan**, 82 Ind. Cas. 975.

COUTTS-TROTTER, J.

(363-b) S. 141. See No. 71, *supra*.

(264) S. 141, O. II, r. 2 and O. XX, r. 12—*Execution—Decree for possession and mesne profits—Separate execution for possession and mesne profits, if allowable. Lingam Veeraghava Row v. Malapragada Gurnadha Row*, 2 L.W. 688=(1915) M.W.N. 793=30 Ind. Cas. 246. See Final Part, 1915, Col. 427.

(265) S. 144, scope of—*Transfer of decree—Objection overruled and transfer recognised—Suit by judgment-debtor to declare invalidity of transfer and for injunction to restrain the execution of decree—Realisation of decree amount—Suit decreed and injunction granted—Restitution.*

S. 144, Civ. Pro. Code, is very wide in its terms and is not confined to cases where restitution is claimed on the reversal of a decree in first or second appeal. Provided the decree is varied or reversed, the section applies, however the reversal or variance has been effected (a).

A transferee of a money-decree having applied for the recognition of the transfer and for permission to execute the decree, the judgment-debtors appeared and opposed the same. The objections were, however, overruled and the transfer recognised, with the result that a sum of Rs. 315-14-4 was realised from the judgment-debtors. After the objections had been overruled and before the realisation of the decree amount, the judgment-debtors had filed a suit for a declaration that the transfer was invalid and for an injunction to restrain the execution of the decree and, the taking out of the decree amount which had been deposited in Court. This suit was eventually decreed in favour of the judgment-debtors. The latter then applied in execution to recover from the transferee-decree-holder the amount which had been received by him from the Court in execution of his decree together with interest thereon.

Held, that the order recognising the transfer and allowing execution to proceed which determined a question arising between the judgment-debtor and the representative of the

Civ. Pro. Code (1908)—(Continued).

decree-holder was a decree, that the said order was superseded by the decree in the subsequent suit, that the order for payment to the transferee-decree-holder in execution of the first decree and the receipt of money by him in pursuance of that order were in fact superseded by the decree for injunction granted in the second suit, and that consequently S. 144, Civ. Pro. Code, applied to the case, and the judgment-debtors were entitled to restitution. **Subbarayudu v. Senhasani**, 3 L.W. 236=(1916) M.W.N. 155=19 M.L.T. 236=80 M.L.J. 366=88 Ind. Cas. 739.

SADASIVA AIYAR and MOORE, JJ.

Reference:—(a) 10 M.I.A. 203, 211, 212, F.

(266) S. 144—*Restitution—Bona fide auction-purchaser.*

Restitution cannot be obtained under S. 144 of the Code as against a *bona fide* purchaser for value at an auction sale held by a Court which had jurisdiction to hold the same. **Pearey Lal v. Hanif-un-nissa Bibi**, 14 A.L.J. 302=88 A. 240=84 Ind. Cas. 803.

PIGGOTT and RAFIQ, JJ.

Reference:—16 O.C. 225, F.

(267) S. 144—*Restitution—Costs and mesne profits—Nature of application for restitution—Is it an application to execute any decree? Asha Bibi v. Nuraddin*, 8 Bur. L.T. 165=80 Ind. Cas. 680=8 L.B.R. 262. See Final Part, 1915, Col. 428.

(268) S. 144—*Suit in ejectment—Decree in landlord's favour and possession taken—Tenant ultimately successful—Application for restitution and mesne profits—Set-off for rent due if claimable by landlord. See LANDLORD AND TENANT*, No. 9, 3 L.W. 405.

(269) S. 144. See RESTITUTION, No. 1, 24 O.L.J. 467.

(270) S. 144. See No. 98, *supra*.

(271) Ss. 144, 47—*Scope of S. 144—Ex parte decree—Sale in execution—Purchase by decree-holder—Crops taken by purchaser while in possession—Ex parte decree set aside—Suit for value of crops—Maintainability—Plaint treated as execution application under S. 47, Civ. Pro. Code.*

Appellants obtained an *ex parte* decree for rent against the respondents in execution of which they caused the respondents' holding to be put up for sale and purchased it themselves. Subsequently the *ex parte* decree was set aside, but in the meantime the appellants had been placed in possession and they had reaped the crops on the land.

Respondents filed this suit for the value of the crops taken by the appellants during the time they had possession of the holding. There was no formal prayer that the execution sale may be set aside. It was contended that the suit was barred by Ss. 47 and 144, Civ. Pro. Code.

Held that the words "Court of first instance" show clearly that S. 144 is intended to be confined to cases in which the decree has been varied or reversed by some superior Court or

Civ. Pro. Code (1908)—(Continued).

by reason of some order passed by a superior Court. The words "Court of first instance" seem to be used to distinguish the Court which is to grant the restitution from some other Court which has varied or reversed the decree. The suit is not barred by S. 144, Civ. Pro. Code.

Held also that the auction-purchaser being the decree-holder himself, the sale must, as a matter of course, be set aside at the instance of the judgment-debtor, and, the proper course for the present plaintiff respondent to pursue was to present an application under S. 47, Civ. Pro. Code. The High Court accordingly treated the plaint in the present suit as an application under S. 47 and upheld the decree passed by the lower Courts in favour of the respondent. *Chintaman Singh v. Chuni Sahu*, 1 Pk. L.J. 43—34 Ind. Cas. 747.

CHAMBER, C.J. and JWALA PRASAD, J.

(271-a) S. 144, O. XXI, r. 85—*Execution application for delivery of possession—Delivery effected—Subsequent application for the same relief.*

The final order of a Court on an execution petition for delivery of actual possession, recording that delivery had been effected in execution and satisfaction had been drawn up, could not be treated as a nullity by the party who filed such execution application praying for such delivery. Until that final order which negatives his right to obtain any further relief in restitution is vacated by a review or by proceedings taken in appeal or revision, a second application for the same relief already granted and recorded as obtained by him is not maintainable. *Chockalinga Mudali v. Gopalathathachariar*, 32 Ind. Cas. 46.

SADASIVA IYER and NAPIER, JJ.

References:—32 Ind. Cas. 44=29 M.L.J. 504, R.

(272) S. 145. See Nos. 81, 99, 130 and 181, *supra*.

(273) S. 148—Application for execution amended and represented after the time allowed by the Court—Applicability of S. 148. See LIMITATION ACT (1908), No. 296, 30 C.W.N. 615.

(274) Ss. 148, 115, O. XX, r. 14—Pre-emption decree—Price for pre-emption directed to be deposited within one month—Decree-holder's application for extension of time granted—Deposit made within extended time—Interference in revision. See PRE-EMPTION, No. 5, 20 C.W.N. 860.

(275) Ss. 148, 149—*Court-fees, deficiency of—Court's discretion—Discretion, if may be challenged in appeal.*

A Judge passing orders under S. 149 of the Code of Civil Procedure for payment of deficit Court-fees, must be taken on the record as it stands to have exercised his discretion as provided by the section; and an appellate Court cannot go into the question as to whether he exercised his discretion in making the various

Civ. Pro. Code (1908)—(Continued).

orders of payment. *Priyanath Bachher v. Meajan Sardar*, 24 O.L.J. 88.

JENKINS, C.J. and N.R. CHATTERJEE, J.

(276) S. 148 and O. XXXIV, r. 8, *proviso—Redemption suit—Dismissal by first Court—Decree by appellate Court—Extension of time—Jurisdiction—S. 148, Civ. Pro. Code, if applicable to extension of time for doing acts allowed by decrees. Dharmaraja Aiyar v. Sreenivasa Mudaliar*, 2 L.W. 1074=18 M.L.T. 486=29 M.L.J. 708=39 M. 876=31 Ind. Cas. 240. See Final Part, 1915, Col. 481.

(277) S. 149. See No. 275, *supra*.

(278) S. 149, O. IV, O. V, r. 1; O. VII, r. 11. See LIMITATION, No. 2, 1 Pat. L.J. 420.

(279) S. 149, O. VII, r. 11—Memorandum of appeal presented along with application for leave to appeal as pauper—Latter application dismissed—Time given to pay Court-fee on memorandum of appeal—Court's power to grant time. See CIV. PRO. CODE (1908), No. 690, 31 M.L.J. 269.

(280) S. 150—Act V of 1881 (*Probate and Administration*), Ss 56, 76, 98—*Probate—Inventory—Bifurcation of District—Transfer of property—Inventory if could be demanded by Court granting probate.*

Having regard to the saving clause in the beginning of S. 150, Civ. Pro. Code, the language of S. 98 of the Probate and Administration Act is clear and imposes on the grantee, the duty of furnishing the inventory to the Court which issued the probate. S. 76 also shows that the undertaking is given to the Court which granted the probate. See also S. 56 of the Probate and Administration Act. That jurisdiction cannot be said to have been taken away, because the properties dealt with in probate are within the jurisdiction of another Court by reason of the bifurcation of the district. *Subramania Chetty v. Ramasami Chetty*, 31 Ind. Cas. 499.

SESHAGIRI AIYAR and KUMARASWAMI SASTRI, JJ.

(281) S. 150. See Nos. 70 and 72, *supra*.

(282) S. 51—*Inherent powers of Court—Time fixed for deposit of money—Extension of time on application after expiry of time fixed.*

When appeal is filed against a decree or order directing deposit of money by a certain date, application for extension of time should be made before the date fixed for payment; but under S. 151, Civ. Pro. Code, a Court has power to extend time even on an application made after such date, if it is necessary for the ends of justice. *Ko Bat v. Maung Kya Baw*, 9 Bur. L.T. 83=32 Ind. Cas. 509.

FOX, C.J.

(283) S. 151—*Order confirming Court sale in favour of transferee from bidder—Power of Court to rectify such erroneous order—Limitation.*

The transferee from a bidder at a Court sale cannot be declared an auction-purchaser and

Civ. Pro. Code (1908)—(Continued).

therefore an order confirming the Court sale in favour of such transferee is erroneous. Under the provisions of S. 151, Civ. Pro. Code, the Court has jurisdiction to set aside that erroneous order, on the error being brought to its notice, and in such a case no question of limitation arises. *All Muhammad v. Alla Khanum*, 80 Ind. Cas. 230.

STUART, A.J.C.

(284) S. 151—Consent decree—Power of Court to vary or set aside same.

Where there was no variance between the decree and the *solenamah* on which the decree was based the decree cannot be varied or set aside under S. 151, Civ. Pro. Code. *Wajid Ali v. Khurshed Assam*, 86 Ind. Cas. 239.

CHATTERJEE and SHEEPSHANKS, JJ.

(285) S. 151—Creditor's petition for adjudication—No adjudication—Power of District Court to stay sale in the Sub-Court. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 10, 8 L.W. 260.

(286) S. 151. See MAD. ACT I OF 1908 (MADRAS ESTATES LAND), No. 39-a, 82 Ind. Cas. 967.

(286-a) S. 151. See Nos. 19, 65, 98, 122, *supra*.

(287) Ss. 151 and 152—Their scope—Reductio ad absurdum—Defective judgment and decree—Compensation for pre-emptor remaining out of possession of pre-empted property—Interest.

Held, that S. 152 of Act V of 1908 is wide enough to enable a Judge to avoid *reductio ad absurdum*. So, where the time allowed in the judgment and decree to the vendee for removing his materials of the building erected by him on the pre-empted site had expired long before the date of the decision and had consequently become impracticable for him to do so, the Chief Court on an application made by the vendee under Ss. 151, 152 of the Code of Civil Procedure, 1908, amended both the judgment and the decree so as to fix fresh period within which the vendee could remove his materials.

Held, also, that where a vendee by his act or omission deprives the pre-emptor both of the use of the pre-emption, money and the pre-empted property the pre-emptor is entitled to get reasonable interest for the time he is so deprived. In this case 6 per cent. per annum was allowed. *Musammatt Bardar Begam v. Jhanda Mal*, 170 P.W.R. 1916.

SIR DONALD JOHNSTONE, C.J.

(288) Ss. 151, 152 and 153, O. XX, r. 8, O. XLVII, r. 1—Scope of—Decree in conformity with judgment—Courts, if can amend decree—Judgment patently erroneous in law, if affects power of amendment—Party, if can apply in execution for amending or correcting judgment and decree—Amendment petition treated as a review.

A Court has no power to vary or amend a decree, when it is in conformity with the judgment, not even if the judgment is erroneous in

Civ. Pro. Code (1908)—(Continued).

law, and even if the error be apparent on the face of the judgment.

A party to a suit, who has not appealed against a decree or applied for review of judgment, cannot be allowed in execution proceedings to contend that the judgment and decree are erroneous and to ask that they should be amended or corrected.

In a partition suit, the matters in dispute were referred to arbitration and it was provided that the costs of the parties should be deducted and paid out of the '*raasi amount*', i.e., the joint family funds. The *interim* decree, embodying the terms of the award, was silent as to costs. The final decree, however, directed that defendants should pay the plaintiffs 2 to 4 their costs. The defendants did not appeal against this decree and the plaintiffs, thereupon, applied for execution of the decree as to costs. Some of the defendants then presented petitions under Ss. 151, 152 and 153 and O. XX, r. 6, Civ. Pro. Code, praying that the direction as to payment of costs might be expunged from the decree as it was not found in the award. The Subordinate Judge who heard all the applications together found that the costs incurred by the plaintiff had already been fully paid up and struck out the direction in the decree regarding the payment of costs.

Held, that none of the sections applied to the case and that the order was illegal and ought to be set aside.

The application was, however in the circumstances of the case, allowed to be treated as a review petition and deficient stamp allowed to be paid in the High Court. *Tadepalli Pit-chayya v. Tadepalli Subba Rao*, 8 L.W. 499.

SADASIVA AYYAR and MOORE, JJ.

(289) Ss. 151, 152, O. XLVI, r. 1—Reference to Chief Court—When reference is competent—Case heard on revision at the request of parties—Review of judgment—Court Fees Act (VII of 1870), S. 15—Refund of Court-fee—Improvements—Compensation—Building—Improvements by mortgages.

The original Court passed a decree excluding certain properties claimed by the plaintiff, but upon an application made by him under Ss. 151 and 152, Civ. Pro. Code, the Court modified the decree by including those properties therein. The defendant appealed, but the appellate Court being of opinion that no appeal lay against an order passed under these sections, a reference was made to the Chief Court for orders as to what should be the procedure to be followed in the case.

Held, that under r. 1, O. XLVI, Civ. Pro. Code, the reference was not competent. The object of the aforesaid sections is to supplement and not to replace the remedy provided for in the rest of the Code. The remedy open in this case was one of review of the judgment. *Labbhu Ram v. Amir Chand*, 73 P.L.R. 1916—105 P.W.R. 1916—35 Ind. Cas. 698.

SHADI LAL and LE-ROSSIGNOL, JJ.

Civ. Pro. Code (1908)—(Continued).

(290) S. 151, O. XXI, rr. 89 and 92—*Application to set aside the sale—Deposit—Extension of time—Power of Court to extend.*

The requirement of O. XXI, r. 92, cl. (2) of the Code of Civil Procedure that deposit under r. 89, should be made within 30 days from the date of sale is not merely directory but mandatory, and the Court has no power to extend the time given by the Code to make such deposit. *Yannuswamy Thevar v. Periaswamy Thevar*, 19 M.L.T. 192—(1916) M.W.N. 179—3 L.W. 271—33 Ind. Cas. 996.

SADASIVA AIYAR and MOORE, JJ.

(291) S. 151, O. XLI, rr. 1, 11, O. XLVII, rr. 4, 7—*Appeal—Copy of decree appealed from filed after the prescribed period of limitation—Permission of Court not obtained—Effect—Validity of appeal—Appeal dismissed at preliminary enquiry—Application by appellant for review ordered ex parte—Prejudice to respondent—Objection by respondent—Selling aside of ex parte order at final hearing of appeal—Inherent power of Court—Application for review—Notice to opposite party necessary.* *Abdul Hakim Chowdhury v. Hem Chandra Das*, 42 C. 433—30 Ind. Cas. 165. See Final Part, 1915, Col. 488.

(292) S. 151 and O. XLI, r. 23—*Appeal—New party, addition of—Remand to lower Court—Procedure.* *Antoni Juaa Prabhu v. Ramakrishnaaya*, 2 L.W. 1034—31 Ind. Cas. 263. See Final Part, 1915, Col. 489.

(293) S. 152. See Nos. 287, 288, 289, *supra*.

(294) S. 152 and O. XLI, r. 33—*Specific performance, suit for—Time fixed for payment of the price—Appeal—Decree of the First Court confirmed—Subsequent application in the appellate Court to extend time for payment of price—Jurisdiction.*

In a suit for specific performance of a contract of sale, the Court of First Instance gave the plaintiff one month's time for the payment of the price and this decree was confirmed on appeal. More than one month after the date of the appellate decree, the plaintiff offered to pay the money and moved the appellate Court to extend the time originally fixed by the Court of First Instance for payment of the price. This application was granted.

Held, on revision, that the appellate Court had no jurisdiction to extend the time and that the order so extending time must be set aside. *Gopala Aiyar v. Sannaal*, 3 L.W. 29—19 M.L.T. 137—32 Ind. Cas. 401.

SRINIVASA IYENGAR, J.

References:—31 M. 28; 1 L.W. 882, *F.*; 16 Bom. L.R. 778, *Not F.*

(295) S. 153. See No. 288, *supra*.

(295-a) S. 153, O. VI, r. 17—*Amendment—Power to allow amendment enabling continuance of suit on cause of action arising pendente lite—Enlarged powers under Civ. Pro. Code (1908).* *Musammam Nur Khatun v. Sumar Sawayo*, 9 S.L.R. 6;—31 Ind. Cas. 7. See Final Part, 1915, Col. 484.

Civ. Pro. Code (1908)—(Continued).

(296) S. 153 and O. VI, r. 17—*First Court and appellate Court—Powers of amendment.* See PARTITION, No. 4, 20 C.W.N. 1276.

(296 a) O. I—*Addition of parties—Discretion of Judge—Appeal from order.*

Orders made under O. I, Civ. Pro. Code, are non-appealable. These orders for adding parties rest on discretion of the trying Judge and against that discretion there is no appeal. *Srimati Bibijan Bibi v. Abdul Jabbar Dattary*, 36 Ind. Cas. 919.

FLETCHER and NEWBOULD, JJ.

(296-b) O. I, r. 1. See PARTIES TO SUIT.

(297) O. I, r. 1—*Scope—One suit by different sets of plaintiffs claiming in the alternative—Legality.* See PLEADING, No. 2, 10 P. R. 1915.

(298) O. I, rr. 1, 9, O. XXXII, r. 3. See LIMITATION ACT (1908), No. 38, 35 Ind. Cas. 868.

(298-a) O. I, r. 3. See PARTIES TO SUIT.

(299) O. I, r. 3—*Parties—Ghatwal—Ghatwali land—Suit—Secretary of State.*

Though the Secretary of State may be a proper party to a suit by a tenant against the landlord, a *ghatwal*, for declaration of occupancy rights in *ghatwali* land and for recovery of its possession yet he is not a necessary party and the suit cannot be dismissed for the non-joinder of the Secretary of State.

It may be pointed out that a *ghatwal* is not a mere servant of Government but has an interest in the *ghatwali* land held by him. *Kallash Mal v. Dwarika Nath Majhi*, 35 Ind. Cas. 788.

FLETCHER and TEUNON, JJ.

(300) O. I, r. 3—*Mis joinder of causes of action—Removal of crops by each individual tenant—Conspiracy neither alleged nor proved.* *Ramanathan Chetty v. Mallaka Anjappan*, 24 Ind. Cas. 818—4 L.W. 399. See Final Part, 1915, Col. 435.

(301) O. I, r. 3. See No. 178, *supra*.

(301-a) O. I, r. 4. See BEN. ACT VIII OF 1885 (BENGAL TENANCY), No. 22-a, 32 Ind. Cas. 749.

(301-b) O. I, r. 8. See PARTIES TO SUIT.

(302) O. I, r. 8—*Suit by plaintiffs as representing a caste section—Meeting of the caste for authorising plaintiffs—Meeting not regularly convened—A number of caste people supporting plaintiff's action subsequent to suit cannot validate the action.*

The Dasa Lad Banias of Broach were divided into two sections, known as the Mojumpurias and Sheherias. The headman of the whole caste was defendant No. 1 who collected fees of both the sections separately and entered them in separate account-books. The plaintiffs filed the present suit against defendant No. 1 under

Civ. Pro. Code (1908)—(Continued).

O. I, r. 8, for taking accounts from defendant No. 1 and recovering from him the amount that might be found due on such accounts being taken. At a meeting of the Mojumpuria section, the plaintiffs were authorized to bring the suit. The meeting was, it appeared, irregularly convened. Subsequent to the filing of the suit, 112 out of 183 members of the Mojumpuria section expressed their adherence to the position which the plaintiffs were adopting; while 70 members supported defendant No. 1. The trial Court granted both reliefs; but the District Judge granted only the relief as to taking of accounts. On second appeal,

Held, (1) that the plaintiffs could not, under O. I, r. 8 of the Civ. Pro. Code, sue on behalf of those numerous members of the Mojumpuria section who were in diametrical opposition to them in the present controversy.

(2) That it was not possible to call in aid the private expressions of consent obtained after suit filed, so as to supply that authority which was admittedly lacking at the time when the suit was in fact filed.

(3) That, therefore the suit as constituted must fail. *Harkisoodas v. Ohhaganlal*, 18 Bom. L.R. 1—40 B 158—33 Ind. Cas. 264.

BATCHELOB and HAYWARD, JJ.

(303) O. I, r. 8—*Dedication of land—Purchase by a community—Conveyance of property to pujari of temple for management—Right of community to assert right against pujari's heir claiming property as his own—Proper form of decrees.*

A section of the Hindu community raised money for the purchase of a plot of land for the erection of a temple thereon. The property so purchased was dedicated for religious service and entrusted to a member of the community as *pujari* of the temple: On the death of the *pujari* the defendant alleging himself to be his heir claimed the temple and its site as his own. Thereupon the plaintiffs having applied to the Court under O. I, r. 8, to be appointed to represent the community, leave was given to them by the Court as required by law. They claimed in the suit that the temple and its site was a religious charitable trust belonging to the members of their community and prayed for an injunction against the defendant. **Held** that in the circumstances of the case the plaintiffs were entitled to maintain an action against the defendant who set up a title in himself and for a declaration that the property belonged to them (a).

The decree that should be passed in the suit must be that the plaintiffs were entitled to a declaration that the property was a public, religious and charitable trust, and that the defendant had no right or title thereto whatsoever, but was a mere trespasser. The plaintiff was further entitled to an injunction restraining the defendant from interfering with the property in question. *Sukhdeo Prasad v. Gopal Misra*, 86 Ind. Cas. 976.

ATKINSON and KINGSFORD, JJ.

Civ. Pro. Code (1908)—(Continued).

References:—(a) 21 M. 10—7 Ind. Dec. (N.S.) 364; 4 C. 33—2 O.L.R. 249—1 Shome L.R. 163—2 Ind. Dec. (N.S.) 22, R.

(303-a) O. I, r. 8. See Nos. 88, 179, *supra*.

(304) O. I, r. 8 and O. XXIX, r. 1—*Suits by or against corporations—Unincorporated societies or clubs.*

O. XXIX, r. 1 of the Code of Civil Procedure applies only to corporations strictly so-called i.e., to bodies authorised by law to act as a person in law, and not to unincorporated bodies or associations of men.

An officer of an unincorporated association can file a suit on behalf of the association only with special permission of the Court under O. I, r. 8. *Ma Gyl v. Pat Lon*, 9 Bur. L.T. 247.

U KIN, J.

(304-b) O. I, r. 9. See PARTIES TO SUIT.

(305) O. I, r. 9—*Scope and application of—Want of proper parties to suit—Dismissal of suit.*

O. I, r. 9, only applies to cases where relief can be given if the necessary parties are joined and the application is within time; but, it has no application to cases where the parties to be joined are barred in the assertion of their rights. If they are barred, then the Court, even though it may join them, can give no relief at all, and the action consequently must be dismissed (a).

If a plaintiff proceeds to trial to recover property which is the joint property of two or more persons, and he omits to join all proper and necessary parties, and if when the case comes to trial, the rights of those who ought to be added as parties to the suit are barred by limitation, then the Court has no alternative but to dismiss the application for want of proper or defective joinder of parties.

"If a necessary party is not on the record, the proper course is to apply to have him joined. If he is not brought on the record at all, or if, when he is brought on the record, the suit as against him is barred by limitation, the whole suit will be dismissed." *Bhagelu Koer v. Abdul Rahman*, 1 Pat. L.J. 472-N—86 Ind. Cas. 77.

ATKINSON, J.

References:—(a) 6 C. 815; 14 O. 791; 7 B. 217; 31 C. 487; 21 B. 154; 14 A. 574; 22 Ind. Cas. 570; 24 Ind. Cas. 25; 24 Ind. Cas. 259; 27 B. 31, R & F.; 19 Ind. Cas. 963, F.

(306) O. I, r. 9—Occupancy holding mortgaged prior to Agra Tenancy Act—Rent suit—Parties. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 20, 31 Ind. Cas. 456.

(307) O. I, r. 9. See No. 298, *supra*.

(308) O. I, r. 9, and O. XXXIV, r. 1—*Scope and application of.*

O. I, r. 9, which provides that no suit shall fail by reason of mis-joinder of parties is subordinate to O. XXXIV, r. 1, which makes it imperative that all persons interested in the

Civ. Pro. Code (1908)—(Continued).

mortgage security shall be joined as plaintiffs. *Glewar Narain Mahton v. Musammatt Mah-bunessa*, 1 Pat. L.J. 468—36 Ind. Cas. 549.

ROSE and JWALA PRASAD, JJ.

(808-a) O. I, r. 10. See PARTIES TO SUIT.

(309) O. I, r. 10—*Addition of party—Service of summons—Date of commencement of proceedings against such person.*

Where a person is added as a party, after institution of the suit, under O. I, r. 10, cl. 5, Civ. Pro. Code the proceedings against him commence when the summons is served on him. *Fakhr-un-nissa Bibi v. Imdad Ali*, 30 Ind. Cas. 795.

BAILLIE, S.M. and TWEEDY, J.M.

(310) O. I, r. 10—*Plaintiff found to have no cause of action—Procedure—Power to import other persons as co-plaintiffs.* See BUDDHIST LAW (INHERITANCE), No. 2, 8 Bur. L.T. 283.

(311) O. I, r. 10. See Nos. 180, 212, 254, *supra*.

(311-a) O. I, r. 10, O. XXII, r. 4—*Application to implead legal representatives in individual capacity.*

Under O. I, r. 10, Civ. Pro. Code, 1908, an application to bring on record legal representatives of a deceased defendant, wrongly impleaded as such, in their individual capacity and not as legal representatives is maintainable. It cannot be said that such an application is not maintainable because a prior application under O. XXII, r. 4, was rejected. *Jagat Guru Chandra Sekhara v. Kumarasami Goundan*, 32 Ind. Cas. 320.

KUMARASWAMI SASTRI, J.

Reference:—31 M. 86, R.

(312) O. II, r. 2—*Cause of action, splitting up of—Different causes of action.*

One Tukaram having died in 1901, his widow Bhagirathi sold in January 1906, two of his fields, Survey Nos. 403 and 404, to Dagdu, and one field, Survey No. 324, to Zagdu. Dagdu, Zagdu and Ukardu were brothers joint in estate. Bhagirathi died in 1909. In 1910, Bahini, a daughter of Tukaram, claiming to be entitled to her father's estate, filed a suit against her sister Tapi and Zagdu to recover possession of Survey No. 324. The suit was dismissed at Bahini's request. Bahini then having sold her right in Survey Nos. 403, 404 and 324 to the plaintiff, the latter filed a suit to recover possession of the lands against Bahini, Tapi, Dagdu, Zagdu and Ukardu. The lower Courts held that, as Bahini omitted to sue in respect of Survey Nos. 403 and 404 in 1910, the plaintiff was barred, by the Civ. Pro. Code, O. II, r. 2, from preferring his claim to those numbers in the present suit. The plaintiff having appealed:

Held, that the suit was not barred under O. II, r. 2, of the Civ. Pro. Code, inasmuch as the causes of action in the two suits were different, the two sets of facts which required to be proved in both suits in order to enable the

Civ. Pro. Code (1908)—(Continued).

plaintiff to succeed being different sets of facts. *Sonu Khushal Khadake v. Bahinibai Krishna*, 18 Bom L.R. 45—40 B. 351—33 Ind. Cas. 950.

BATCHELOR and HAYWARD, JJ.

(313) O. II, r. 2—*Partition—Joint Hindu family—Suit for partition of property in Allahabad—Previous suit for partition of property at Sultanpur.*

Plaintiff brought a suit for partition of a house situated in Allahabad and for a declaration that a deed of gift in respect of it was invalid. He had brought a previous suit at Sultanpur for partition of property situated there alleging that he had been dispossessed. *Held*, that O. II, r. 2 of the Code of Civil Procedure did not bar the suit. *Ram Harakh v. Ram Lal*, 14 A.L.J. 257—38 A. 217—33 Ind. Cas. 124.

PIGGOTT and WALSH, JJ.

(314) O. II, r. 2—*Mortgage—Mortgagee entitled to profits—Right to possession on non-payment—Suit for profits—Subsequent suit for possession, maintainability of.*

A mortgage-deed provided that the mortgagee was entitled to receive a certain amount annually by way of profits from the mortgagors who were to remain in possession of the land mortgaged; and in the event of non-payment of the amount of profits agreed upon, he was entitled to sue for recovery of the profits or to obtain possession of the land in lieu of the principal mortgage-money and the profits due. A default having been made, the mortgagee sued for profits only as the land was in possession of third parties. Subsequently the mortgagors came into possession of the land and the mortgagee sued for possession:

Held, that the suit was not barred by O. II, r. 2, of the Civ. Pro. Code, inasmuch as at the time of the previous suit the mortgagee was precluded from suing for possession under the terms of the mortgage-deed. *Nathu Mal v. Tiloka*, 42 P.W.R. 1916—32 Ind. Cas. 719.

SHAH DIN, J.

References:—28 P.R. 1907—140 P.W.R. 1907; 268 P.W.R. 1912—17 Ind. Cas. 581, D.

(315) O. II, r. 2—*Splitting of claim—Mortgage with possession—Mortgaged property leased to mortgagor—First suit for rent—Second suit for principal money not barred.*

The mortgagee sued the mortgagor for recovery of rent of mortgaged property which the mortgagee had leased to the mortgagor. Subsequently he sued for recovery of mortgage money which he had advanced to the mortgagor.

Held, that the subsequent suit was not barred by r. 2 of O. II of the Civ. Pro. Code, for the cause of action in the two suits was not the same. *Pinoli Das v. Lal Chand*, 103 P.L.R. 1916—36 Ind. Cas. 209.

SHADI LAL and LE ROSSIGNOL, JJ.

(316) O. II, r. 2—*Plaintiff aware of the relief he is entitled to—Omission to claim it—Subsequent suit barred.* *Adul Hakim Khan v.*

Civ. Pro. Code (1908)—(Continued).

Karan Singh, 13 A.L.J. 929—87 A. 646—80 Ind. Cas. 951. See Final Part, 1915, Col. 437.

(817) O. II, r. 2—*First suit dismissed as brought for partial partition—Whether second suit lies for partition of all joint properties.* Gulab Shah v. Havell Shah, 87 P.R. 1915—181 P.W.R. 1915—81 Ind. Cas. 468, See Final Part, 1915, Col. 437.

(818) O. II, r. 2—*Omission to sue for a portion of claim—Subsequent suit for that portion if lies.* Kall Kumar Chuckerbutty v. Alam, 90 C.W.N. 169—88 Ind. Cas. 139. See Final Part, 1915, Col. 488.

(819) O. II, r. 2—*Suit for damages for breach of covenant in registered Zur-i-peshgi lease—Claim not made in previous suit—Bar of suit.* See LIMITATION ACT (1908), 192-b, 34 Ind. Cas. 51.

(820) O. II, r. 2—*Plaint in first suit returned for presentation to proper Court—No re-presentation—Subsequent suit if barred.* See LIMITATION ACT (1908), No. 143, 9 L.W. 193.

(821) O. II, r. 2. See Nos. 39, 264, *supra*.

(822) O. II, r. 2, cl. (1) and (2)—*Duty of plaintiff to lump together several causes of action—Bar of subsequent suit.*

R. 2, of O. II, Civ. Pro. Code, does not compel a plaintiff who has several causes of action to lump them together under the penalty of having the subsequent suit barred. The section does not say that every suit shall include every cause of action or every claim which the party has, but only that every suit shall include the whole of the claim arising out of the cause of action, meaning the cause of action for which the suit is brought. If the causes of action are distinct a subsequent suit will not be barred. *Sumeka Das v. Balkuntha Chandra Das*, 80 Ind. Cas. 607.

ASUTOSH MOOKERJI and CHAPMAN, JJ
References:—16 A. 165—A.W.N. (1894) 65, D.; 12 I.A. 116—8 M. 520—9 Ind. Jur. 274—4 Sar. P.O.J. 638, Rel.; 6 C.W.N. 585, R

(828) O. II, r. 2, sub-r. (8)—*Suit for royalty—Accidental omission of portion of claim already due—Court's power to reserve portion of cause of action—Amendment of plaint which would deprive defendant of plea of limitation, if should be allowed—Consolidation of suits pending appeal.*

Where it appeared from certain leases that the causes of action as regards minimum royalty and excess royalty were the same, but the lessor sued only for the minimum royalty which had fallen due at the date of the suit:

Held, that he was precluded by O. II, r. 2 of the Civ. Pro. Code, from suing again for the excess royalty, even though, in decreeing the previous suit, the Court expressly reserved the plaintiff's cause of action in respect of excess royalty.

O. II, r. 2, sub-r. (8) of the Civ. Pro. Code does not authorize the Court to split up the plaintiff's cause of action, but only to allow the plaintiff to pursue the reliefs in respect of the same cause of action at different times.

Civ. Pro. Code (1908)—(Continued).

Where the plaintiff sued for royalties due on a mining lease during a specified period, excluding from his claim certain previous arrears which were also due, on the ground that certain amounts paid by the defendants during the period of suit had been appropriated in discharge of these previous arrears, but the Court held that the payments should have been appropriated in discharge of a portion of the arrears sued for.

Held—that a subsequent suit for the recovery of the arrears excluded from the claim in the previous suit was barred by O. II, r. 2 of the Civ. Pro. Code

Even an accidental or involuntary omission by a plaintiff of a portion of his claim is covered by the rule (a).

The Court would proceed to consolidate suits, if at all, only where the consolidation is asked for before the trial of the suits begins, and the evidence to be given is common to both.

The High Court declined to consolidate two suits already decided in the first instance by the lower Courts, in which appeals were pending before it, the suits having been tried in the lower Courts by different Judges and on evidence recorded separately in each suit.

Thā High Court also refused leave to amend a plaint when the amendment, if permitted, would deprive the defendants of the right that the law had given them, *vis.*, to state or allege that the claim was legally barred. *Jagardan Kishore Lal Singh Das v. Sib Prosad Ram*, 20 C.W.N. 475—43 C. 95—36 Ind. Cas. 179

FLETCHER and TEUNON, JJ.

References:—(a) 11 M.I.A. 551, F.; 12 W.R. 79, R.

(824) O. II, r. 2, cl. (3)—*Omission to obtain leave for suit for other reliefs on same cause of action—Subsequent suit barred—Jurisdiction to grant leave.*

Omission in a previous suit for cancellation of a deed to ask for leave to bring a separate suit for possession will bar a subsequent suit for possession under O. II, r. 2, cl. (3).

The competence of a Court to give leave to a plaintiff to omit to sue for a relief to which he is entitled, does not depend on the pecuniary value of the claim in respect of which such leave is sought. *Maung On Gaing v. Ma On Sin*, 9 Bur. L.T. 98—88 Ind. Cas. 135.

U KIN, J.

(825) O. II, r. 8—*Suit separately cognisable by Small Cause Court—Several causes of action combined in one suit—Aggregate value of suit—Jurisdiction of Subordinate Judge—Suit on pro notes—Execution admitted—Plea of absence of consideration—Onus.* Chhragh Din v. Bhagwan Das, 100 P.R. 1915—82 Ind. Cas. 40. See Final Part, 1915, Col. 489.

(826) O. II, r. 3. See REFERENCE, No. 1, 9 Bur. L.T. 226.

(827) O. II, r. 5. See SPECIFIC RELIEF ACT, No. 1, 35 Ind. Cas. 792.

(828) O. II, r. 6—*Separate trial—Causes of action essentially of different character.*

Civ. Pro. Code (1908)—(Continued).

The case that is contemplated by O. II, r. 6, which authorises the Court to exclude a cause of action and directs a separate trial, is a case where the causes of action joined in the same suit are essentially of different character. In such a case the Judge has the power to direct a separate trial of the two different causes of action.

Plaintiff sued against two classes of defendants; *first*, against certain persons who were formerly the executors of her husband's will and, *secondly*, against certain persons who had been constituted as trustees to a certain charity established by her deceased husband under a scheme settled by the District Judge under a compromise entered into between the persons who were the executors and the then guardian of the plaintiff, she being at that time a minor.

The plaintiff alleged that the scheme settled by the District Judge was obtained by fraud and that it was not binding on her. The lower Court excluded the first cause of action from the suit. *Held* that the facts alleged by the plaintiff arose out of the facts that were common to both the causes of action. Therefore the lower Court was not justified in excluding the first cause of action under the provisions of O. II, r. 6. **Nandaram Das v. Hari Charan Gangopadhyaya**, 36 Ind. Cas. 29.

FLETCHER and TRUNON, JJ.

(328-a) O. III, r. 1. See **LEGAL PRACTITIONERS**.

(329) O. III, r. 1—Usurping functions of a pleader — Remedy. See **LEGAL PRACTITIONERS ACT, 1879**, No. 3, 8 Bur. L.T. 280.

(330-340) O. III, r. 1—Pleader's acts how far binding on clients—Pleader's authority to compromise — *Vakalatnamah* containing such authority whether sufficient—Form IV, *Sind Courts Civil Circulars*. See **PLEADER AND CLIENT**, No. 5, 9 S.L.R. 218.

(341) O. III, r. 1. See No. 255, *supra*.

(342) O. III, r. 1, O. VI, r. 14—*Plaint signed by authorised agent—Act II of 1901 (Agra Tenancy)*, S. 193 (a).

The provisions of r. 14, O. VI, that a plaint should be signed by the party are subject to the provisions of O. III, r. 1, which allow any act required by law to be done by a party to be done by the authorised agent of that party. But it is otherwise if the suit has not been instituted with the approval of the actual plaintiff. **Amle up-Nissa v. Ram Charan Das**, 31 Ind. Cas. 859.

BAILLIE, S.M.

Reference :—A.W.N. (1891) 152, D.

(348) O. III, r. 2—Power-of-attorney—Admissibility in evidence. See **EVIDENCE ACT**, No. 48, 18 O.C. 372.

(344) O. III, r. 4—*Scope and application of—Appearances by pleader not duly authorised—Delegation of duties by one legal practitioner to another; practice as to—Legality—Power of attorney.*

Civ. Pro. Code (1908)—(Continued).

The provisions of O. III, r. 4 of the Civ. Pro. Code, 1908, are clear and imperative, and the Courts have no power to relax them.

An act or appearance by any pleader, not duly appointed by the person for whom he is to act, is no act or appearance in law.

"Where a pleader is expressly empowered to employ a colleague to act for or with him he may make the appointment. But if he does so, he must obey O. III, r. 4 (1) of the Civ. Pro. Code. The only exception is that provided by cl. (8) of the same rule. Where a pleader, *duly authorised by a power-of-attorney to act in this behalf*, appoints a legal practitioner of the classes described in cl. (9) to act for him, the latter is of course not under any obligation to produce written authority. But if the pleader appointing him has no express written authority to appoint a barrister or advocate, the latter cannot legally appear for him. It is desirable that the bar will give special attention to these provisions of the law, and regulate their practice accordingly, so as to avoid such failures of duty and loss to parties as the unauthorized delegation of work must involve." (Per **Stanyon, A.J.C.**)

In **Barar**, a practice appears to be growing up among pleaders of orally delegating their duties to one another. This is a form of laxity which cannot be recognized because it is distinctly illegal. It is also obviously irregular: and when it goes to the extent of delegating the important duty of presenting a memorandum of appeal to a pleader not appointed by the appellant, who signs a power not given to him, the procedure borders upon professional misconduct. (Per **Stanyon, A.J.C.**)

A pleader whose name is omitted from the body of the *vakalatnamah* is not a duly appointed pleader, and an appeal presented by him is not properly presented, even though the omission might be only due to an oversight. The fact that no objection was taken till a very late stage would not validate the appointment of a pleader which was not made properly (a). **Dhannoolal v. Mt. Bajl**, 19 N.L.R. 189.

STANYON, A.J.C.

References :—(a) 11 A.L.J. 458; 36 A. 46—where **Jas Ram** appears in place of **Saktu**; 6 A. L.J. Notes, p. 110, R.

(345) O. III, r. 4. See **PLEADER**, No. 1, 20 C.W.N. 287.

(346) O. IV. See No. 278, *supra*.

(347) O. V, r. 1. See No. 278, *supra*.

(348) O. V, r. 3. See No. 160, *supra*.

(349) O. V, rr. 12, 17 and O. IX, r. 13, O. XLIII, r. 1 (1)—*Appeal against order refusing to set aside ex-parte decree—Service of summons, substituted service, sufficiency as to.*

Where it is a question of substituted service, the requirements of the Code should be strictly observed in every respect, even though the defendant knew of the issue of the writ.

Where the serving officer went to a defendant's place of business and made enquiries

Civ. Pro. Code (1908)—(Continued).

about him, and, not finding him on any one of the three separate occasions when he went there, posted a copy of the writ on the outer door of the said house which he erroneously believed to be the defendant's ordinary place of residence.

Held, this was not sufficient service of the summons.

Proper enquiries and real and substantial effort should be made to find out when and where the defendant is likely to be found, and proper effort made to find the defendant in the place where he ordinarily resides or carries on business (a).

The mere fact that the defendant or his solicitor knew that a suit has been instituted would not dispense with the necessity of proper service of summons. *Kassim Ebrahim Saleji v. Johermull Khemka*, 20 O.W.N. 173 = 28 C. L.J. 182 = 43 C. 447 = 34 Ind. Cas. 799.

SANDERSON, C.J., and WOODROFFE and MOOKERJEE, J.J.

References:—(a) 19 C. 201, F.

(349-a) O. V, r. 17—*Summons, service of*.

Where a serving officer finds a defendant to be away temporarily from home and knows where he is, it is not good service if he thereupon does no more than fix the summons to the outer door of the house. *Kunj Behari Lal v. Sarjon Prasad*, 32 Ind. Cas. 826.

BANERJI and PIGGOTT, J.J.

References:—24 A. 803 = A.W.N. (1902) 68, F.

(350) O. V, r. 17. See No. 349, *supra*.

(351) O. V, r. 19—*Examination of process-server before passing ex-parte decree—Ejectment in spite of insufficient notice—Act II of 1901 (Tenancy), S. 59—Revision by Board of Revenue*.

The *chaprasi* or process-server must be examined on oath before an *ex-parte* decree can be given. See O. V, r. 19, Civ. Pro. Code, 1908.

The Board of Revenue could interfere in revision with an order of ejectment made in spite of insufficiency of service of notice under S. 59, Tenancy Act, there being a material irregularity under the circumstances. *Kanahia v. Durga Prasad*, 31 Ind. Cas. 479.

HOLMS, S.M., and CAMPBELL, J.M.

(352) O. VI, r. 4—*Fraud in pleading how to be stated—Mortgage—Redemption—Suit for, without getting rid of Revenue Court proceedings*.

Although the general rule, no doubt is that where fraud is alleged and relied upon, it must before it can be proved, be clearly stated in accordance with the provisions of O. VI, r. 4, Civ. Pro. Code, 1908, the rule does not apply where the party aggrieved raises no objection and fights the case at the original hearing as though the pleadings were in proper form (a).

A party cannot rely upon his own fraud.

Just as a man is entitled who sues for possession on the strength of his own title to succeed although there is some invalid document

Civ. Pro. Code (1908)—(Continued).

standing in his way to recover possession without taking steps to get that document formally removed by the decree of a competent Court, so also the mortgagor in this case held entitled to a decree for redemption without taking formal steps to get rid of the Revenue Court proceedings brought about by the fraudulent and collusive conduct of the mortgagee. *Bent Madho v. Basanto Kunbi*, 35 Ind. Cas. 252.

WALSH, J.

Reference:—(a) 14 A.L.J. 109, F.

(353) O. VI, r. 4—*Fraud—Re-opening of suit for accounts—Evidence*.

Where in a suit the plaintiff claimed that the defendant might be ordered to render correct accounts of certain property and that upon the taking of those accounts, a document should be held to be valid only for the amount that should be found due on the taking of accounts, *held* that, under the circumstances, the plaintiff alleged no fraud entitling to go into evidence to re-open the accounts which were settled at the time the document was executed. *Ramji v. Komau Das*, 35 Ind. Cas. 603.

RICHARDS, C.J., and BANERJI, J.

(354) O. VI, r. 14. See No. 342, *supra*.

(354-a) O. VI, r. 17. See PLEADINGS.

(354-b) O. VI, r. 17. See PRACTICE AND PROCEDURE.

(355) O. VI, r. 17—*Amendment of pleadings*.

R. 17 of O. VI of the Code of Civil Procedure is in more general terms than the corresponding S. (59) of the Code of 1882. It leaves questions of amendment of pleadings to the discretion of the Court, but the discretion must be exercised in accordance with settled judicial principles.

The general rule is that any amendment allowed must be such as is either raised in the pleadings or is consistent with the case as originally laid; and the state of facts and the equities and grounds of relief originally alleged and pleaded by the plaintiff should not be departed from.

A suit to enforce a mortgagor's right of redemption cannot be amended so as to convert it into a suit to enforce a right as owner. *Nauk Te v. Ma Hnin*, 9 Bur. L.T. 150 = 8 L.B.R. 418 = 36 Ind. Cas. 5.

FOX, C.J. and TWOMEY, J.

(356) O. VI, r. 17—*Plaint, amendment of—Inconsistent claim set up by way of amendment—Suit for declaration of right to easement—Conversion of suit with one for declaration of title not allowed*.

Where in a suit for declaration of a right to an easement by prescription of taking water by building a dam across a river the plaintiff failed by reason of the use having been found to be permissive and the plaintiff sought to amend the claim into one for declaration of title to the river-bed the Court refused such an amendment as it would be, quite inconsistent with the plaint and as a person most interested in the

Civ. Pro. Code (1908)—(Continued).

question was also not a party to the suit. *Muk-
kosa Naig Yeetli v. Secretary of State, 34
Ind. Cas. 541 (F.B.).*

WALLIS, C.J., AYLING and KUMARA-
SWAMI SASTRI, JJ.

(357) O. VI, r. 17—*Suit for ejectment—
Error in the number of the plot—Amend-
ment of plaint.*

In a suit for ejectment from No. 17-8/1
measuring 1 bigha, it appeared subsequently
that No. 17-8/1 was in the cultivation of a
tenant and measured 5 bighas and that
the correct number should have been 17-9/1.
Held, that the error was a clerical error liable to
amendment under O. VI, r. 17, Civ. Pro. Code.
*Sheoraj Singh v. Kovilban Singh, 32 Ind. Cas.
512.*

REYNOLDS, J.M.

(359) O. VI, r. 17. See PRINCIPAL AND
AGENT, No. 5, 31 M.L.J. 688.

(359) O. VI, r. 17. See SPECIFIC PER-
FORMANCE, No. 9, 31 Ind. Cas. 1.

(360) O. VI, r. 17. See Nos. 295, 296, *supra*.

(361) O. VI, rr. 17 and 41, r. 33—*Amendment
of plaint—Acquisition of substantial right
by defendant—Power of appellate Court to
order amendment.*

No order for amendment of plaint can be
passed where it deprives a party of a substan-
tial right or privilege or otherwise prejudices
a party.

Where the defendant in a suit has acquired a
substantial right by the operation of the law of
limitation it is manifestly unfair at the appel-
late stage to order an amendment of the plaint
and deprive him of that right. *Surendra
Narain Sinha v. Hafijur Rahman, 30 Ind.
Cas. 379.*

SHARFUDDIN and MULLICK, JJ.

(362) O. VII, r. 10. See LIMITATION ACT
(1908), No. 51, 24 C.L.J. 355.

(363) O. VII, rr. 10 and 11. See BEN. ACT
VIII OF 1885 (BENGAL TENANCY), No. 61, 35
Ind. Cas. 76—21 C.W.N. 209.

(364) O. VII, r. 11, cl. (c) See COURT FEES
ACT, No. 5, 31 Ind. Cas. 807.

(365) O. VII, r. 11. See Nos. 278, 279,
363, *supra*.

(366) O. VII, r. 14—*Document relied upon in
possession of third party—Plaintiff, whether
may produce it in course of trial—Refusal
to take a particular oath, effect of—Pro-
cedure—Practice.*

1. As a rule all documents that a plaintiff
seeks to rely on should be produced at the
opening of the suit. But a document which is
in the possession of a third party and is called
for in order to rebut a plea raised by the defend-
ant may be produced in the course of the
trial (a).

2. A mere refusal on the part of a party to a
suit to take a particular oath is not a sufficient
ground for deciding an issue against him (b).

Civ. Pro. Code (1908)—(Continued).

Gappa Mal Mangal Ram v. Piara Lal, 38 P.
W.R. 1916—32 Ind. Cas. 619.

RATTIGAN, J.

References:—(a) 30 P.R. 1915—25 P.W.R.
1915—27 Ind. Cas. 625, R. (b) 22 B. 680, F.

(367) O. VII, r. 14. See STAMP ACT (1899),
No. 2, 35 Ind. Cas. 415.

(367-a) O. VIII, r. 3 See No. 369, *infra*.

(368) O. VIII, r. 5—*Pleadings—Written
statement—Specific denial—In absence of
denial, facts alleged treated as admitted—
Practice—Proof of letter.*

In a suit to recover money the plaintiffs
sought in their plaint to bring the claim within
time by relying on a letter written by the
defendants. It was contended by the defend-
ants in their written statement that the suit
was "not saved by the letter put in from the
bar of limitation." The trial Judge held that;
in view of the above state of pleadings the letter
must be accepted as proved; and decreed the
claim. The lower appellate Court having
differed from this view, and reversed the decree,
the plaintiffs appealed:

Held, reversing the decree that the trial
Court was right in thinking that in the above
state of the pleadings, the letter must be
accepted as admitted between the parties and
therefore unnecessary to be proved. *Laxmi-
narayan Ramdayal v. Chinniram Gird-
harilal, 18 Bom. L.R. 946—41 B. 89.*

BATCHELOR, A. C. J. and SHAH, J.

(369) O. VIII, r. 5, O. VIII, r. 3, O. IX,
r. 6, O. VI, r. 15, O. XIX, r. 8 (1),
O. XXXVII, r. 2, S. 107 (1)—*Penal Code,
Ss. 191 and 193—Plaint verified, if evi-
dences—Verification, object of—Damages
unliquidated, pleadings and proof as to—
Remand, power of High Court as to—Plead-
ings—Practice—Undefended cases, plain-
tiff to prove his case in.*

Sanderson, C.J.—The fundamental principle
of law is that the plaintiff, when he comes to
Court, must prove his case, and he must prove
it to the satisfaction of the Court.

Under the Civ. Pro. Code (1908), such proof
can be dispensed with and the allegations in
the plaint considered as admitted, only in un-
defended cases of bills of exchange, promiss-
ory notes and hundis as contemplated in
O. XXXVII, r. 2 of the Code.

O. VIII, r. 5 of the Code does not apply to
undefended cases. It is clear from the wording
of that rule that it is only intended to apply to
a case where a pleading has been put in by the
defendant.

Per Curiam.—O. VIII, r. 5, does not apply
where there is no written statement and it does
not justify a decree without any evidence where
no written statement has been filed.

Woodroffe and Mookerjee, JJ.—O. VIII, r. 5,
is really a rule of construction of the defend-
ant's pleading.

The provision in O. IX, r. 6, for the Court to
"proceed *ex parte*" in undefended cases means
"proceed to take and determine on evidence."

Civ. Pro. Code (1908)—(Continued).

Sanderson, C.J.—It would be unreasonable to conclude from S. 191, Penal Code, that it was ever intended that a plaint, which has got the usual verification by the plaintiff, could be adopted by a Court of Justice as sufficient proof of the facts which are contained in the plaint.

Woodroffe and Mookerjee, JJ.—Because a false verification may be the basis of a prosecution under S. 191, Penal Code, that is, it may come within the definition of "False Evidence" for the purposes of the Penal Code, that does not make a verification evidence on which a decree can be founded in a civil suit whether the defendant appears or not.

Woodroffe, J.—Verification does not dispense with evidence. The object of verification of the plaint is to fix on the plaintiff the responsibility for the statements which it contains and to afford a guarantee of his good faith. Verification of pleadings may be by persons other than those who have personal knowledge of facts and who may verify same, as in the present case, on information and belief of the facts being true.

Sanderson, C.J.—A Court would not be justified in allowing the plaint to be put in as evidence of the facts on which the plaintiff wished to rely.

In the present case, which was one for breach of contract and unliquidated damages, the defendants had taken no steps to defend and the trial Judge gave a decree for full amount claimed by the plaintiffs without taking any evidence:

Held on Appeal—That the plaintiffs should be called upon to prove all the material facts which are necessary for the proof of their case, *i.e.*, not only the cause of action upon which they rely but also the actual amount of damages they have in fact sustained.

Held also—that in this case where the claim is for unliquidated damages, it was not incumbent on the defendant under O. VIII, r. 8, to deny specifically the allegations of fact regarding damages, and the Court should even then make some enquiry to ascertain the damages to which the plaintiff would be entitled.

Mookerjee, J.—The defendant, merely because he did not appear, cannot, in the present case, be in a worse position in this respect, than what he would have been in if he had appeared and filed a written statement.

Woodroffe and Mookerjee, JJ.—Where a plaintiff did not offer any evidence, strictly speaking, the suit should be dismissed.

Per Curiam.—Having regard to the fact that a written statement was not filed under a *bona fide* mistake and to the circumstances of the case, it was remanded for re-hearing with liberty to defendant to put in a written statement and adduce evidence.

Mookerjee, J.—Although there is a provision in the Code for remand in certain specified circumstances, it cannot legitimately be contended that our powers are restricted thereby and that we cannot make an order of remand if exigencies of the case demand that such an order should be made. **J. B. Ross and Co. v. C. R.**

Civ. Pro. Code (1908)—(Continued).

Seriven, 20 C.W.N. 1192 = 43 C. 1001 = 84 Ind. Cas. 285.

SANDEBSON, C.J., WOODROFFE and MOOKERJEE, JJ.

(370) O. VIII, r. 6, and O. XX, r. 19—*Equitable set-off—Lessor and lessee—Rent, suit for—Barred claim for unliquidated damages, if can be set off.*

O. XX, r. 19, Civ. Pro. Code, covers also claims for equitable set-off.

The words 'legally recoverable' in O. VIII, r. 6, Civ. Pro. Code, include all unsustainable claims whether barred by limitation or otherwise.

Though it is well settled in Madras that claims for unliquidated damages may be raised by way of equitable set-off if they arise out of the same transaction as the one in suit, yet such a set-off will not be allowed if the claim in respect of such set off had become barred on the date of suit (a).

Though in cases where there is a fiduciary relationship between the parties as in the case of trustee and *cestui que trust* or where there is accountability as in the case of mortgagor and mortgagee, even barred claims are taken into account in passing the final accounts, the benefit of such exception cannot be extended to cases of lessor and lessee.

Per Seshagiri Iyer, J.—Whether the cases which allow barred claims being taken into account in passing the final accounts are rightly decided. **Vyavan Chetty v. Nataraja Dealkar, 8 L.W. 34 = 30 M.L.J. 59 = 32 Ind. Cas. 80 = 39 M. 939.**

WALLIS, C.J. and SESHAGIRI Aiyar, J.
References:—(a) M.L.J. 285, *Expt.*; 1 Ver. 293; 2 Boh. & Let. 607, 630, *F.*

(371) O. IX, rr. 2, 4—*Dismissal of suit—Summons not served—Appeal.*

Where the Court of first instance passed an order under O. IX, r. 2 of the Code, dismissing a suit on its being found that the summonses had not been served on the defendants in consequence of the plaintiff's failure to pay the Court-fee for such service, *held*, that no appeal lies from that order to the District Judge, and the plaintiff's remedy was by way of a fresh suit or an application under O. IX, r. 4 of the Code. **Lachmi Narain v. Darbari Lal, 14 A.L.J. 347 = 88 A. 357 = 33 Ind. Cas. 737.**

PIGGOTT and WALSH, JJ.

References:—9 C. 627; 20 Ind. Cas. 1, *F.*

(372) O. IX, r. 4—*Execution application struck off—Restoration—Objection as to limitation—Jurisdiction.*

O. IX, Civ. Pro. Code, 1908, does not apply to proceeding in execution (a).

It is contemplated by the old Code of Civil Procedure and by the new Code that application for execution should, when struck off, be presented afresh and not revived as would be done in the case of plaints.

Any order passed under O. IX would be passed without jurisdiction in proceedings taken in

Civ. Pro. Code (1908)—(Continued).

execution of a decree; where a Court has no jurisdiction its order may be treated as a nullity (b).

Objection on the ground of limitation may be taken at any stage of the proceedings if the fact upon which the objection is based are patent upon the face of the record. *Gunjra Koer v. Lakhan Koer*, 35 Ind. Cas. 337.

ROE, J.

References:—(a) 17 A. 106 (P.C.), F. (b) 41 O. 1, F.

(373) O. IX, r. 4. See No. 371, *supra*.

(373-a) O. IX, r. 4, O. XVII, rr. 2, 3—*Parties not appearing at adjourned hearing—Dismissal of suit—Restoration*

On a suit adjourned for want of time, being subsequently dismissed for non appearances of parties at the adjourned hearing, though the pleaders were present, held on an application for restoration that the dismissal was not under O. XVII, r. 3, and that there was a default of appearance by the parties within the meaning of O. IX, r. 4. *Yenkatappa Nayanum Yaru v. Padl Ramakrishnappa*, 32 Ind. Cas. 714.

SRINIVASA AIYANGAR, J.

References:—(a) 30 M. 274, F.; 37 M. 241, R.

(374) O. IX, r. 5—Non-service of summons—Effect—Personal judgment against defendant if can be set aside. See SUMMONS, No. 1, 23 O.L.J. 436.

(375) O. IX, r. 6. See Nos. 183 and 369, *supra*.

(376) O. IX, r. 8. See Nos. 5 and 201, *supra*.

(377) O. IX, r. 9—*Suit by co-sharer against Lambardar for profits—Dismissal of suit for default—Subsequent suit for certain years including years covered by previous suit—Bar to suit.*

The plaintiff, a co sharer, brought a suit against the defendant, the Lambardar of a village, for the profits of certain years. That suit was dismissed for default of appearance on the part of the plaintiff under O. IX, r. 8, Civ. Pro. Code. Some years later the plaintiff brought the present suit against the same person for profits of his share for certain years, which included the years covered by the previous suit. Held that, as the causes of action for the two suits were totally different, the present suit was not barred by the operation of O. IX, r. 9, Civ. Pro. Code, so far as the plaintiff's relief in respect of the years comprised under the previous suit was concerned. *Raja Bahadur v. Shyam Lal*, 30 Ind. Cas. 568.

CHAMIER, J.

(377-a) O. IX, r. 9. See Nos. 5 and 201, *supra*.

(378) O. IX, r. 9—Ss. 114, 141—*Whether application for revival of an application lies—S. 141, Civ Pro Code (Act V of 1908), scope and effect of—Alternative remedy by way of review under S. 114, or O. XLVII, r. 1, whether available—Conversion of an application for restoration to one for review whether allowable—Provincial Small Cause Courts Act (IX of 1887), S. 17, proviso—What it actually requires.*

Civ. Pro. Code (1908)—(Continued).

When an application for the restoration of a Small Cause Court suit dismissed for default is in its turn dismissed for default, an application under O. IX, r. 9, for the revival of that application, lies under the provisions of S. 141 of the new Civ. Pro. Code. An alternative remedy under the review section, O. XLVII, r. 1, also lies. Conversion of an application under the former section to one under the latter section is allowable.

S. 17 of the Provincial Small Cause Courts Act, which requires deposit of security, has no application to such cases (a). *Bepin Behari Saha v. Abdul Barik*, 21 C.W.N. 30—24 C.L.J. 446—35 Ind. Cas. 613.

CHATTERJEE and NEWBOULD, JJ.

Reference:—(a) 19 C.W.N. 758, F.

(379) O. IX, r. 9, O. XXI, rr. 58 and 63—*Attachment—Claim—Dismissal—Declaratory suit—Dismissal for default—Fresh attachment and fresh proclamation—Subsequent suit for declaratory relief—Not maintainable—Same cause of action—Limitation Act, Art. 11.*

In execution of a decree obtained against B, certain properties were attached. B's son G preferred an objection under O. XXI, r. 58, which was summarily rejected by its belated appearance. He then brought a regular suit for a declaration that the property was not liable to attachment and sale in execution of the decree against his father, but that suit was dismissed for default in 1912. The decree-holder, owing to failure to secure an adequate bid in 1912, had at that date withdrawn his execution, but presented a fresh application for sale by auction in 1915 and proclamation of sale was made. Plaintiff (G) again brought the present suit, alleging that the proclamation of 1915 gave him a fresh cause of action and asking for the same declaratory relief as in the former suit of 1912.

Held, that the suit was time-barred (*Vide* Limitation Act, Art. 11).

The fresh proclamation of 1915 furnished no fresh cause of action. The cause of action in 1915 as in 1912 was the threat levelled against the plaintiff's title, the attachment and proclamation of auction connoting and importing a denial of any right of the plaintiff.

The plaintiff, not having proceeded with the prior suit of 1912, nor having withdrawn it with leave to bring another suit, he could not agitate the matter again (a).

Held, that the suit is barred also by O. IX, r. 9, Civ. Pro. Code, for in both the cases the cause of action, *vis.*, the threatened annihilation of plaintiff's asserted right, is the same. *Gopal Singh v. Ganpat Rai*, 66 P.R. 1916—130 P.L.R. 1916—117 P.W.R. 1916—35 Ind. Cas. 321.

RATTIGAN and LE ROSSIGNOL, JJ.

Reference:—(a) 27 Ind. Cas. 944 (945), R.

(380) O. IX, r. 9, O. XXI, r. 90, O. XLIII, r. 1, cl. (c)—*Application by judgment-debtor under O. XXI, r. 90, to set aside sale—*

Civ. Pro. Code (1908)—(Continued).

Dismissal for default—Application for restoration, rejection of—Order if appealable—Application to set aside sale if "suit."

O. IX, r. 9 of the Civ. Pro. Code, is applicable to applications for setting aside sales which have been dismissed for default (a).

An application to set aside a sale is a proceeding which may terminate in an adjudication such as is referred to in S. 2 of the Civ. Pro. Code, and if the question had been *res integra*, the Court would have held that it was a suit within the meaning of O. XLIII, r. 1, (c) (b). *Bhuban Behary Nag Mazumdar v. Dharendra Nath Banerji*, 30 O.W.N. 1208—38 Ind. Cas. 581.

TEJUNON and NEWBOULD, JJ.

References:—(a) 19 O.W.N. 758; 12 C.L.J. 6, *Bel. on.* (b) 19 O.W.N. 25, *R.*

(381) O. IX, r. 9, O. XLVII, r. 1—*Suit—Dismissal for default of prosecution—Application for restoration not presented within 30 days—Application for review—Not maintainable.*

Where, in the presence of parties, a suit was dismissed for default and no application for restoration of the suit was made under O. IX, r. 9, Civ. Pro. Code, within 30 days from the order of dismissal.

Held that the party in default should not be permitted to evade the rule of limitation by making an application for review under O. XLVII, r. 1, Civ. Pro. Code, 1908 (a).

Per Sharfuddin, J.—O. IX, r. 9, applies only to original cases and not to cases in appeal. O. XLVII, r. 1, is a general law for review of judgments. *Deodip Singh v. Gopal Singh*, 1 Pat. L.J. 547.

SHARFUDDIN and ROE, JJ.

References:—2 O.W.N. 318, *F.*; 16 C.W.N. 643, *Diss. from*; 26 O. 598, *Expl.*

(382) O. IX, r. 13—*Jurisdiction of Court to set aside ex parte decree—Appeal by defendant who appeared dismissed.*

A suit for sale on foot of a mortgage was instituted against several defendants. Some of the defendants appeared but as against the other defendants the suit proceeded *ex parte*. A decree was passed against all the defendants but *ex parte* as against the absent defendants. The contesting defendants appealed against the decree but the absent defendants were not made a party to the appeal. The plaintiffs also filed cross-objections. The decree of the lower Court was modified. An application was then made to the original Court by one of the absent defendants to set aside the *ex parte* decree:—*Held*, that the original Court had jurisdiction to set aside the decree passed by it against the absent defendant.

Where an applicant for setting aside an *ex parte* decree is no party to an appeal against that decree either as appellant or respondent, and the appellate Court has not adjudicated upon his case, the decree of the Court of first instance does not merge in that of the Court of appeal. Whether the decree of the Court of first instance has merged into that of the Court of appeal largely

Civ. Pro. Code (1908)—(Continued).

depends on the facts of each case. *Gajrajmati Tiwarin v. Swami Nath Rai*, 14 A.L.J. 853—39 A. 18—36 Ind. Cas. 307.

WALSH and SUNDAR LAL, JJ.

(383) O. IX, r. 13—*Ex parte decree, application to set aside on ground of fraud—Application, dismissal of—Subsequent suit to set aside decree on same ground—Maintainability.*

The defendant in a suit against whom an *ex parte* decree had been passed made an application under O. IX, r. 13 of the Civ. Pro. Code to set aside the same on the ground that she had not been served with summons in the suit owing to the fraud of the plaintiff. The Court found against the said allegations and dismissed the application. This order was upheld on appeal. The defendant subsequently brought the present suit to set aside the decree on the same allegations.

Held that the suit was not maintainable. *Yogamba Bol Ammani v. Armuga Mudaliar*, 8 L.W. 572—20 M.L.T. 126—(1916) 2 M.W.N. 63—36 Ind. Cas. 198.

ABDUR RAHIM and SRINIVASA AIYANGAR, JJ.

Reference:—29 A. 212, *F.*

(384) O. IX, r. 13—*Ex parte decree—Payment of decree amount on compromise—Order setting aside said decree after disposal of appeal by other judgment-debtors.*

The petitioner obtained a mortgage decree on contest against one defendant and *ex parte* against another defendant. The former preferred an appeal against the decree but his appeal was dismissed. The decree-holder then applied for execution and caused the mortgaged property to be sold and himself purchased the property. Thereupon the other defendant, against whom the *ex parte* decree had been passed, applied for setting aside the decree against him.

This defendant and the plaintiff then arrived at some sort of agreement to the effect that on payment of the decretal amount by the defendant the decree-holder should relinquish his claim to the property. The defendant accordingly paid the amount set out in the original decree, but the decree holder objected to the deposit. The Court, however, overruling the objection set aside the *ex parte* decree. *Held* that the first Court had no longer jurisdiction to entertain an application under O. IX, r. 13, in respect of the mortgage decree, inasmuch as appeal had been preferred against the original mortgage decree. *Held* also that the judgment-debtor, who paid the money into Court in pursuance of certain arrangement, could take such steps as he might be advised to take for enforcing the compromise arrived between the parties in the first Court. *Raj Gobind Singh v. Behari Pathak*, 30 Ind. Cas. 247.

WALMSLEY and ROE, JJ.

References:—17 M.L.J. 436—30 M. 536; 9 Ind. Cas. 189—38 O. 394—15 C.W.N. 309—13 C.L.J. 231, *R.*

Civ. Pro. Code (1908)—(Continued).

(885) O. IX, r. 13—Suit to set aside a fraudulent *ex parte* decree—Maintainability. See **EX PARTE DECREE**, No. 2, U.B.R. (1916), 1st Qr., 106.

(886) O. IX, r. 13. See Nos. 1-a and 349, *supra*.

(887) O. IX, r. 13 and S. 151—Decree against minor—Not properly represented in suit—Decree set aside—Suit remanded—Revival of suit. See **MINOR**, No. 4, 14 A.L.J. 818.

(888) O. IX, rr. 13 and 14, and O. XLIII, r. 1 (d)—*Application to set aside ex-parte decree—Dismissal of application for default—Appeal.*

Where an application to set aside an *ex parte* decree was dismissed for default an appeal lies from the order dismissing the application. **Sheikh Sachseeml v. Sheikh Kanta Hasi**, 36 Ind. Cas. 798.

CHATTERJEE and NEWBOULD, JJ.

References :—30 Ind. Cas. 45 = 21 C.L.J. 638, F.

(889) O. IX, r. 13, and O. XVII, r. 3. See **EX PARTE DECREE**, No. 5, 34 Ind. Cas. 835.

(890) O. IX, r. 13; O. XVII, r. 3, S. 96—*Practice—Decree ex parte—Application for rehearing rejected—No appeal preferred—Appeal against decree.*

A suit was filed for possession of a house. On the date fixed the case was not taken up by the Court and a second date was fixed. On the adjourned date the plaintiff not being ready asked for another date and it was granted. On the third date the plaintiff with his witnesses appeared. Some witnesses for the defendant had been summoned, but neither the defendant nor his pleader appeared. The Munsiff heard the witnesses of the plaintiff and passed a decree in his favour. The defendant upon appearing made an application for the re-hearing of the case, but it was rejected on the ground that the Munsiff had no jurisdiction and the defendant might appeal in the regular way. The defendant then preferred an appeal against the decree and the Judge dismissed it. The defendant then preferred second appeal: *Held* that the decree passed by the Munsiff in the absence of the defendant was a decree *ex parte*, and upon the dismissal of his application for re-hearing he could have appealed against the order to the District Judge, but, as he had preferred an appeal against the decree which appeal was dismissed on the merits, the High Court could not interfere. **Hummil v. Anisuddin**, 14 A.L.J. 1226 = 39 A. 148.

RICHARDS, C.J., and BANERJI, J.

(890-a) O. IX, r. 13, O. XLIII, r. 1 (d)—*Appeal from conditional order setting aside ex parte decree—Costs not imposed.*

A conditional order setting aside an *ex parte* decree must be taken to be a conditional dismissal and as such covered by O. XLIII, r. 1 (d), and is appealable (a).

If in an order setting aside an *ex parte* decree under O. IX, r. 13, no terms are imposed as to costs, the order does not become *ultra vires*.

Civ. Pro. Code (1908)—(Continued).

Yankataswami Nayudu v. Shanmugam Pillai, 32 Ind. Cas. 984.

SESHAGIRI AYYAR, J.

Reference :—(a) 12 A.L.J. 1270, F.

(890-b) O. XX, r. 14. See No. 388, *supra*.

(891) O. XI, r. 2—*Scope of O. XI—Applicability to probate proceedings—Affidavit of assets actually received how to be obtained in probate proceedings—Interrogatories—Method of administration—Power of Court to settle interrogatories, Ss. 53, 55, Act V of 1881 (Probate and Administration).*

O. XI, Civ. Pro. Code (1908), applies to proceedings in probate. Under that order there are only two methods of discovery, one by interrogatories and the other by an order directing discovery of documents in the possession or power of the other side.

In probate proceedings, an affidavit of assets actually received can therefore be obtained only by the first method, namely, by interrogatories.

Under O. XI, r. 2, Civ. Pro. Code, the Judge has not any power to settle interrogatories, but he can only decide what should be administered.

The *dicta* in English cases with regard to the more extensive powers of Courts in matters of probate, seem to imply that the strictest relevancy in the interrogatories may not be required, but the Courts would certainly be obliged to exclude anything offensive or improper in the same way as in any other case. **Anilabala Das v. Rajendranath Dalal**, 43 C. 300 = 23 C.L.J. 480 = 34 Ind. Cas. 227.

HOLMWOOD and MULLICK, JJ.

(891-a) O. XI, rr. 2 and 13—*Interrogatories—Object to discover nature of opponent's evidence—Discovery of particulars of documents.*

In the course of a suit the plaintiff wanted to deliver to the defendants certain interrogatories. Though there was no doubt as to the precise case set up by the defendant in their written statement, plaintiff wanted to know what the evidence was upon which the defendants rested their case. With this end in view he delivered interrogatories for ascertaining what documents the defendants had in support of their case and the particulars of those documents. The lower Court disallowed the interrogatories on the ground that they were of a fishing nature. *Held*, that though the plaintiff might have proceeded under O. XI, r. 13, Civ. Pro. Code, for discovery of documents he did not do so. The plaintiff was not entitled to ascertain the particulars of documents relied upon by his adversary. *Held*, that the lower Court was justified in disallowing the interrogatories. **Upendra Nath Ghose v. Sarada Sundari Ghose**, 36 Ind. Cas. 888.

CHATTERJEE and NEWBOULD, JJ.

(892) O. XI, r. 2, O. XX, r. 12—*Claim for mesne profits, subsequent to suit for possession, if barred.*

A suit for possession of immoveable property without a claim for mesne profits will not bar a

Civ. Pro. Code (1908)—(Continued).

subsequent suit for mesne profits accruing after date of institution of first suit. *Shwe Boon v. M. U. The Nyo*, 9 Bur. L.T. 92—82 Ind. Cas. 649.

FOX, C.J.

(898) O. XI, r. 21—*Failure to produce account book—Dismissal of suit.* *Kishun Lal v. Sultan Singh*, 18 A.L.J. 881—88 A. 5—80 Ind. Cas. 526. See Final Part, 1915, Col. 448

(894) O. XVI, rr. 10, 12—*Fine for non-production of documents, conditions to be fulfilled before imposing fine—Duty of Courts and Settlement Officers to strictly follow the law relating to issue and service of summons.*

O. XVI, r. 10 of the Civ. Pro. Code does not apply where there has been no summons upon anybody to produce the documents, and no order under r. 12 can be made until the procedure laid down in r. 10 has been followed where that rule applies.

The Civil Courts, and particularly the peripatetic Settlement Courts which cause a large amount of disturbance to local interests, cannot be too careful to follow the provisions of law strictly as regards summoning persons and documents before them. *Nabadip Chandra Mandi v. The Secretary of State*, 20 C.W.N. 511—88 Ind. Cas. 968.

HOLMWOOD and IMAM, JJ.

(895) O. XVI, r. 12. See No. 394, *supra*.

(896) O. XVII, r. 1—*Adjournment of case—Evidence—Opportunity to produce further evidence—Second appeal.*

In the course of arguments, after the parties had closed their evidence, plaintiff applied under O. XVII, r. 1, Civ. Pro. Code, to the Court to adjourn the case to allow him opportunity to produce further evidence in regard to a matter which was not made clearly the subject of an issue.

The Court, being of opinion that the rule was not applicable at that stage of the case, did not grant the adjournment and the appellate Court also did not think it proper to allow the plaintiff another opportunity to produce additional evidence.

Held, on second appeal that, although r. 1 of O. XVII, Civ. Pro. Code, applied to every stage of a case, the plaintiff was not entitled to the indulgence asked for by him under the circumstances of the case, and it was doubtful if second appeal in the case was competent. *Gaman v. Muhammad*, 91 P.L.R. 1916—167 P.W.R. 1916—86 Ind. Cas. 76.

SCOTT SMITH, J.

(897) O. XVII, r. 2—*Party failing to appear at adjourned hearing—Dismissal for default.*

O. XVII, r. 2, Civ. Pro. Code, only says that when at an adjourned hearing the parties or any of them fail to appear, the Court "may" dispose of the case under O. IX, Civ. Pro. Code. The word being "may" and not "shall" entails on the Court the exercise of some discretion and the discretion must be judicial discretion.

When a plaintiff has closed his case and there is evidence which if un rebutted would prove his

Civ. Pro. Code (1908)—(Continued).

case, it can hardly be deemed a judicial exercise of discretion to dismiss the suit for default. The Court should record the defence evidence even though the plaintiff is absent and dispose of the case on the merits (a). *Subramania Othuvay v. Munusamiya Pillai*, 81 Ind. Cas. 869.

PHILLIPS, J.

Reference:—7 Bom. L.R. 201, F.

(898) O. XVII, r. 2. See No. 183, *supra*.

(899) O. XVII, rr. 2, 3—*Suit decreed under O. XVII, r. 3—Proper procedure to set aside.*

In a suit upon a mortgage-bond, the defendants, who pleaded discharge, were absent on the hearing day. Their pleader having intimated to the Court that he had no instructions, the District Munsif decreed the suit under O. XVII, r. 3, Civ. Pro. Code. Subsequently, the defendants filed a petition before the District Munsif to set aside the *ex parte* decree under the impression that the disposal was under O. XVII, r. 2, but he dismissed it on the ground that there was no *ex parte* decree. This order being confirmed on appeal by the District Judge, the defendants filed a Civil Revision Petition to the High Court.

Held, that the Revision Petition was incompetent and that the proper procedure was to have appealed against the decree in the suit itself. *Gundan alias Chenroyan v. Kamakka Rama Chetti*, 8 L.W. 524—88 Ind. Cas. 660.

SADASIYA AIYAB and MOORE, JJ.

Reference:—19 M.L.J. 760, F.

(899-a) O. XVII, rr. 2, 3—*Default—Dismissal of suit—Decree drawn up—Appeal.*

Where a Munsif after the passing of the following order "The plaintiff's pleader says that he and his client would retire from the case as the plaintiff has no witness to day. So the case is dismissed for default" signed a decree drawn up in the case. *Held*, that the order was an order under O. XVII, r. 2, and was not appealable. *Nasarat Khan v. Manulla*, 32 Ind. Cas. 766.

CHATTERJEE and BEACHROFT, JJ.

(400) O. XVII, r. 3—*Specific Relief Act, S. 9, suit under—Decision passed 'forthwith,' whether on merits.* *In re Chidipatu Somayya*, 2 L.W. 1067—31 Ind. Cas. 807. See Final Part, 1915, Col. 449.

(401) O. XVII, r. 3. See Nos. 389, 390, 399, *supra*.

(402) O. XVII, r. 3, O. IX, r. 18—O. XVII, r. 3, when applies—*Payment of process fee for summoning witnesses—Duty of Court.* *Harjas Bai v. Narain Singh*, 51 P.R. 1915—39 Ind. Cas. 998—98 P.L.R. 1916. See Final Part, 1915, Col. 449.

(403) O. XVIII, r. 18—*Provincial Small Cause Court—Abstract of evidence incomplete—Judgment based on such abstract, whether legal.* *Ratna Pathan v. Para Sundaram*, 2 I.W. 808—(1915) M.W.N. 765—80 Ind. Cas. 684. See Final Part, 1915, Col. 450.

Civ. Pro. Code (1908)—(Continued).*

(404) O. XIX, r. 8. See No. 369, *supra*.(408) O. XX, r. 1—*Notice of delivery of judgment—Limitation Act, S. 5—Sufficient cause—Discretion of Court—Evidence Act, S. 91—Meaning of "Terms of a contract."*

Under O. XX, r. 1, when the Court does not pronounce judgment at once after the case has been heard, it ought to give notice to the parties of the day on which judgment is to be delivered.

When the failure of the Court to give notice of the date of delivery of judgment has led to a delay in filing the appeal that ought to be considered sufficient cause for extending time under S. 5 of the Limitation Act.

Whether time for an appeal should be extended under S. 5 of the Limitation Act is a matter of discretion for the Court before which the appeal is filed, and its discretion should not be interfered with in appeal unless it has been exercised arbitrarily or illegally.

Quære whether the words "terms of a contract" in S. 91 of the Evidence Act include the date of a contract. *Ma Hla Dun v. Moung Shwe Ya*, 9 Bur. L. T. 250.

U KIN, J.

(406) O. XX, r. 2—*Judgment or order written and pronounced by Judge after he gave over charge of his office—Validity.*

A judgment or order passed by an officer, who had heard the case and have given his mind to the matter, is no less legal because it was written and pronounced by himself after he gave over charge of his office. (*Vide* O. XX, r. 2, Civ. Pro. Code.) *Daya Ram v. Mussammat Jatti*, 80 P. R. 1916=128 P. W. R. 1916=48 P. L. R. 1917=35 Ind. Cas. 938.

JOHNSTONE, C. J.

References:—30 B. 21; 84 O. 293, R.

(407) O. XX, r. 6. See No. 288, *supra*.(408) O. XX, r. 11. See No. 130, *supra*.(409) O. XX, r. 12. See Nos. 4, 40, 264, 392, *supra*.(410) O. XX, r. 18. See No. 4, *supra*.(411) O. XX, r. 14. See Nos. 4, 274, *supra*.(412) O. XX, r. 15. See No. 4, *supra*.(413) O. XX, r. 16—*Suit for money based on accounts—Necessity for passing preliminary decree.*

Where in a suit it is necessary, in order to ascertain the amount of money due to or from the parties, that an account should be taken, there must be a preliminary decree passed in the first instance under O. XX, r. 16, Civ. Pro. Code. *Fatch Lal v. Mr Charles Edward Gray*, 86 Ind. Cas. 210.

RICHARDS, C. J. and RAFIQUE, J.

(414) O. XX, r. 16. See No. 4, *supra*.(415) O. XX, r. 17. See No. 4, *supra*.(416) O. XX, r. 18. See Nos. 4, 129, 256, *supra*.(417) O. XX, r. 19. See No. 370, *supra*.

(418) O. XX, r. 46. See PRACTICE AND PROCEEDINGS, No. 2, 9 Bur. L. T. 122.

Civ. Pro. Code (1908)—(Continued).*

(418-a) O. XXI, r. 2. See LIMITATION ACT, 1908, Art. 182.

(419) O. XXI, r. 2—*Payment out of Court by decree-holder—Payment not certified to the Court—Application to execute the decree—False averment in the application that no payment received under the decree—Fraud upon the Court—Execution cannot proceed.*

The plaintiff obtained a decree for Rs. 2,500 against the defendant on the 18th March 1899. The next day, the parties effected a compromise for Rs. 2,000 in full satisfaction of the decretal debt. The money was duly paid and a formal receipt passed; but the payment was not certified to the Court. Notwithstanding this, the plaintiff applied to the Court to execute the decree, making a false averment in the application, under S. 285 (e) of the Civ. Pro. Code of 1882 that there had been no adjustment of the decretal amount. The lower Courts declined to recognise the payment or adjustment, by virtue of O. XXI, r. 2 (8) of the Civ. Pro. Code, and ordered the execution proceedings to go on. The defendant having appealed:

Held, that, on the facts stated, a fraud had been clearly committed upon the Court in the application for execution by reason of the false statements made by the plaintiff; and that the Court could not permit a litigant by means of proved false statements to obtain an unjust order from the Court in execution. *Hansa Godhaji Marwadi v. Bhava Jogaji Marwadi*, 18 Bom. L. R. 22=40 B. 933=38 Ind. Cas. 332.

SCOTT, C. J. and HAYWARD, J.

(420) O. XXI, r. 2—*Satisfaction or adjustment of decree—Partners holding a joint decree—Payment to two out of three partners, when valid—Shares in the decree debt, definiteness of—Joint Hindu family and partnership compared—Liability under decree, discharge of.*

A payment to two out of three partners who are joint decree-holders cannot bind the third, unless the payees have been appointed by the other decree-holder as his agent for the purpose, or unless it is admitted or proved that the several joint decree-holders own separate and definite shares in the decree-debt, and a payment so made cannot have the legal effect of satisfying or adjusting the decree even in part (a).

The status as such agent must appear from the decree itself or should be expressly created subsequent to the decree, and the position of the payee as manager of the joint Hindu family of the decree-holders or as a member of the partnership holding the joint decree cannot lead to any inference of such agency (b).

Per Oldfield, J.—The manager of a joint Hindu family cannot give a discharge of a joint decree-debt of the family without the concurrence of the other members, and there is no difference between a manager and a member of a partnership in this respect.

Per Sadashiva Aiyar, J.—Neither a partner nor a member of a joint Hindu family can

and receive a definite share in a particular partnership debt or a family debt respectively.

There is a distinction between the case of joint private creditors having claims in respect of a joint debt which has not merged into a decree and the case of persons holding a joint decree of Court in their favour. *Mahomed Sillar Sahib and Co. v. Nabi Khan Sahib*, 8 L.W. 579—(1916) M.W.N. 471—81 M.L.J. 98—20 M.L.T. 881—85 Ind. Cas. 157.

OLDFIELD and SADASIYA AIYAR, JJ.

References:—(a) 25 M. 431, F; 26 A. 318; 15 M 843, R. (b) 28 A. 253, R.

(421) O. XXI, r. 2—*Limitation Act* (1908), Ss. 19, 20—*Payment extending limitation*—*Certification of payment by decree-holders*—*Statement of payment in application for execution of decree if sufficient*.

A decree-holder in his application for execution of his decree notified to the Court that he had received a certain sum from the judgment-debtor and relied on this payment as saving limitation. It was found that the payment had in fact been made by the judgment-debtor himself by way of interest.

Held, that the decree-holder may either apply to certify payment before execution or may do so in his application for execution of the decree.

That there was sufficient certification by the decree-holder, and under the circumstances it was not necessary for the Court to record the certification, and O. XXI, r. 2, did not stand in the way of the decree-holder.

That, in the face of the finding, the fact of the endorsement and the question as to who made it, and the authority by which it was made, were immaterial. *Khatibnussa Bibi v. Sancho Lal Nahata*, 20 C.W.N. 272—43 C. 207—23 O.L.J. 890—34 Ind. Cas. 606.

WOODROFFE and NEWBOULD, JJ.

(422) O. XXI, r. 2—*Adjustment in whole or in part*—*Certifying adjustment*—*No particular mode prescribed*—*Inquiry as to manner or extent of adjustment*—*Competency of Court to hold such inquiry*—*Sums of money accountable by one party to another*—*Remedy by regular suit*—*Arrangement to give credit by such amounts in execution*—*Validity*—*Not illegal nor opposed to public policy*—*Mortgage decree*—*Omission to provide for the profits realised by decree-holder being applied in satisfaction of decree*—*Incompetency of Court to direct taking of accounts of such profits*—*Construction of decree*—*Interpretation by parties*—*Not binding on Court*. *Lodd Govinda Doss Krishna Doss Yaru v. The Rajah of Karvetnagar*, 29 M.L.J. 219—30 Ind. Cas. 857. See Final Part, 191b, Col. 453.

(423) O. XXI, r. 2—*Part-payments made within time but certified after time*—*Whether operate to save limitation*—*Limitation Act* (1908), S. 20. *Rajam Aiyar v. Anantharathnam Iyer*, 29 M.L.J. 669—18 M.L.T. 475—(1916) M.W.N. 127—81 Ind. Cas. 313. See Final Part, 191c, Col. 453.

(424) O. XXI, r. 2. See CIV. PRO. CODE (1908), No. 12, 89 M. 1096.

(425) O. XXI, r. 2. See No. 100, *supra*.

(426) O. XXI, rr. 2 and 16—*Decree—Execution—Assignment benami for one of the judgment-debtors—Executability of decree—Adjustment*.

A transferee of a decree must first prove his right before he can be allowed to execute it and it is only then that any question of adjustment arises.

Where the assignment of a decree is *benami* for one of the judgment-debtors, the transferee cannot execute the decree (a). *Mohamad Rowther v. Flehal Rowther*, 4 L.W. 594—85 Ind. Cas. 624.

SPENCER and KRISHNAN, JJ.

References:—(a) 3 L.W. 126, F.

(427) O. XXI, rr. 2 and 16—*Execution—Uncertified adjustment—Transfer benami to one of the judgment-debtors—Executability of decree*.

O. XXI, r. 2, Civ. Pro. Code, merely forbids effect being given to an uncertified payment when it is set up as a defence to an application for the execution of a decree and when such application is made by a person who is admitted or proved to be the owner of the decree rights. It has no application to cases where the right itself of the applicant to execute the decree is questioned even though the facts relied on showed that the decree had been adjusted.

A transferee of a decree, who is a *benamidar* for one of the judgment-debtors, cannot be allowed to execute the decree under O. XXI, r. 16, Civ. Pro. Code.

An application under O. XXI, r. 16, Civ. Pro. Code, presented by a transferee of a decree for the recognition of his transfer and for permission to execute the decree was opposed by one of the judgment-debtors on the ground that the transfer was *benami* for another judgment-debtor and that the decree had in fact been satisfied by payment of the amount to the original decree-holder. The lower appellate Court found that the transfer was really *benami* and dismissed the application.

Held, that it was incumbent on the transferee, first, to prove his right under the transfer set up by him, that, until that was done, the question of adjustment of decree could not arise, that O. XXI, r. 2, had no application to the case, that the moment the transfer was found to be *benami*, the Court was bound to dismiss the application, and that consequently the refusal of the lower appellate Court to recognise the transfer was legal and proper. *Ramayya v. Krishnamurthi*, 3 L.W. 186—19 M.L.T. 124—(1916) M.W.N. 133—82 Ind. Cas. 953.

SADASIYA AIYAR and MOORE, JJ.

(428) O. XXI, r. 2 (3)—*Execution of decree—Satisfaction petition by judgment-debtor—Execution application struck off with consent of decree-holder—Fresh execution application, maintainability of*.

Civ. Pro. Code (1908)—(Continued).

On an application to execute a decree the judgment-debtor on 12-11-1909 filed a petition stating that the decree had been fully satisfied out of Court. But this petition was filed after time. The execution application was ordered to be struck off with the consent of the decree-holder. On the decree-holder filing a fresh application for execution on 15-7-1914, the judgment-debtor objected that it was barred by reason of the order of the Court on 12-11-1909. But it was contended for the decree-holder that his consent was secured by mistake and that the order of 12-11-1909 was a nullity since the petition was barred. *Held* that the order 12-11-1909 was the record of an adjustment of the decree certified to the Court which could be recognised under O. XXI, r. 2 (2), Civ. Pro. Code, that if the decree-holder made a mistake in giving his consent to the order, it did not vitiate the order, though it was open to the decree-holder to move the Court by way of review; that if the petition by judgment-debtor setting forth full satisfaction was out of time, the order passed thereon was not a nullity; and the only course left to the decree holder was to have appealed against the order of 12-11-1909. Since he has failed to do so, the order became final. *Maung Po Myang v. Palaniappa*, 35 Ind. Cas. 369.

PARLETT, J.

(429) O. XXI, r. 2 (2), O. XXXII, r. 7—*Meaning of "show cause" in O. XXI, r. 2 (2)—Application by judgment-debtor to record satisfaction of decrees—Enquiry into questions of fact—One of the judgment-debtors a minor—Validity of compromise—Court's duty—Compromise after decree—Applicability of O. XXXII, r. 7, Civ. Pro. Code.*

The judgment-debtors in this case applied for recording satisfaction of the decree, stating that they had entered into an arrangement with the decree holder according to which they had executed a sale deed to the latter, but that the latter would not allow it to be registered. The decree-holder (counter petitioner) denied the correctness of some of the above allegations. The lower Court, without recording any evidence, rejected the application to record satisfaction, on the ground that the sale deed, not having been registered, could not pass title to the vendee, and that, until the deed was registered, the question whether satisfaction of the decree should be recorded could not be gone into. *Held*, on appeal, that the lower Court was wrong in summarily rejecting the application without allowing the parties an opportunity of establishing their respective allegations.

The words "to show cause" in S. 258, Civ. Pro. Code (1882), which corresponds to O. XXI, r. 2, Civ. Pro. Code (1908) do not mean merely to "allege cause nor even to make out that there is room for argument but both to allege cause and to prove it to the satisfaction of the Court," and it is incumbent upon the Court to

Civ. Pro. Code (1908)—(Continued).

investigate and decide any questions of fact which the parties may not be agreed (d).

The provisions of O. XXXII, r. 7, Civ. Pro. Code, apply to a compromise entered into after a decree had been passed, and an adjustment of a decree to which the minor is a party requires the sanction of the Court (b). *Shank Dayud Rowther v. Paramasami Pillai*, 81 M.L.J. 207—85 Ind. Cas. 70.

SADASIVA AYYAR and MOORE, JJ.

References:—(a) 11 C. 166, R (b) 26 B. 109; 99 M. 809, R.

(430) O. XXI, r. 2 (3)—*Effect of not certifying—Instalment decrees—Limitation—No payment made.*

An instalment decree was passed which provided that, on failure to pay any one instalment, the decree-holder would be entitled to execute the entire decree. The decree-holder put in an application for execution alleging that four instalments had been duly paid but default had been made in respect of the fifth. The payments had not been certified under O. XXI, r. 2 of the Code. The judgment-debtor denied any payment and contended that the application was time-barred:—

Held that the application was time-barred (1) because, assuming that no payment had been made, the time began to run from the date when the first instalment became due; and (2) because the payments not having been certified, the Court executing the decree could not recognise such payments.

The practice in these provinces is that, when payments are made in Court or out of Court, there is a record on the execution file showing that the payments have been certified and recorded. It would obviously not be within the spirit of O. XXI, r. 2 of the Code that the "certifying" of the payments on foot of a decree should rest entirely with a decree-holder. *Chatter Singh v. Amir Singh*, 14 A.L.J. 132—88 A. 204—92 Ind. Cas. 590.

RICHARDS, C.J., and RAFIQ, J.

(431) O. XXI, r. 5—*Agreement prior to decree between one of the judgment-debtors and the decree-holder to enter up satisfaction of the decree—Application to enter up satisfaction, maintainability of.*

Under O. XXI, r. 5 of the Code of Civil Procedure one of the judgment-debtors may apply to the executing Court to enter up satisfaction of the decree as against him, on the ground there was an agreement to that effect entered into between himself and the decree holder prior to the passing of the decree. *Subramania Pillai v. Kumaraavela Ambalam*, 89 M. 541—98 Ind. Cas. 66.

SESHAGIRI AYYAR and NAPIER, JJ.

References:—9 M.L.T. 464, R.; 22 B. 463, F.; 81 C. 179. *Not F.*

(432) O. XXI, r. 5—*Civil Rules of Practice, r. 161-A—Decree—Execution—Transmission to District Court—Transfer by District Court to Subordinate Judge's Court—Decree-holder not entitled to six months from such date—Scope*

Civ. Pro. Code (1908)—(Continued).

Effect of r. 161-A—Violation of rule—Effect—Decrees not rendered void. F.M.A. Vellappan Chettiar v. S.N. Subramaniam Chetty, 29 L.J. 179—29 Ind. Cas. 119—39 M. 485. See Final Part, 1915, Col. 455.

(438) O. XXI, r. 7. See Nos. 46, 83, 101, *supra*.

(434) O. XXI, rr. 9, 13—*Execution of decrees—Property described in decrees amplified in execution—Sale proclamation.*

In a case where the description of property in decree was amplified in the application for the execution of decree, the proper course for the Court was to advertise for sale the right, title and interest of the judgment-debtors in the property as described in the decree and then enter for purposes of identification the description given by the decree-holder in the application for execution, in order that intending purchasers might have an idea of the value of the property.

But this entry should be made as a foot-note and it should be made clear that the additional information was given by the holder of the decrees. *Raghunath Tewari v. Radhessor Kuar*, 35 Ind. Cas. 368.

SHARFUDDIN and ROE, JJ.

(435) O. XXI, r. 10. See No. 70, *supra*.

(436) O. XXI, rr. 10, 64—*Attachment on execution application—Non-disposal of application—Later application for sale of attached property.*

While an execution application, whereon an order for attachment was made, was not disposed of, a subsequent application was made to sell the attached property. Held that there could be no bar of limitation in such cases as the decree-holder only asked that effect be given to the application which was still pending before the Court and that the decree-holder neither abandoned his application nor had he disabled himself by laches from seeking to enforce his remedies under the pending application. *Bommaraju Venkata Perumal v. Subramania Nayanal Varu*, 31 Ind. Cas. 87.

BESHAGIRI AIYAR and KUMARASWAMI SASTRI, JJ.

References:—36 M. 553; 16 M.L.T. 399, F.

(436-a) O. XXI, r. 13. See EXECUTION OF DECREE.

(437) O. XXI, r. 13—*Execution of decrees—Limitation—Application to attach immovable property—Property not properly described—Amendment of application—Application in accordance with law.*

When considering whether an application for execution of decree is preferred within limitation, it is not necessary to examine the previous applications to ascertain whether they in all respects comply with provisions of law. *Baldeo Sahai v. Kanhaiya Lal*, 65 P.L.R. 1916—34 Ind. Cas. 955.

CHEVIS and SHADI LAL, JJ.

References:—23 P.R. 1888; 116 P.R. 1907, F.

(438) O. XXI, r. 13. See No. 434, *supra*.

Civ. Pro. Code (1908)—(Continued).

(438-a) O. XXI, r. 16. See EXECUTION OF DECREE.

(438-b) See LIMITATION ACT (1908), Art. 182.

(439) O. XXI, r. 16—*Execution—Injunction, decrees for, in respect of easement—Transfer of dominant tenement—No application by transferee—Decree-holder, right of, to execute decree—Executing Court, competency of, to consider incapacity of decree-holder to enjoy easement owing to transfer of dominant tenement.* Yelligadu v. Raja Venkata Kumara Mahipati Surya, 2 L.W. 1192—18 M.L.T. 494—29 M.L.J. 693—(1916) M.W.N. 119—31 Ind. Cas. 542. See Final Part, 1915, Col. 456.

(440) O. XXI, r. 16. See Nos. 100, 117, 426, 427, *supra*.

(440-a) O. XXI, r. 16, O. XXII, r. 10, O. XXXIV, r. 5—*Mortgage suit—Preliminary decrees for sale—Application for execution by transferee.*

An application by a transferee of mortgage decree for sale in execution with a prayer for passing the final decrees held to be premature since only a preliminary decree has been passed; the applicant was directed to amend the petition as order falling under O. XXII, r. 10, cl. (1) and O. XXXIV, r. 5. *Kanniah Nalaidu v. Chengama Naidu*, 33 Ind. Cas. 981.

SADASIVA AIYAR and MOORE, JJ.

(440-b) O. XXI, r. 17. See EXECUTION OF DECREE.

(441) O. XXI, r. 17—*Execution application not giving dates of prior applications—Return for amendment—Representation not made—Step-in-aid of execution—Limitation Act (1908), Art. 182—Applying in accordance with law, construction of, if affected by O. XXI, r. 17, Civ. Pro. Code—Practices.*

An execution petition returned by the Court for amendment but not re-presented yet operates as a step-in-aid and gives afresh starting point for limitation (a).

O. XXI, r. 17, Civ. Pro. Code, was not intended to affect the construction put upon the words "applying in accordance with law" occurring in Art. 182 of the Limitation Act by judicial decisions in dealing with formal defects in execution applications. The rule is an enabling provision, which allows certain defective applications subsequently amended to be deemed applications 'in accordance with law' with effect from the date of their first presentation. *Kamatchi Ammal v. Pitchu Iyer*, 4 L.W. 103—(1916) 2 M.W.N. 152—31 M.L.J. 561.

SPENCER and KRISHNAN, JJ.

References:—(a) 16 M. 142; (1915) M.W.N. 65; 2 L.W. 1207, F.

(441-a) O. XXI, r. 18. See EXECUTION OF DECREE.

(442) O. XXI, r. 18—*Cross-decrees set off—Decrees for sale on mortgage against puisne encumbrancer—Personal decrees in favour*

Civ. Pro. Code (1908)—(Continued).

of puisne encumbrancer against mortgagee—Different capacities.

Certain persons were impleaded as defendants to a suit for sale on certain mortgages as purchasers of a portion of the equity of redemption. The suit was decreed. Those persons had brought a suit against the mortgagees for possession of certain other property and mesne profits; that suit was decreed. The decree-holders in the suit for possession applied for the execution of the decree for costs in their favour, and the mortgagee decree-holders prayed that the amount due to them from the applicants under the decree on the mortgage might be set off against the amount due to the applicants under their decrees:—

Held that, under O. XXI, r. 18, Civ. Pro. Code, there could be no set-off, inasmuch as the applicants filed distinct characters in the two cases. A person against whom a decree foreclosing his right to redeem a property from sale is passed in his character as a puisne mortgagee or an attaching creditor is a judgment-debtor to that decree in a character different from the one in which he holds a decree made in his favour personally and which is enforceable against his judgment-debtor by the arrest of his person and the attachment of his property. In the one case he has obtained his decree for costs in his individual and personal capacity. In the other he is not ordered to pay any sum of money in his individual and personal capacity but is only given an option to do so if he likes to save from sale some property in which he is interested. *Sheo Shankar Kualapuri v. Ghool Lal*, 14 A.L.J. 776=38 A. 669=36 Ind. Cas. 948.

WALSH and SUNDAR LAL, JJ.

(443) O. XXI, r. 19, *object of—Joint and several decree in favour of A against B and C for Rs. 1,200—Decrees for costs in favour of B against A for Rs. 400 and C against A for Rs. 1,000—Execution by A against B for Rs. 800—Legality—‘Two parties,’ meaning of—Difference between the old and new Codes—Procedure to be followed, if C executes his decree against A.*

The object of O. XXI, r. 19 Civ. Pro. Code, is to prevent each side executing a decree in respect of sums due whether for costs or otherwise under the same decree.

There is nothing in O. XXI, r. 19, Civ. Pro. Code, to prevent a plaintiff, who holds a joint and several decree against two defendants (who under the same decree are individually entitled to different amounts for costs, which in the aggregate exceed the amount due to the plaintiff), from taking out execution of the decree against one defendant alone for the balance due to him by both defendants until the other defendant makes an application in execution to recover the amount due to him by the plaintiff under the decree.

The words ‘two parties’ in the phrase ‘two parties are entitled to recover sums of money from each other’ in O. XXI, r. 19, Civ. Pro. Code, mean the two parties or sets of parties,

Civ. Pro. Code (1908)—(Continued).

who are parties not only to the suit in which the decree was passed but also referred to in the opening sentence of the rule.

The difference between the language of O. XXI, r. 19, and old S. 247 pointed out.

The procedure to be followed if the other defendant applies for execution of his decree also pointed out, *Rangiah Chetty v. Narasaya*, 3 L.W. 267=34 Ind. Cas. 388.

SADASIVA AIYAR and MOORE, JJ.

(444) O. XXI, r. 19—*Decree—Execution—Cross claims under the same decree—Mesne profits due—Costs allowed—Costs, though recovery thereof barred by limitation, can be set off.* *Madappa Ganapa Hegde v. Jaki Ghosal Gabri Ghosal*, 17 Bom. L.R. 689=40 B. 60=30 Ind. Cas. 893. See Final Part, 1915, Col. 457.

(444-a) O. XXI, r. 22. See EXECUTION OF DECREE.

(444-b) See LIMITATION ACT, 1908, Art. 182.

(445) O. XXI, r. 22—*Limitation—Act XIV of 1882, S. 248—O. XXI, r. 22, Civ. Pro. Code, notice, issue under—Irregular or defective notice, effect of.*

Held that the issue of a notice under S. 248 of Act XIV of 1882 corresponding to O. XXI, r. 22 of the present Code gives a new start for limitation, even though the preceding application upon which the notice was issued was defective or irregular. *Sri Ram v. Mohan Lal*, 19 O.C. 17=34 Ind. Cas. 280.

STUART, A.J.C.

(446) O. XXI, r. 22.

The omission to give notice, as required by O. XXI, r. 22 of the Code of Civil Procedure, is not a mere irregularity which makes the proceeding voidable, but is a defect which goes to the root of the proceeding and renders it void for want of jurisdiction (a).

Such omission renders proceedings inoperative even though a stranger may have acquired title in course thereof. *Syam Mandal v. Sati Nath Banerjee*, 24 C.L.J. 523.

MOOKERJEE and CUMING, JJ.

References:—(a) 20 C. 370; 21 C. 19; 32 B. 572, R.

(446-a) O. XXI, r. 22. See LIMITATION ACT (1908), No. 300, 36 Ind. Cas. 999.

(447) O. XXI, rr. 22, 66, S. 11—*Former execution application—No notice under O. XXI, r. 22, issued—Issue of one under O. XXI, r. 66—Amount of interest claimed not then objected to—Subsequent application for execution—Right to object interest claimed—Not barred—Notice under O. XXI, r. 66—Nature of.*

Where, in a previous application for execution, there was no occasion to issue a notice to show cause as required by O. XXI, r. 22 and therefore the judgment-debtor had no opportunity of raising objection as to the interest claimed by the transferee of the decree and there was no adjudication between the parties, but a notice was issued for settling the matters referred to in O. XXI, r. 66.

Civ. Pro. Code (1908)—(Continued).

Held that the omission of the judgment-debtor to contest the amount claimed in the previous application did not debar her from contending in the present case that she was not liable for the amount now claimed (a).

A notice for settling matters referred to in O. XXI, r. 66, is not a notice relating to execution. *Ratan Lal v. Mussammat Biba Kunria*, 34 Ind. Cas. 144.

BANERJEE, J.

References:—(a) A.W.N. (1901) 32 & 37 A. 589, R.

(448) O. XXI, rr. 23 and 57—*Execution—Notice, issue of—Attachment—Default on the part of the decree-holder—Dismissal of application—Order for execution, whether res judicata*. *Periakaruppan Chettiar v. Manikka Yachaga*, 2 L.W. 1055=31 Ind. Cas. 293. See Final Part, 1915, Col. 457.

(449) O. XXI, r. 24, O. XXXVIII, r. 7. See PENAL CODE, No. 3, 1 Pat. L.J. 550.

(450) O. XXI, r. 30. See No. 124, *supra*.

(450-a) O. XXI, r. 32. See LIMITATION ACT (1908), Art. 182.

(451) O. XXI, r. 32—*Injunction—Temporary disobedience—Executability of decree*.

O. XXI, r. 32, Civ. Pro. Code, is not confined in its operation to cases where the imprisonment or attachment can be continued until the decree has been executed, but applies also to cases where the injunction restrains certain persons from doing certain acts in perpetuity.

Even a temporary disobedience of an injunction decree passed by a Civil Court is punishable under O. XXI, r. 32, Civ. Pro. Code, and the fact that the party guilty of disobedience has subsequently obeyed it is no bar to its execution under the provisions of that rule.

A Court has no power under O. XXI, r. 32, Civ. Pro. Code, to order the party who disobeys a decree for an injunction to execute a security bond for its obedience. *Aiyana Charlar v. Yathiar Ramanuja Ayyangar*, 3 L.W. 161=19 M.L.T. 132=(1916) M.W.N. 147=32 Ind. Cas. 698.

PHILLIPS, J.

(452) O. XXI, r. 35—*Decree-holder put in possession under—Obstruction by third person on behalf of judgment-debtor—Decree-holder whether entitled to file a second application for possession under*. *Thandavaroya Mudall v. Subramania Gurukkal*, 29 M.L.J. 501=32 Ind. Cas. 44. See Final Part, 1915, Col. 457.

(453) O. XXI, r. 35. See No. 271-a, *supra*.

(454) O. XXI, r. 36—*Tenant put in possession by landlord—Subsequent dispossession by trespasser—Landlord's right to sue for possession—Form of decree*. See LANDLORD AND TENANT, No. 4, 30 M.L.J. 259.

(454-a) O. XXI, r. 41. See ATTACHMENT.

(455) O. XXI, r. 41—*Practice—Scope—Order for examination of judgment-debtor when*

Civ. Pro. Code (1908)—(Continued).

may be made—Order when may be set aside.

An application under O. XXI, r. 41, Civ. Pro. Code, which is made *ex-parte* on a verified tabular statement, is in order.

It is open to the Court to hear the objections of the person summoned, before he is actually examined, and he must apply on summons to have the order for examination set aside.

The object of O. XXI, r. 41, is to obtain discovery for purposes of execution, to avoid unnecessary trouble in obtaining satisfaction of money decrees. It is a useful rule, but orders for discovery may operate harshly against the party directed to give discovery and ought not to be lightly made. An order for personal examination is likely to operate still more harshly, and cause unnecessary harassment and obviously ought not to be made unless the Court is satisfied about the *bona fide* of the application and urgent necessity for it.

Such an application, however, ought not to be discouraged. It may perhaps be usefully encouraged to prevent unduly dilatory, troublesome and expensive execution proceedings. It can be made at any stage of the execution proceedings and it may be made even before all other methods are exhausted. *National Bank of India, Ltd. v. A.K. Ghuznavi*, 43 C. 285=34 Ind. Cas. 287.

CHAUDHURI, J.

Reference:—17 B. 514, R.

(455-a) O. XXI, r. 43. See ATTACHMENT.

(456) O. XXI, rr. 43, 54 and 64—*Execution of decree—Sale without attachment, validity of*.

Where a sale in execution of a decree has been confirmed it cannot be treated as a nullity on the ground that the sale did not take place in pursuance of an attachment as required by law. The absence of an attachment, though an irregularity, does not render the sale absolutely void. *Tarak Nath Roy Chowdhury v. Syama Charan Chowdhury*, 26 Ind. Cas. 292.

CHATTERJEE and RICHARDSON, JJ.

References:—18 C. 189; 21 A. 311=A.W.N. (1899) 84. F.; 12 Ind. Cas. 911=36 B. 156=13 Bom. L.R. 1193, D.; 5 A. 86=A.W.N. (1882) 186, Diss.; 21 C. 66 (P.C.)=20 I.A. 176=17 Ind. Jur. 534=6 Sar. P.C.J. 324=10 Ind. Dec. (N.S.) 676; Rafique & Jackson's P.C. No. 131, R.

(456 a) O. XXI, r. 46. See ATTACHMENT.

(457) O. XXI, r. 46—*Execution of decree—Jurisdiction of executing Court to issue prohibitory order to person outside territorial jurisdiction of executing Court*. *Mr. F. A. Gregory v. Mr. H. Thomson*, 177 P.L.R. 1915=116 P.W.R. 1915=30 Ind. Cas. 457. See Final Part, 1915, Col. 459.

(458) O. XXI, rr. 46, 54, 79—*Debt, attachment and sale of*.

Civ. Pro. Code (1908)—(Continued).

A debt can be sold under O. XXI, r. 64 and delivery can be made in the manner prescribed in r. 79, O. XXI.

It is only when the garnishee or third party admits the debt that payment can be ordered to be made to the judgment-debtor, and if he denies the debt, it is open to the judgment creditor to have it sold or to apply for the appointment of a receiver with power to sue the garnishee for the recovery of the debt from him (a). *M.R.R.M. Firm v. U Zan*, 35 Ind. Cas. 469=10 Bur. L.T. 6.

MAUNG KIN, J.

Reference:—11 B. 448, F.

(459) O. XXI, r. 46 (a) of *Burma Chief Court*—*Admission of debt to judgment-debtor—Procedure.*

The procedure to be followed when a debtor, who admits he owes money to a judgment-debtor, does not pay it into Court, is indicated in O. XXI, r. 46 (a) added to the Civ. Pro. Code (Act V of 1908) by the Burma Chief Court.

All that can be done is to warn him that if he fails to pay the amount due by him into Court he may be subjected to a suit. *P.L.M. Firm v. Daley M. Stacey*, 38 Ind. Cas. 169.

SIR CHARLES FOX, C.J. and MR. PARLETT, J.

(460) O. XXI, r. 46 (3)—*Money paid under compulsion of legal process, suit to recover, if lies—Bona fides of party receiving payment—Attachment of debt ostensibly payable to other than judgment-debtor—Necessity of enquiry as to who is real creditor—Duty of Court to guard against its orders prejudicing party not before the Court.*

A sued B for recovery of money and obtained an order for attachment before judgment. The property attached was a debt due ostensibly from C to D but the debt was attached on the allegation that B and not D was the real creditor and the Court issued a prohibitory order on C. A obtained an *ex parte* decree in his suit against B, and C was then called upon to pay into Court the money due from him ostensibly to D. C deposited the money in Court on an order being made that the money would be retained in Court till the adjudication of the question whether B or D was beneficially interested therein. No enquiry was made into this question and without notice to C or D the Court on the application of A paid out the money to him. D subsequently sued C and recovered judgment against him on the debt. C now sued A to recover the money which he had deposited in Court and which without notice to him or his creditor D had been withdrawn by A. Both the Courts below concurrently found that not B but D was the real creditor of C.

Held, that, though the principle is that where money has been paid by the plaintiff to the defendant under compulsion of legal process, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received, there must be *bona fides* on the part of the party who has

Civ. Pro. Code (1908)—(Continued).

got the benefit of his opponent's payments in order to bring this principle in force. If the person enforcing a payment under legal process has therein taken an unfair advantage or acted unconscientiously, knowing that he had no right to the money, the principle laid down above may not prevent the plaintiff from recovering the money back (a).

That in the present case the defendant was able to appropriate the money by what constituted a grave abuse of the process of the Court and the principle laid down above had no application.

That the money deposited in this case did not cease to be the money of the plaintiff merely because he had brought it into Court on the faith of a conditional order which directed its retention in Court pending enquiry into the question raised as to who was the real creditor, and the Court had full authority to compel the defendant to bring back the money into Court to be repaid to the plaintiff.

O. XXI, r. 46, cl. (3), contemplates a case where there is no dispute that, if the suit results in a decree against the defendant or there is a pre-existing judgment against him, the money is recoverable thereunder from the depositor.

There being such a dispute in this case, it was incumbent on the Court to make an enquiry, and the conditional order was the proper order to make in this case.

The Court has inherent power to guard against an abuse of its process and to ensure that its orders do not operate to the prejudice of persons who have no notice of the proceedings. *Harinath Choudhuri v. Haradas Acharyya Choudhuri*, 20 C.W.N. 188=23 C. L.J. 163=43 C. 269.

MOOKERJEE and ROE, JJ.

References:—(a) 7 T.R. 269; (1797) 2 Smith's Leading Cases 420; (1900) 1 Q. 675, R.

(461) O. XXI, r. 50—*Minor partners of Hindu joint family business—Liability for debts of the business.* *O.A.M.K. Chetty Firm v. K.P. Chetty Firm*, 8 L.B.R. 112=31 Ind. Cas. 271. See Final Part, 1915, Col. 459.

(461-a) O. XXI, r. 52. See ATTACHMENT.

(462) O. XXI, r. 52—*Dispute as to priority with regard to funds in receiver's hands—Competent Court to decide.*

Under Civ. Pro. Code, O. XXI, r. 51 in an attachment if funds are in the hands of a receiver the Court to decide a dispute as to property between the mortgagee and the holder of the money decree is only the Court in whose custody the money is. *Rani Debendra Bala Das v. Babu Chandra Sekhar Prasad Singh*, 1 Pat. L.J. 449=35 Ind. Cas. 589.

CHAMIER, C.J. and SHARFUDDIN, J.

(463) O. XXI, r. 52, scope of—*Attachment—Application for formal attachment under O. XXI, r. 52—Previous attachment, effect on.* *Surjamull Agarwala v. Ram Chandra Mistry*, 28 Ind. Cas. 193=20 C.W.N. 412. See Final Part, 1915, Col. 460.

Civ. Pro. Code (1908)—(Continued).

(464) O. XXI, r. 52. See No. 141-a, *supra*.
 (465) O. XXI, r. 53—Attachment of decrees—Exclusion of time occupied by attachment—See LIMITATION ACT (1908), No. 52, 30 Ind. Cas. 587.

(466) O. XXI, r. 53. See No. 141-a, *supra*.
 (467) O. XXI, r. 54. See Nos. 141-a, 142, 143, 456, *supra*.

(468) O. XXI, r. 55. See No. 141-a, *supra*.

(468-a) O. XXI, r. 57. See ATTACHMENT.

(469) O. XXI, r. 57—Attachment by Court of First Instance—Sale stayed by appellate Court—Dismissal of application in consequence, effect of, on attachment.

Under O. XXI, r. 57, Civ. Pro. Code, the attachment shall cease only if the application for execution has been dismissed for any default of the decree-holder.

In all other cases of dismissal, it is a question of fact in each case whether the order removing the application from the file does or does not prevent the attachment from subsisting.

Effect of dismissals for default under the old and new Codes compared.

Where after attachment by a Court of First Instance the sale was stayed by an order of the appellate Court and the Court of First Instance thereupon dismissed the application. *Held*, that the attachment subsisted.

Held also, that O. XXI, r. 57, should be strictly construed. *Yallakath Puthiah Mallayakkal Mammi Kutti Haji v. Thachar A. Manakkal Parameswaran Nambudri*, 3 L. W. 601 = 35 Ind. Cas. 240.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—34 A. 490, *Appr.*; 38 C. 482, *Not F.*

(470) O. XXI, r. 57—Whether retrospective. See ATTACHMENT, No. 1, 31 Ind. Cas. 911.

(471) O. XXI, r. 57. See No. 448, *supra*.

(472) O. XXI, r. 58—Payment under protest to avoid illegal attachment—Application under O. XXI, r. 58, for refund not maintainable—Remedy of applicant by suit.

Where an attachment was issued against the goods of the judgment-debtor, but the bailiff was about to actually seize the goods of another person (the applicant), and the latter person, with a view to avoid the illegal attachment, paid under protest the amount named in the warrant, he cannot apply under O. XXI, r. 58, Civ. Pro. Code, that the money should be returned to him: Rule 58 has no application, for it refers to the release of property which has been wrongfully attached, but no property was attached in this case. The applicant's remedy therefore is by suit and not by application in execution proceedings. *In the matter of an application by Jan Mahomed*, 9 S.L.R. 218 = 34 Ind. Cas. 492.

PRATT, J.C.

References:—7 C. 648; 40 C. 598; (1906) 1 Ch. 800 (807), *R.*

Civ. Pro. Code (1908)—(Continued).

(473) O. XXI, r. 58—Mortgage-decrees—Attachment of property—Claims, investigation of—Procedure. *Mg Mra Tun v. U Kalng*, 29 Ind. Cas. 941 = 8 Bur. L.T. 214 = 8 L.B.R. 215 (F.B.). See Final Part, 1915, Col. 461.

(474) O. XXI, r. 58. See Nos. 102, 103, 379, *supra*.

(475) O. XXI, rr. 58 to 62—Investigation essential to make order operative so as to necessitate institution of suit—Investigation nature of.

The essential requisite of an operative order under O. XXI, rr. 58 to 62 which would necessitate the institution of a suit within one year is that there must be some investigation. If there is no investigation of any kind there can be no operative order and the bar of one year's limitation does not apply to such a case. But there is no authority for the proposition that where a Judge has passed an order after a perfunctory investigation such an order is not an operative order. The order is equally operative whether the investigation has been satisfactory or unsatisfactory. *Bal Makund v. Salyed Maqud Ali*, 19 O.C. 357.

STUART, J.C.

(476) O. XXI, rr. 58, 61, 62—Applicability to claims founded on mortgage—Order refusing to recognise mortgage—Suit to set aside the order—Limitation—Art. 11, Limitation Act (1908)—Applicability to orders made after full investigation and to orders passed on default.

Claims founded on mortgages are as much within O. XXI, r. 58, Civ. Pro. Code, as any other claim (a).

The language of Art. 11, Limitation Act, shows that orders refusing to recognise mortgages are within the article. Art. 11 of the new Act is more comprehensive than the previous Act, and covers orders after full investigation as well as orders passed on default (b). *Ponnusami Pillai v. Samu Ammal*, 31 M.L.J. 247.

SESHAGIRI AIYAR and BAKEWELL, JJ.

References:—(a) 22 B. 640, *F.*; 29 C. 25, *D.* (b) 2 L.W. 206; 31 Ind. Cas. 205, *Appr.*

(477) O. XXI, rr. 58, 63—Case under Companies Act—Refusal to adjudicate upon claim—Appeal. See COMPANIES ACT (1883), No. 13, 14 A.L.J. 722.

(478) O. XXI, r. 59—Attachment—Claim—Evidence of possession not adduced—Decision on title.

Where in an enquiry on a claim petition no evidence of possession is adduced, the Court is justified in confining itself to the question of title. *Sevugam Chetty v. Rungammal*, 32 Ind. Cas. 84.

ABDUR RAHIM and SPENCER, JJ.

(479) O. XXI, r. 59. See No. 475, *supra*.

(480) O. XXI, r. 60. See No. 475, *supra*.

(481) O. XXI, r. 61. See Nos. 475, 476, *supra*.

Civ. Pro. Code (1908)—(Continued).

(482) O. XXI, r. 62—Sale of property subject to mortgage—Right of purchaser to question validity of mortgage.

Where property is sold subject to a mortgage, only judgment-debtor's right of redemption is sold, so that the purchaser does not acquire any greater right than that of redeeming the mortgage, and it is not open to the purchaser to question the validity of such a mortgage. *Gur Charan Prasad v. Bachni*, 30 Ind. Cas. 238.

STUART, A.J.C.

References:—28 A. 418=A.W.N. (1906) 68=3 A.L.J. 200 and 15 Ind. Cas. 5=15 O.C. 211, F.

(483) O. XXI, r. 62—Order by Court to notify prior encumbrances without preliminary enquiry—Mention of monies due or them in sale proclamation—Description of encumbrances not notified—Duty of purchaser to pay encumbrance.

In execution of a decree the Court directed without holding any preliminary enquiry, but with the consent of the decree-holder's pleader, that certain encumbrances on the property to be advertised for sale might be notified for what they were worth. The order was passed without any notice to the judgment-debtor. In the proclamation of sale the mortgage monies were mentioned under the heading of prior encumbrances without a statement either as to the dates of the mortgages or the persons to whom the said monies were due, and in the certificate of sale the entire sum was lumped up together and described as a "bar" or encumbrance notified at the time of auction. *Held*, that from the above circumstances it was not possible to conclude that the Court had directed the sale of the attached property, subject to the liens notified in the manner laid down in S. 282, Civ. Pro. Code, 1882, corresponding to O. XXI, r. 62 of the present Code.

Where at the time of sale the existence of certain encumbrances is notified, the purchaser of the property in the sale is not estopped from showing the invalidity of the encumbrances. *Lala Bhagwan Das v. Chaudhuri Ahmad Jan*, 36 Ind. Cas. 732.

STUART and KANHAIYA LAL, A.J.CS.

References:—29 Ind. Cas. 360=2 O.L.J. 140=5 O. and A.L.R. 106, F.; 5 Ind. Cas. 874=7 A.L.J. 199; 30 Ind. Cas. 238=2 O.L.J. 225, D.; 3 Ind. Cas. 793=31 A. 583=13 C.W.N. 1143=10 O.L.J. 313=6 A.L.J. 817=11 Bom. L.R. 1230=6 M.L.T. 277=19 M.L.J. 682=36 I.A. 203 (P.C.), R.

(484) O. XXI, r. 62. See Nos. 475, 476, *supra*.

(485) O. XXI, r. 63—Declaratory suit by defeated claimant against attaching decree-holders—Plea that sale was fraudulent under S. 53, Transfer of Property Act—Validity—Scope of S. 53, Transfer of Property Act—Remedy of person aggrieved—Representative action whether necessary—Difference between judgment-creditors and

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ordinary creditors—English and Indian Law.

The property in suit belonged to V. He sold it to plaintiff at a time when he was heavily involved in debt. Defendants had a number of decrees against V for monies due to them before the date of sale to plaintiff, and they attached the property in execution of their decrees.

Plaintiff filed a claim petition, which was rejected on the decree-holders' plea that the sale was invalid under S. 53, Transfer of Property Act. Thereupon the claimant filed the present suit for a declaration that the property belonged to him by sale and that V had no interest therein. On second appeal by plaintiff, it was contended that, as defendants had not sued to set aside the sale in favour of plaintiff before they attached the property, they were not entitled to resist the plaintiff's claim in this suit. *Held*, that this contention should be allowed.

Per *Seshagiri Aiyar, J.*—There is nothing in the Hindu Law which is inconsistent with S. 53, Transfer of Property Act. At any rate S. 53 may be taken as indicating the principles of equity, justice and good conscience which ought to guide Courts in the absence of specific legislative provisions (a).

On the language of S. 53 of the Transfer of Property Act, it is open to any creditor to impeach a conveyance made by his debtor; provided he alleges in the plaint that the sale was intended to defraud him and others similarly placed. A decree in such a suit will not give any personal rights to the litigating plaintiff, but would enure for the benefit of all creditors like himself (b).

There is nothing in the words of S. 53 to differentiate between the position of the decree-holder and that of an ordinary creditor in this respect.

If the sale is void or is found to be a sham transaction, it will not be necessary either for the creditor individually or conjointly with others to sue to set aside the sale. But if it is only voidable, the creditors can have no remedy against the property conveyed until the sale is set aside. It is well settled that, in cases of voidable transactions, until the transaction is avoided, it continues in force (c).

The English Law on the above points discussed (d). *Palanulandi Chetty v. M.V. Appavu Chettiar*, 30 M.L.J. 565=19 M.L.T. 390=34 Ind. Cas. 778.

COUTTS-TROTTER and SESHAGIRI AIYAR, JJ.

References:—(a) 34 C. 999; 11 B. 666, R. (b) 16 B. 1; 27 B. 146; 32 C. 198 (217); 30 M.L.J. 116, R. (c) 24 M.L.J. 592; 25 B. 327; 35 C. 202; 39 B. 507; 29 M. 184; 30 M. 6; 24 C. 825, R. (d) (1884) 13 Q.B.D. 199; (1912) 3 K.B. 474; (1845) 10 Hare 30; (1838) 3 Mylne & Craig 407; (1869) 7 Eq. 347, R.

(486) O. XXI, r. 63—Suit against order on claim-petition—Plaintiff's right to declaration and consequential relief—Sale of

Civ. Pro. Code (1908)—(Continued).

property before order on the claim-petition—Limitation Act, Sch. II, Art. 11.

In a suit against an order on a claim-petition, the plaintiff is not confined to the relief which can be given by the Court that heard the claim; but is entitled to ask both for declaration of his title to the property, and for all consequential reliefs, e.g., recovery of its value where the property has been sold prior to the order on the claim-petition.

Such a suit comes within Art. 11 of Sch. II of the Limitation Act, and is in time if it is instituted within one year of the date of the order dismissing the plaintiff's claim though after more than a year from the date of the attachment and sale of the properties. *Basilvi-reddi v. Ramayya*, (1916) 2 M.W.N. 207=4 L.W. 300=20 M.L.T. 353=81 M.L.J. 394=36 Ind. Cas. 445.

ABDUR RAHIM, O.C.J., SESHAGIRI IYER and PHILLIPS, JJ.

References:—12 C. 696; 16 B. 608; 16 M. 140, R.; 35 C. 202, D.

(487) O. XXI, r. 63—*Specific Relief Act, S. 42—Suit for declaration after withdrawal of attachment.*

Although an attaching creditor who withdraws his attachment cannot file a suit under O. XXI, r. 63, he can file a suit under S. 42 of the Specific Relief Act for a declaration that the property sought to be attached belonged to his judgment-debtor. *Chan Tat Thal v. Ma Lat*, 9 Bur. L.T. 89=33 Ind. Cas. 124.

U KIN, J.

(488) O. XXI, r. 63—*Burden of proof—Proof of bona fides—Deed, innocent appearance of—Suit by claimant to property, nature of.* *Jama-har Kumari Bibi v. Askaran Bold*, 22 C.L.J. 27=30 Ind. Cas. 855. See Final Part, 1915, Col. 462.

(489) O. XXI, r. 63—*Suit for declaration that property not liable to attachment and sale—Amount of decree below Rs. 5,000—Suit valued at Rs. 25,000—Appeal—Forum.* *Khetra Pal v. Mumtaz Begam*, 13 A.L.J. 1104=38 A. 72=81 Ind. Cas. 879. See Final Part, 1915, Col. 462.

(490) O. XXI, r. 63—*Suit for mere declaration—No prayer for possession—Maintainability of suit—Specific Relief Act, S. 42—No bar.* See SALE, No. 12, 34 Ind. Cas. 125.

(491) O. XXI, r. 63. See Nos. 379, 477, *supra*.

(492) O. XXI, r. 64. See Nos. 436, 456, 458, *supra*.

(493) O. XXI, r. 65. See No. 154, *supra*.

(493-a) O. XXI, r. 66. See SALE.

(494) O. XXI, r. 66—*Execution of decrees—Ancestral property—General Rules of Practice for Civil Courts, Ch. IV, r. 5.*

Property to which title is made out by gift is not property inherited within the meaning of r. 4, Chap. IV of the General Rules of Practice,

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for the Civil Courts and such property is consequently not ancestral. *Fazal Ahmad v. Wesal-ud-din*, 14 A.L.J. 669=38 A. 481=35 Ind. Cas. 742.

WALSH and SUNDER LAL, JJ.

(495) O. XXI, r. 66—*Execution—Sale proclamation—Duty of Court—Purchaser's remedy in event of improperly conducted sale.*

A purchaser at a Court sale of immovable property buys at his own risk and there is no warranty of title or guarantee that the property will answer to the description given of it, unless the sale is vitiated by fraud on the part of the decree holder or the judgment-debtor (a).

In sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The Court, it is said, should at any rate not fall below the standard of honesty which it exacts from those on whom it has to pass judgment. The slightest suspicion of trickery or unfairness must affect the honour of the Court and impair its usefulness. It would be disastrous, it would be absolutely shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain illusory and unconscientious (b).

By O. XXI, r. 66, a duty is cast upon the Court to use all possible materials before it in drawing up a proclamation of sale which will give such information about the property to be sold as may be as fair and as accurate as possible. Where the presiding Judge has not availed himself of the materials before him, they being such as would have enabled him to avoid the trouble afterwards occasioned, the purchaser who has in fact been misled should have a remedy.

The remedy would be either for a proportionate refund of the purchase money for the missing acres or for a cancellation of the sale. *A. M. Hashim Isphany v. N. A. P. K. Chetty Firm*, 8 L.B.R. 427=9 Bur. L.T. 169=33 Ind. Cas. 1003.

MAUNG KIN, J.

References:—(a) 17 M. 228; 23 A. 355; 27 A. 637; 18 A. 324; 20 C. 8; 21 Ind. Cas. 774, N.F. (b) 5 L.B.R. 25, F.

(496) O. XXI, r. 66—*Sale proclamation—Duty to state encumbrances on property to be sold—Effect of order passed under the rule.*

S. 287, Civ. Pro. Code 1882, which corresponds with O. XXI, r. 66 of the present Code imposed upon the Court the duty of stating as fairly and accurately as possible for the information of would be purchasers any encumbrances to which the property advertised for sale was liable, with any other things which the Court considered material for the purchasers to know in order to judge of the nature and value of the property. But an order passed by the Court executing the decree in the course of such an enquiry is not conclusive as between the decree-holder or purchaser on the one hand and the

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holder of the encumbrance on the other. **Lala Bhagwan Das v. Chaudhuri Ahmad Jan**, 36 Ind. Cas. 732.

STUART and KANHAIYA LAL, A.J.CS.

References:—28 A. 418 = A.W.N. (1906) 68 = 8 A.L.J. 200; 10 O.C. 280; 15 Ind. Cas. 5 = 15 O.C. 211, R.

(497) O. XXI, r. 66. See Nos. 104, 206, 447, *supra*.

(497-a) O. XXI, rr. 66, 67, 90—*Execution sale—Irregularity in proclamation—Application to set aside sale—Points to be proved.*

A mere irregularity in a sale proclamation held, under the circumstances of the case, to be not enough for setting aside a sale.

To allow a judgment-debtor who stands by when an irregularity is committed within his knowledge and in his presence to afterwards take advantage of that irregularity in support of his application to set aside the auction-sale has been strongly animadverted upon by their Lordships of the Privy Council in 12 M. 19.

An applicant seeking to set aside a Court sale on the ground of irregularity in the conduct of the sale and of consequent loss to himself must let in "direct evidence" to connect the irregularity with the alleged loss (a). **Swaminatha Aiyar v. Sivagurunatha Chettiar**, 32 Ind. Cas. 990.

SADASIVA AIYAR and MOORE, JJ.

References:—(a) 21 C. 66 (P.C.) = 20 I.A. 176, (P.C.)

(497-b) O. XXI, r. 69. See SALE.

(498) O. XXI, r. 69, O. XLI, r. 5—*Pendency of appeal against an order refusing to set aside ex parte decree—Stay of proceedings in execution—Discretion of Court.*

The original Court may stay proceedings in execution pending the disposal of an appeal against an order refusing to set aside an *ex parte* decree. There is no power vested in an appellate Court to stay such proceedings. **Jamuna Prasad v. Magal Ram**, 35 Ind. Cas. 443.

ROE and JWALA PRASAD, JJ.

Reference:—31 C. 1091, *relied on*.

(498-a) O. XXI, r. 71. See SALE.

(499) O. XXI, rr. 71, 84—*Auction sale in execution—Failure of purchaser to deposit—Re-sale—Defaulting purchaser, when liable for loss.*

In case of a default on the part of a purchaser at an auction sale to deposit the purchase money, the property must be resold forthwith. Fresh bids should be invited soon afterwards and no fresh proclamation of sale is necessary (a).

Where, therefore, a period of nearly six months intervened between the default of the auction-purchaser and the final sale:

Held, that the requirements of O. XXI, r. 84 had not been complied with and the auction-purchaser could not be called upon to pay the

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deficiency in price. **Bell Ram v. Sohan Singh**, 45 P.W.R. 1916 = 32 Ind. Cas. 907.

SHADI LAL, J.

References:—(a) 16 C. 33 and 12 M. 454, F.

(500) O. XXI, r. 79. See No. 458, *supra*.

(500-a) O. XXI, r. 84. See SALE.

(501) O. XXI, r. 84—*Power of officer conducting sale to extend time for deposit of purchase money—Failure to make deposit within time, effect of.*

The officer conducting a judicial sale has no authority to extend the time fixed for deposit of the $\frac{1}{2}$ of the purchase money. The omission to deposit the $\frac{1}{2}$ of the purchase money vitiates the sale *ab initio*. **All Muhammad v. Alla Khanum**, 30 Ind. Cas. 230.

STUART, A.J.C.

References:—28 A. 238 = A.W.N. (1905) 263; 9 Ind. Cas. 66 = 15 C.W.N. 350; 5 A. 316; A.W.N. (1893), 38; 30 A. 273; A.W.N. (1908) 107 = 5 A.L.J. 336, R.

(502) O. XXI, r. 84. See No. 499, *supra*.

(502-a) O. XXI, r. 88. See SALE.

(503) O. XXI, r. 88—*Sale of share in undivided immoveable property—Simultaneous bid by co-sharer—Right of pre-emption.*

Where a co-sharer asserted his right of pre-emption in a sale of a share of an undivided immoveable property by offering the same amount, as the person preceding him did bid, there was sufficient compliance with the requirements of O. XXI, r. 88, Civ. Pro. Code, **Iqbal Husain v. Ejaz Husain**, 36 Ind. Cas. 654.

KANHAIYA LAL, A.J.C.

References:—2 A. 850; 3 A. 827 = A.W.N. (1891) 86, R.

(503-a) O. XXI, r. 89. See SALE.

(504) O. XXI, r. 89 (S. 310-A, old Code)—*Execution sale, setting aside of, if permissible without an application, oral or written.*

A sale in execution cannot be set aside under O. XXI, r. 89, Civ. Pro. Code (S. 310-A, old Code), without an application (oral or written) within 30 days. **Yenkata Narasimma v. Lakshmi Narasimham**, 3 L.W. 174 = 32 Ind. Cas. 783.

SADASIVA AIYAR and MOORE, JJ.

(505) O. XXI, r. 89—*Decree—Sale in execution—Judgment-debtor selling the property after auction-sale—Application by judgment-debtor to set aside auction-sale.*

Q, judgment-debtor, whose property has been sold at a Court-sale, has a right to apply to the Court to have the sale set aside, as a person owning the property sold in execution of the decree within the meaning of r. 89 of O. XXI of the Code of 1908, although he has transferred or attempted to transfer his interest in the property to a third party after the Court-sale.

Civ. Pro. Code (1908)—(Continued).

Pandurang Laxman Uphade v. Govinda Dala Uphade, 18 Bom. L.R. 571—40 B. 557.

BATCHELOR and SHAH, JJ.

(506) O. XXI, r. 89—*Auction-purchaser—Deposit—No confirmation of sale—Application to set aside sale.*

Amounts paid by purchasers in Court auction whose purchases have not been confirmed and which amounts therefore could not be withdrawn by the decree-holder at his pleasure could not be taken advantage of by any person who applies under O. XXI, r. 89, Civ. Pro. Code, 1908. **Muhammad Rowther v. Rangachariar**, 31 Ind. Cas. 913.

SADASIVA AIYAR and NAPIER, JJ.

Reference:—28 M.L.J. 262, F.

(507) O. XXI, r. 89—*Sale of mokarrari—Deposit by share-holder of purchase-money—Bengal Tenancy Act, 1885, S. 174.*

Where a portion of a mokarrari was sold in execution of a decree, an application by a share-holder therein to deposit the purchase-money is governed by O. XXI, r. 89, Civ. Pro. Code, and not by S. 174 of the Bengal Tenancy Act, 1885. **Moulvi Saliyd Razl-ud-din Hossain v. Bendsahri Prasad Singh**, 36 Ind. Cas. 769.

MULLICK, J.

(508) O. XXI, r. 89—*Mortgage decree against several defendants—Payment of their respective shares by some of the defendants before sale—Whole property mortgaged sold for the balance—Deposit of balance of decree debt by one of the defendants and application by him alone for setting aside sale—Maintainability—Received by the decree-holder, meaning of.* **Karunakara Menon v. Krishna Menon**, 2 L.W. 196 = 28 M.L.J. 262 = 27 Ind. Cas. 952 = 39 M. 429. See Final Part, 1915, Col. 465.

(509) O. XXI, r. 89—*Application made in time—Money tendered before 3 p.m. but not accepted—Effect of.* **Munna Lal v. Radha Kishan**, 13 A.L.J. 793 = 37 A. 591 = 30 Ind. Cas. 186. See Final Part, 1915, Col. 466.

(510) O. XXI, r. 89. See APPEAL (SECOND APPEAL), No. 12-a, 36 Ind. Cas. 769.

(511) O. XXI, r. 89. See Nos. 105, 143, 256-a, 290, *supra*.

(512) O. XXI, rr. 89 and 90—*Application to set aside sale—Non-payment by judgment-debtor within time agreed upon—Power of Court to extend time—Appeal.*

After a sale in execution of a decree accompanied by delivery of possession the judgment-debtor entered into an agreement with the decree-holder-purchaser, that on payment of the amount of the decree within a certain time the purchaser should give back the property to the judgment-debtor. Notwithstanding the several extensions of the time fixed for payment made with the consent of the parties money was not paid by the judgment-debtor. Then the Court against the will of the decree-holder extended the time for performing the agreement and allowed the judgment-debtor to get back his property on the terms of the agreement, which

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the judgment-debtor had broken and not performed on his own part. The questions for disposal were whether the first Court was competent to extend the time and whether an appeal lay to the District Judge from the order of the lower Court granting the extension. *Held* that the application by the judgment-debtor having been made under O. XXI, r. 89 or 90, one of the two, an appeal clearly lay to the District Judge. *Held*, also that it was not competent to the first Court to extend the time that the parties themselves had fixed by agreement for performing the contract. *Held* further that the High Court could not revise the order of the lower appellate Court on the ground that the Judge of that Court had made a mistake of law. **Shashi Bhushan Banerji v. Charushila Debi**, 36 Ind. Cas. 909.

FLETCHER and NEWBOULD, JJ.

(512-a) O. XXI, r. 90. See SALE.

(513) O. XXI, r. 90—*Locus standi of a person alleging his property to have been sold in execution of a mortgage-decree—Person whose interests are affected by the auction-sale.*

A person who alleges that his property has been sold in execution of a mortgage-decree passed on foot of a mortgage which had not been executed by him, has no *locus standi* to apply, under O. XXI, r. 90 of the Code, to have the sale set aside, he having already brought a suit for the declaration of this title to the property mortgaged. **Hardwar Lal v. Muhammad Salamat-ullah Khan**, 14 A.L.J. 409 = 38 A. 358 = 34 Ind. Cas. 272.

PIGGOTT and WALSH, JJ.

Reference:—23 Ind. Cas. 839, R.

(514) O. XXI, r. 90—*Execution sale, setting aside of—Material irregularity.*

An omission to state in the sale proclamation the precise amount of claims received from other decree-holders, subsequently to the order directing the sale of the property, can scarcely be called an irregularity at all.

The absence from the sale proclamation of a valuation of the property to be sold, if it had not a deterrent effect on the minds of intending or possible bidders, is not a material irregularity.

Though a sale officer, in allowing an intending bidder for several lots to deposit his one-fourth share of the purchase-money at the conclusion of the sales of all the lots, instead of at the conclusion of the bid for each specific lot, is an irregularity, yet it is for the judgment-debtor to prove that such irregularity materially prejudiced him and resulted his substantial loss. **Mohammad Ali v. Mahabir Prasad**, 35 Ind. Cas. 411.

PIGGOTT and LINDSAY, JJ.

References:—28 A. 238, Appr.; 5 A. 316; 30 A. 273, Cons.

(515) O. XXI, r. 90—*Non-transferable occupancy holding, sale of, under rent-decree—Right of mortgagee to set aside.*

Civ. Pro. Code (1908)—(Continued).

A mortgagee purchaser in execution of a mortgage-decree of an entire non-transferable holding is competent to set aside a subsequent execution sale held in execution of a rent decree. The words of O. XXI, r. 90 "whose interests are affected by the sale" are very wide and the mortgagee purchaser comes within the rule. **Saibabala Debi v. Nritya Gopal Sen Poddar**, 31 Ind. Cas. 859.

RICHARDSON and ROE, J.J.
Reference:—20 C.W.N. 40, D.

(516) O. XXI, r. 90—*Sale in execution—Material irregularities in proclamation of sale.*

A sale in execution of a decree is liable to be set aside on the ground of material irregularities, where the sale proclamation understated the value of the property to be sold, and omitted to state the amount due under a mortgage thereon, and the price realised is very inadequate. **Mohendra Nath Jana v. Bepin Behary Ghosh**, 33 Ind. Cas. 946.

TEUNON and CHAUDHURI, J.J.

(517) O. XXI, r. 90. See Nos. 106, 107, 108, 109, 380, 512, *supra*.

(518) O. XXI, r. 90 and S. 47. See BEN. ACT IX of 1879 (COURT OF WARDS), No. 2, 20 C.W.N. 552.

(519) O. XXI, r. 90 and S. 73—*Whose interests are effected—Decree-holder not entitled to rateable distribution, not such person—Judgment-debtor who has been adjudged an insolvent, not such person—Combination among bidders at auction, effect of.*

A decree-holder, who has not made an execution application before receipt of assets to enable him to claim rateable distribution under S. 73 of the Code, has no existing interests in the properties to enable him to apply for setting aside the sale.

The words in r. 90 "entitled to a share in a rateable distribution of assets" refer to decree-holders who are entitled to a rateable distribution under S. 73 of the Civ. Pro. Code.

The right to dividend before the Official Receiver is not contemplated by the rule. It is a right contingent on proof of debt before the Official Receiver and was not established at the time of the application.

Where the judgment-debtor has, subsequent to the sale of his property, been adjudged insolvent, he ceases to have any existing interest in the property and cannot apply for setting aside the sale.

The allegation that the bidders conspired with the auction purchaser to put down the price is no ground for setting aside a sale under Civ. Pro. Code, O. XXI, r. 90 (a).

The words in r. 90 "where interests are affected by the sale" refer to existing interests in the property sold. The phrase cannot be extended to the claims of creditors, for that would involve (1) the proof of claim in the execution proceedings and (2) a construction which would make the words "the decree-holder

Civ. Pro. Code (1908)—(Continued).

or any person entitled to share in a rateable distribution of assets" redundant (b). **Pragji Kala v. Asna Jalal**, 10 S.L.R. 53=35 Ind. Cas. 530.

PRATT, J.C.

References:—(a) 23 M. 227, F. (b) 26 Ind. Cas. 93, F.

(520) O. XXI, r. 92. See Nos. 105, 110, 290, *supra*.

(521) O. XXI, rr. 92, 93—*Refund of purchase-money—Right of suit by auction-purchaser—Act XIV of 1882, S. 315.*

The plaintiff was auction-purchaser of certain property at a Court-sale. After the purchase made by him a suit was brought by a third party against the judgment-debtor for possession which was successful. The plaintiff applied to be made a party to that suit, but his application was refused. The auction-sale was never set aside. The present suit was brought for the refund of purchase-money against the judgment-debtor and the decree-holder: *Held*, that having regard to the provisions of O. XXI, rr. 92 and 93 of Act V of 1908 which in this respect had introduced great changes upon the language used in S. 315 of Act XIV of 1882, the suit was not maintainable (a). **Nannu Lal v. Bhagwan Das**, 14 A.L.J. 1216=39 A. 114.

RICHARDS, C.J. and RAJPUJ, J.

Reference:—(a) 5 A. 577 (F.B.), D.

(522) O. XXI, r. 93. See MAD. ACT I OF 1908 (ESTATES LAND), No. 35, 35 Ind. Cas. 153.

(523) O. XXI, r. 93. See Nos. 97, 521, *supra*.

(524) O. XXI, r. 93 and S. 315 (Old Code), *differences between—Execution sale set aside—Purchaser, suit by, against decree-holder for poundage deducted from purchase-money as well as for interest on the amount of purchase-money deposited—Maintainability—Poundage, what is.* **Parvathi Ammal v. Govindasami Pillai**, 2 L.W. 861=29 M.L.J. 467=(1915) M.W.N. 797=30 Ind. Cas. 827=39 M. 803. See Final Part, 1915, Col. 469.

(525) O. XXI, r. 94—*Scope and nature of—Sale certificate—Duty of Court to grant.*

The provisions of O. XXI, r. 94 of the Code of Civil Procedure are mandatory and it imposes a positive and imperative duty upon the Court in the matter of granting a sale certificate.

Where, under a decree in a mortgage suit in which the subject matter of the mortgage was the tenant's interest in a particular house, such interest was sold and purchased by the mortgagee himself, *held* that the Court was bound to grant such purchaser a sale certificate. It would be improper for the Court to require him to produce a money-order receipt showing that the purchaser had paid the mutation fee to the landlord for the purpose of having his name entered in the books of the landlord as transferee of the tenant's interest. **Balkuntl Misair v. Narinda Sundari Debi**, 1 Pat. L.J. 446.

ATKINSON and JWALA PRASAD, J.J.

(526) O. XXI, r. 94. See No. 149, *supra*.

Civ. Pro. Code (1908)—(Continued).

(527) O. XXI, r. 95—*Sale of share in nankar rights—Acquisition of full right by purchaser—Necessity for purchaser to apply for possession.*

The purchaser of a share in a certain nankar right in Court-sale is not bound to perfect his title by making an application for possession in the sense indicated by O. XXI, r. 95. He acquires full title to them from the date of his purchase. *Pratab Das v. Kanhal Lal*, 36 Ind. Cas. 768.

LINDSAY, J.C.

(528) O. XXI, r. 95. See No. 111, *supra*.

(529) O. XXI, r. 95 and S. 47—*Execution sale—Purchase by decree-holder—Delivery of possession—Order whether appealable. See EXECUTION SALE, No. 4, 20 C.W.N. 829.*

(530) O. XXI, r. 97. See No. 150, *supra*.

(531) O. XXI, r. 98. See No. 150, *supra*.

(532) O. XXI, rr. 98, 99—*Possession directed when.*

O. XXI, r. 98, Civ. Pro. Code, gives jurisdiction to the Court to direct possession only if it is satisfied that the obstruction was by the judgment-debtor or by some other person at his instigation. *Secretary of State v. Cherukara Narayananunni Pisharodi*, 21 Ind. Cas. 799.

SADASIVA AIYAR, J.

(533) O. XXI, r. 99. See Nos. 150, 532, *supra*.

(534) O. XXI, r. 100. See Nos. 112, 150, *supra*.

(535) O. XXI, rr. 100, 101 and 103, O. XLI, rr. 23 and 25—*Limitation Act (1908), Art. 11-A—Ss. 332, 335, Civ. Pro. Code (1882).*

Held, that, where a case has not been decided on a preliminary point, the remand, if necessary, should be under r. 25 and not r. 23 of O. XLI, Civ. Pro. Code (1908).

Held, also, that, where on an application made under r. 100 of O. XXI of Act V of 1908, an order under r. 101 has been passed against a person other than the judgment-debtor, his regular suit filed after one year from the date of this order is barred by time under Art. 11-A, Limitation Act (1908). *Ram Singh v. Kundan Singh*, 96 P.W.R. 1916=103 P.L.R. 1916=36 Ind. Cas. 211.

LE ROSSIGNOL, J.

(536) O. XXI, r. 101. See Nos. 113, 150, 585, *supra*.

(537) O. XXI, r. 102. See No. 150, *supra*.

(538) O. XXI, r. 103. See Nos. 114, 150, 585, *supra*.

(539) O. XXII, r. 3—*Death of party, decree passed after—Application under r. 3 to bring legal representative on record—Limitation Act XV of 1877, S. 6, Sch. II, Art. 175-A—Limitation Act, 1908, Sch. I, Art. 176.*

A decree passed subsequent to the death of a party is a nullity (a).

Civ. Pro. Code (1908)—(Continued).

Under O. XXII, r. 3, Civ. Pro. Code, 1908, an application to bring on record legal representatives of a deceased appellant should be made within 6 months of the latter's death.

S. 6 of the Limitation Act will not apply to such applications. *Ma Min Thin v. Maung Po Win*, 35 Ind. Cas. 438.

PARLETT, J.

Reference:—26 B. 317, R.

(540) O. XXII, r. 3 (1)—*Meaning of—Suit by legal representative to establish his position—Duty of plaintiff. See RELIGIOUS ENDOWMENTS, No. 1, 30 M.L.J. 274.*

(541) O. XXII, r. 4—*Effect of abatement same as dismissal—Decree—Appeal. See ABATEMENT, No. 2, (1916) M.W.N. 301.*

(542) O. XXII, rr. 4, 9—*Abatement of appeal—Application to set aside—Insufficient cause—Neglect of appellant—Case not to proceed against other respondents. Muhammad Subhan Baksh v. Abdul Rahman Khan*, 81 P.W.R. 1915=155 P.L.R. 1915=30 Ind. Cas. 717. See Final Part, 1915, Col. 470.

(543) O. XXII, rr. 4 and 11—*Death of one respondent—Appeal heard without legal representative on record—Appellant, if entitled to apply for a re-hearing. Yellayan Chetty v. Jothi Mahalinga Iyer*, 2 L.W. 166=28 M.L.J. 138=(1915) M.W.N. 201=28 Ind. Cas. 83=39 M. 386. See Final Part, 1915, Col. 470.

(544) O. XXII, rr. 4 (3) and 9 (2)—*Appeal—Death of respondent—Application to substitute heirs after six months—Ignorance of death—Whether 'sufficient cause'.*

Where it was found that the appellant knew of the death of the respondent long before he made his application for the substitution on record of the names of the respondent's heirs or at least that, if he was not actually aware of it, his ignorance implies great negligence.

Held that no 'sufficient cause' was shown to excuse the delay in making the application, and that the appeal abated (a).

Application for substitution of names of heirs of a deceased party must be made within six months of the death or the suit (or appeal) must abate (*vide* O. XXII, r. 4, Civ. Pro. Code), and the plaintiff is out of Court unless he can satisfy the Court that he 'was prevented by any sufficient cause from continuing the suit'—O. XXII, r. 9 (2) which means that the party must satisfy the Court that he had sufficient excuse for not applying in time. *Daya Singh v. Buta Singh*, 118 P.R. 1916.

JOHNSTONE, C.J. and CHEVIS, J.

References:—(a) 60 P.R. 1911, *Ref. to*; 113 P.R. 1907 and 43 P.R. 1869, *Dist.*

(545) O. XXII, r. 6—*Judgment written after death of one of the defendants—Validity—Liability of joint tort-feasors—Death of one—Survival of cause of action against the others—Act XIII of 1865 (Fatal Accidents)—Right of undivided brother of deceased to claim compensation—Hindu joint family—Amount of compensation—Judgment in criminal trial and evidence*

Civ. Pro. Code (1908)—(Continued).

then recorded—*Admissibility in civil proceedings—Defendant's admission of guilt to police—Admissibility—*Ss. 17, 18, 21, 25, 33, 42, *Evidence Act. Bishen Das v. Ram Labhaya*, 106 P.R. 1915=32 Ind. Cas. 18. See Final Part, 1915, Col. 472.

(546) O. XXII, r. 9. See Nos. 207, 542, 544, *supra*.

(547) O. XXII, rr. 9, 11—Application for substitution made more than 6 months after appellant's death—No objection by respondents—Effect. See LIMITATION ACT (1908), No. 144, 20 O.W.N. 993.

(548) O. XXII, r. 9 (2)—*Application to set aside abatement of appeal—Sufficient cause—Limitation Act (1908), Art. 171—Excuse for delay neither mentioned in application or affidavit cannot be considered—Ignorance of fact when excusable.*

Where one of the necessary parties to an appeal was murdered on the 26th January, 1914, and applications to substitute names were not made until the 15th April, 1915, the excuse offered in the application being ignorance of the fact of the murder, and it being further alleged on the hearing that both the plaintiffs appellants were absent on pilgrimage at the time:

Held, (1) that the appeal having abated six months after the date of the murder, the application ought to have been made within 60 days after abatement;

(2) that the appellants had failed to show sufficient cause for delay in applying, seeing that they lived within 15 kos of the deceased's village, and that the excuse about absence on pilgrimage was not mentioned either in the applications or the affidavits. *Thakur v. Narain Singh*, 12 P.W.R. 1916=31 Ind. Cas. 697.

JOHNSTONE, C.J. and CHEVIS, J.

(549) O. XXII, r. 9, cl. 2—*Suit for malicious prosecution against manager of joint Hindu family—Abatement—Cause of action—Survival—Legal representative applying for setting aside abatement—Refusal—Appeal.*

When a Court treats a suit as having abated owing to the cause of action not surviving, there is no right in the plaintiff's legal representative to apply under O. XXII, r. 9, cl. (2), Civ. Pro. Code, 1908, to set aside that order of abatement. Cl. 2 of r. 9 applies only to cases where the abatement takes place in consequence of an application not having been made within the time limited by law to bring in the legal representatives. An order of the Court declaring that a suit has abated owing to the cause of action not surviving is a decree, and it determines that the right of the plaintiff ceased to exist on his death, and therefore, falls within the definition of a decree, there being no appeal provided for in the Code from that order "as an appeal from an order" (see exception (a) to S. 2, Civ. Pro. Code).

The cause of action for a suit for damages caused by the malicious prosecution of the manager of an undivided Hindu family does

Civ. Pro. Code (1908)—(Continued).

not, on his death, survive to the remaining coparceners, even as regards that portion of the claim which related to the loss incurred by the estate in the defence of the criminal case brought against the manager, the cause of action being a single and indivisible one in a personal action. Further the surviving members of an undivided family are not representatives of the deceased member. *Subramania Iyer v. Venkatarama Iyer*, 31 Ind. Cas. 4.

SADASIVA AIYAR and NAPIER, JJ.

(550) O. XXII, r. 9 (2)—*Abatement set aside by one Division Bench—Order passed ex parte—Another Bench if can reopen the same—Practice—Procedure—Jurisdiction—Community, properly belonging to—Some members allowed to act as trustees—Gift by such persons in favour of third person—Possession of third person, whether permissive or adverse—Declaratory suit based on denial of title—Cause of action when arises—Knowledge of some members, if affects the rights of others. Muruga Chetty v. Rajaswamy*, 2 L.W. 813=(1915) M. W.N. 701=18 M.L.T. 327=29 M.L.J. 574=30 Ind. Cas. 669. See Final Part, 1915, Col. 473.

(551) O. XXII, r. 10—*Lessees pendente lite—Whether can be made parties to the suit.*

Where, during the pendency of a suit for recovery of possession of certain villages, the defendants granted leases to a number of persons enabling them to work mica mines in the said villages:

Held that the plaintiffs are entitled to have the lessees added as parties to the proceedings and to compel them to account for any profits which they may have received from the land(a).

The language of O. XXII, r. 10, Civ. Pro. Code, 1908, is sufficiently wide to cover the cases of leases such as those which are alleged to have been granted by the defendants during the pendency of the litigation. *Ram Kumar Lal Bhagat v. Raja Mukund Sahl*, 1 Pat. L.J. 596.

CHAMIER, C.J. and SHARFUDDIN, J.

Reference:—(a) 39 C. 220, *Dist.*

(551-a) O. XXII, r. 10—*Application to be made—Co-plaintiffs—Adverse decision—Devolution of interest from original plaintiff pendente lite.*

Where certain persons applied to be made co-plaintiffs and failed, they could not apply to have the application treated as one under O. XXII, r. 10, Civ. Pro. Code, for substitution of new plaintiffs on the ground that there had been a transfer or devolution of interest from the original plaintiff *pendente lite*. *Srimati Bibi Jan Bibi v. Abdul Jabbar Daftary*, 36 Ind. Cas. 919.

FLETCHER and NEWBOULD, JJ.

(552) O. XXII, r. 10. See MESNE PROFITS, No. 1, 1 Pat. L.J. 427.

(553) O. XXII, r. 10 and O. XLIII, r. 1, cl. 1—*Suit by Hindu widow—Adoption pending suit—Widow allowed to prosecute suit though divested, on strength of ante-adoption agreement—Order, if appealable.*

Civ. Pro. Code (1908)—(Continued).

Where, during the pendency of a suit brought by a Hindu widow, the defendant objected that, by an adoption made since the institution of the suit, the plaintiff had divested herself of the estate of her husband and so could no longer prosecute the suit, but the Court overruled the objection in the view that plaintiff was entitled to prosecute the suit under an ante-adoption agreement with the natural father of the adopted son:

Held—that the order was not one under r. 10 of O. XXII of the Civ. Pro. Code, and was not appealable under O. XLIII, r. 1, cl. 1. *Pro-motha Nath Ray v. Dinamoni Chowdhrali*, 20 C.W.N. 552=39 Ind. Cas. 868.

D. CHATTERJEE and BEACHCROFT, JJ.

(554)—O. XXII, r. 11. See Nos. 543, 547, *supra*.

(555) O. XXIII, r. 1—*Suit—Withdrawal—Second suit—Cause of action and relief different whether in respect of same subject-matter—If statutory bar.*

The rule laid down in 21 M. 35 that a plaintiff, who has withdrawn a former suit without permission to bring a second suit, is prevented from agitating in the second suit the truth of the allegations which constitute the defence in the first suit, does not apply to a case where the cause of action and the relief claimed in the second suit are substantially different from those in the first suit; in such a case the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit. *Pandilapalli Singareddi v. Yeddula Subba Reddi*, 31 M.L.J. 48=20 M.L.T. 62=(1916) 2 M.W.N. 1=4 L.W. 1=39 M. 947=35 Ind. Cas. 185 (F.B.).

WALLIS, C.J., ABDUR RAHIM and SRINIVASA AYYANGAR, JJ.

References:—21 M. 35; (1910) M.W.N. 782; 2 L.W. 177, *Overruled*.

(556) O. XXIII, r. 1—*Withdrawal of appeal—Suit for declaration of invalidity of alienation by widow—Suit dismissed—Appeal—Death of widow pending appeal—Appeal allowed to be withdrawn at plaintiff's request—No express permission to bring fresh suit—Subsequent suit for possession barred.*

Permission to bring a fresh suit under O. XXIII, r. 1, of the Code of Civil Procedure, must be given in express terms and cannot be implied (a).

Thus the withdrawal of an appeal from a decree dismissing a suit for a declaration regarding the invalidity of an alienation by a widow after the death of alienor without the express permission of Court to bring a fresh suit would bar the subsequent suit for possession. *Jita Singh v. Hari Singh*, 97 F.R. 1916.

RATTIGAN, J.

References:—(a) 3 P.R. 1905, R.; 8 Ind. Cas. 1066; 28 Ind. Cas. 91, R.; 21 O. 265; 1 P.R. 1904; 4 C.W.N. 110, D.

(557) O. XXIII, r. 1—*Withdrawal of suit—Pedigree filed with plaint being found*

Civ. Pro. Code (1908)—(Continued).

wrong—No formal defect—Liberty to bring fresh suit.

Where a suit was filed with a pedigree which was found to be wrong, the suit could not be permitted to be withdrawn with liberty to bring a fresh suit on the allegation of the pedigree being wrong, as there was no formal defect by reason of which the suit might fail. *Gulab Del v. Patan Din*, 30 Ind. Cas. 351.

STUART, A.J.C.

(558) O. XXIII, r. 1—*Withdrawal of suit—When allowed—Application made at late stage not to be granted—Revision.*

Where all the evidence in the case has been adduced and the case almost closed, the Courts ought not to permit the plaintiff to withdraw from the suit with liberty to bring a fresh suit on the same cause of action more especially when it is not shown what defect there was in the plaint which necessitated such withdrawal.

The High Court in revision set aside an order of the District Munsif permitting the plaintiff to withdraw from the suit and remitted the case to be heard and decided by him in accordance with law leaving it open to him to deal with any application that may be made for any amendment of the plaint. *Rajendra Nath Chakravarty v. Balkanta Nath Pramanick*, 34 Ind. Cas. 934.

TEUNON and SHEEPSHANKS, JJ.

(559) O. XXIII, r. 1. See No. 257, *supra*.

(560) O. XXIII, r. 1, Sch. II, S. 3 (2)—*Arbitration—Suit referred to arbitration—Award made found valid—Withdrawal of suit with liberty to file a fresh suit.*

After a suit has been referred to arbitration and a valid award has been made, the further jurisdiction of the Court to permit the withdrawal of the suit with leave to file a fresh one would be an abuse of the power of the Court and contravene the provisions contained in S. 3 (2), Sch. II of the Code of Civil Procedure. *Abdul Karim v. Muhammad Husain*, 3: Ind. Cas. 347.

KANHAIYA LAL, A.J.C.

(561) O. XXIII, r. 1 (2)—*Application to withdraw from suit with liberty to sue again—Court if may grant application but without liberty.*

Where the trial Court, being of opinion that no sufficient ground had been made out for allowing the plaintiff to withdraw from the suit with liberty to institute a fresh suit in the same cause of action, passed order allowing him to withdraw without such leave:

Held:—That the suit was not disposed of by the order.

Where a plaintiff does not desire to withdraw from the suit unless with liberty to bring a fresh suit, and the Court considers that such liberty ought not to be granted, the proper course is simply to dismiss the application. *Suradhani Debya v. Chandra Nath Pramanick*, 20 C.W.N. 1011.

N. R. CHATTERJEE and MULLICK, JJ.

Reference:—32 B. 345, F.

Civ. Pro. Code (1908)—(Continued).

(562) O. XXIII, r. 1 (3)—*Withdrawal of suit without leave, effect of—Bengal Tenancy Act (VIII of 1885), Ss. 106, 109.*

In the absence of permission to bring a fresh suit, O. XXIII, r. 1, sub-r. (3) of the Civ. Pro. Code, precludes the plaintiff from instituting any fresh suit in respect of such subject-matter or such part of the claim from which he has withdrawn.

Suits for declaration of title and for recovery of possession are entirely foreign to the jurisdiction of the Revenue officer under S. 106, Bengal Tenancy Act, his work being limited to entries in the record of rights.

S. 109 of the Bengal Tenancy Act is a bar only in respect of matters which are legally the subject-matter of the investigation made under Ch. X of the Act and of decisions thereunder. *Aswini Kumar Aloh v. Saroda Charan Basu*, 24 O.L.J. 79.

D. CHATTERJEE and NEWBOULD, JJ.

(563) O. XXIII, r. 1 (3). See MORTGAGE (REDEMPTION), No. 6 (1916) M.W.N. 171.

(564) O. XXIII, r. 3, scope of—*Suit, adjustment of—Arbitration, reference to—Agreement, enforcement of.*

An agreement by the parties to a suit to refer a dispute to arbitration does not come within the scope of O. XXIII, r. 3 of the Code of Civil Procedure, inasmuch as such an agreement does not finally dispose of the suit, as there is still a great deal of judicial work to be done, evidence has to be considered and weighed, and a judicial opinion arrived at (a).

Where, however, the parties presented a petition to Court, and agreed that the case should be finally disposed of in one way if a simple fact was found to exist, and in another way if it was found not to exist, the agreement came within the terms of O. XXIII, r. 3 of the Code, as no further judicial action was necessary; and the agreement being capable of enforcement, the losing party should not be entitled to repudiate it after the fact, on which it depended, had been ascertained (b). *Khobhari Sah v. Jhaman Sah*, 23 C.L.J. 482 = 34 Ind. Cas. 220.

SHARFUDDIN and COX, J.

References:—(a) 20 C. 218, R. (b) 14 A. 141, Expl.

(565) O. XXIII, r. 3—*Order recording petition of compromise—Jurisdiction of Court to decide whether suit has been settled out of Court when one party denies the settlement—Absence of authority of persons negotiating compromise.*

There can be no doubt that when one party alleges and the other denies that a suit has been settled by a lawful agreement out of Court, the Court has power to decide whether there has been such a settlement and if this question is decided in the affirmative to grant a decree in accordance with the agreement.

The Full Bench decision in 24 C. 908 = 1 C.W.N. 597, has been now given effect to by the alterations made from the language of S. 375

Civ. Pro. Code (1908)—(Continued).

of the Civ. Pro. Code of 1882 in O. XXIII, r. 3 of the Code of 1908

In this case the High Court, on a consideration of the circumstances, set aside the order of the lower Court recording a petition of compromise on the ground that none of the persons who took part in the negotiations were authorised to effect a compromise that was binding on the parties to the suit. *Anadi Krishna Dutt v. Priya Shankar Majumdar*, 36 Ind. Cas. 375 = 21 C.W.N. 366.

CHATTERJEE and NEWBOULD, JJ.

(566) O. XXIII, r. 3, order passed under, not appealed—*Effect.*

An order passed by the Court apparently under O. XXIII, r. 3, has the effect of a final and binding decree if no appeal is preferred against it. *Kannayya v. Ramanna*, 31 Ind. Cas. 21.

SPENCER and PHILLIPS, JJ.

(567) O. XXIII, r. 3—*Petition presented to Revenue Court stating adjustment of suit—Registration not necessary—Registration Act (1908), S. 17. Sital Prasad v. Lal Bahadur*, 13 A.L.J. 1122 = 38 A. 75 = 31 Ind. Cas. 902. See Final Part, 1915, Col. 477.

(568) O. XXIII, r. 3—*Effect of, when read with S. 83, Probate and Administration Act. See PROBATE, No. 3, 20 C.W.N. 986.*

(569)—O. XXIII, r. 3, O. XLIII, r. 1 (m) and S. 96 (3)—*Consent decree under O. XXIII, r. 3, when may be passed—Compromise not recorded—Effect—Appeal.*

A decree can be passed under the terms of O. XXIII, r. 3, Civ. Pro. Code, only after there has been an order that the compromise be recorded. This is not a mere matter of form, but of substance. The aggrieved person has a right of appeal against such an order under O. XLIII, r. 1 (m) of the Code, S. 96 (3), Civ. Pro. Code, does not bar an appeal from such a decree. *Paban Sardar v. Bhupendra Nath Nag*, 43 C. 85 = 33 Ind. Cas. 769.

JENKINS, C.J. and N.R. CHATTERJEE, J.

(570) O. XXIV, r. 3. See TRANSFER OF PROPERTY ACT, No. 117, 31 M.L.J. 548.

(571) O. XXV, r. (1) (3) and O. XXXIII—*Pauper suit by woman—Security not required.*

The plaintiff applied for and got permission to sue as a pauper. The defendant then applied for an order to her to give security for his costs under O. XXV, r. 1 (3). The District Court made an order under that rule. The plaintiff was unable to furnish security, and her suit was dismissed. *Held*, that it was not proper to direct a pauper plaintiff to give security for the defendant's costs (a).

The effect of the order for security under such circumstances would render nugatory an order permitting a person to sue as a pauper.

O. XXV, rr. (1) (3), Civ. Pro. Code, does not apply in the case of a woman who has been permitted under O. XXXIII to sue as a pauper.

Civ. Pro. Code (1908)—(Continued).

Ma Gun v. Tha Hayin, 8 L.B.R. 387 = 36 Ind. Cas. 320.

FOX, C.J., and TWOMEY, J.

Reference:—(a) 12 C.W.N. 163, F.

(572) O. XXVI, r. 5. See RULES OF THE HIGH COURT, No. 1, 34 Ind. Cas. 855.

(573) O. XXVI, r. 9—*Local investigation by Court*.

It is matter of some doubt as to whether under the provisions of the present Civ. Pro. Code, it is legal for the Court in person to hold any local investigation. There are two principles applicable to a local enquiry. One of these is that the result of it should be made a matter of record in order that the party adversely affected by it may have an opportunity of meeting it, and the other is that the enquiry should be used only for the purpose of enabling the Judge to understand the evidence and not for the purpose of finding his decision thereon. **Anant Lal Sahu v. Gokal Sahu**, 35 Ind. Cas. 344.

KINGSFORD, J.

Reference:—15 C.L.J. 138, R.

(574) O. XXVI, r. 13. See No. 256, *supra*.

(575) O. XXVIII, r. 11. See No. 141, *supra*.

(576) O. XXIX, r. 1. See No. 301, *supra*.

(577) O. XXIX, rr. 1, 2—*Corporate bodies—Suit against—Suit defective in form—Amendment—Notice*. **India General S.N.R. Co. v. Lal Mohan Saha**, 22 C.L.J. 241 = 43 C. 441 = 31 Ind. Cas. 35. See Final Part, 1915, Col. 479.

(578) O. XXIX, r. 2. See No. 577, *supra*.

(579) O. XXXII, r. 3—*Minors—Application for appointment of guardian ad litem—Failure to pass formal order of appointment—Effect—Not material irregularity—Partnership—Managing member of Hindu family, a partner—Representation of the family—Minor coparceners—Extent of their liability—S. 247, Contract Act*. **Narain Das v. Ralli Brothers**, 61 P.R. 1915 = 136 P.W.R. 1915 = 31 Ind. Cas. 45. See Final Part, 1915, Col. 480.

(580) O. XXXII, r. 3. See Nos. 190, 298, *supra*.

(581) O. XXXII, r. 3, cl. (4)—*Irregular appointment of guardian ad litem—Question of prejudice—Redemption suit fully contested by manager of a joint Hindu family—Representation of minors—Irregularity of appointment of guardian ad litem*.

In a redemption suit all the defendants mortgagees were members of a joint Hindu family. The manager of the family, who was a defendant, having declined to act as guardian *ad litem* for one of minor members, the Court at once appointed the Nazir as such guardian in without issuing the notices required by O. XXXII, r. 3, cl. (4), Civ. Pro. Code. The Nazir did not put in any defence. The manager fully contested the suit which was decreed in appeal and the

Civ. Pro. Code (1908)—(Continued).

mortgage was accordingly redeemed. Subsequently the minor brought a suit for a declaration that the former proceedings were void as against him and for possession as mortgagee. Both the lower Courts found that the minor plaintiff was a member of a joint Hindu family living under the care and guardianship of the manager aforesaid. No fraud or collusion in the former proceedings was established.

Held, that although there had been grave irregularity in the appointment of the guardian *ad litem* for the minor defendant in the former suit, yet, as the manager of the family had fully contested the suit, the minor had in no way been prejudiced, and that there had been an effective redemption of the mortgage which was binding on the minor.

The moment it is shown that there has been no fraud and that the minor's interests have not been prejudiced by the irregularity, the minor's right to set aside the proceedings must be denied.

If the appointment of a guardian has been irregular, it does not necessarily follow that the minor must be deemed to have been prejudiced. That is an issue of fact and has to be established by evidence. **Ram Barechha Ram v. Tarak Tewari**, 14 A.L.J. 589 = 33 Ind. Cas. 805.

PIGGOTT and WALSH, JJ.

(582) O. XXXII, r. 3, cl. 4—*Minor party—Court-guardian, appointment of—Notice to natural guardian, if necessary—O. XXXII, r. 4, Civ. Pro. Code, construction of*.

When the appointment of a Court-guardian to a minor party in a suit is proposed, notice must always go to the natural guardian of the minor or the person with whom he lives.

A Court can appoint an officer of Court as guardian only when there is no other person willing to act as guardian (a).

O. XXXII, r. 4 and other rules as to the appointment of guardian must be read with the provisions of r. 3 which provides for applications for appointment of a guardian.

In a suit to set aside an order dismissing a claim petition, the burden will be on the plaintiff to show that he was entitled to the property. **Nachiappa Chetty v. Chinniah Ambalam**, 4 L.W. 362 = 36 Ind. Cas. 794.

SRINIVASA AYYANGAR, J.

References:—(a) 37 A. 179, H.; 30 C. 1021 (P.C.), D.

(583 & 584) O. XXXII, r. 3 (4). See EVIDENCE, No. 6, 32 Ind. Cas. 350.

(585) O. XXXII, r. 7—*Compromise by next friend or guardian when binding on minor—Leave of Court—Arbitration in accordance with compromise—Petition for leave withdrawn*.

No next friend or guardian to the suit shall, without the leave of the Court expressly recorded in the proceedings enter into any agreement or compromise on behalf of a minor with reference to the suit in which he comes as next friend or guardian.

The action of the Court in proceeding to refer a case to arbitration in pursuance of a

Civ. Pro. Code (1908)—(Continued).

compromise between a minor's guardian and other parties, is not equivalent to approving of their compromise on behalf of the minor.

It is open to a guardian to withdraw a petition for leave to enter into a compromise at any time before leave is granted. *Hanuman Rai v. Jagdar Rai*, 35 Ind. Cas. 676.

CHAMIER, C.J., and KINGSFORD, J.

(596) O. XXXII, r. 7. See No. 429, *supra*.

(587) O. XXXII, r. 7, Sch. II, para I. et seq

—Prior suit for partition—Minor parties—Reference to arbitration—Decree in accordance with award—Appeal from decree—Compromise in appeal—Leave of Court not obtained either to arbitration or to consent decree—Effect—Minor's right of suit to avoid the decree—Prior partition suit re-opened with reference to all parties.

The present plaintiffs, who were minors, were parties to an earlier suit instituted by the present first defendant for partition. That suit was referred to arbitration and a decree was passed in accordance with the award. The present plaintiffs' father appealed from the decree. The appeal was compromised and a decree was purported to be passed therein by the consent of the parties. Neither the reference to arbitration nor the consent decree was with leave of the Court under O. XXXII, r. 7, Civ. Pro. Code.

The present plaintiffs brought this suit for declaration that the consent decree did not bind them and for setting it aside and for other reliefs.

Held, that it was competent to the minors to institute the present suit and obtain a declaration that the decree on the award does not bind them.

Held also, that the effect of avoiding the decree in this case was to re-open the suit for partition not only with respect to the minors but also with respect to all the parties to the suit.

The agreement contemplated in Civ. Pro. Code, Sch. II, paragraph I. et seq, is an "agreement with reference to the suit" under O. XXXII, r. 7, and it is not validly entered into on behalf of a minor where the guardian of the minor purports to bind the minor without the leave of the Court expressly recorded and thus exceeds the authority given to him by the said rule. *Davuluru Vijaya Ramayya v. Davuluru Venkatasubba Rao*, 30 M.L.J. 465=32 Ind. Cas. 881=39 M. 853.

AYLING and TYABJI, JJ.

References:—28 A. 35; 36 A. 69; 29 C. 167, 23 B. 629; (1896) Bom. P.J. 609; 26 B. 298; 24 M. 326; 20 B. 304; 21 M.L.J. 990; 26 B. 76; 30 C. 218; 21 M.L.J. 263; 36 M. 295; 13 A. 300; 23 W.R. 429; 17 B. 357; 31 M. 345=18 M.L.J. 298; 14 C.W.N. 626; 29 B. 239; 10 B. 998; 28 A. 585; 13 B.L.R. Appx. 11; 2 C. 184; (1891) A.C. 31; (1838) 6 Dowl. Pr. Cas. 489=49 R.R. 728; (1838) 3 M. & W. 199; 3 Cl. & Fin. 479, E.

(588) O. XXXII, r. 7, Sch. II, paras. 15, 16

—Decree based on award—Appeal whether lies

Civ. Pro. Code (1908)—(Continued).

—Revision when allowable—Sanction omitted under O. XXXII, r. 7, Civ. Pro. Code—Objections as to conduct of arbitrators—Whether grounds for revision—Agent appointed by guardian—Agent's acts whether binding on minors. *Musammatt Gulab Khatan v. Chaudhri*, 99 P.R. 1915=32 Ind. Cas. 250. See Final Part, 1915, Col. 482.

(589) O. XXXII, r. 10—Minor defendant—

Appellant—Death of guardian ad litem during pendency of appeal—Appeal disposed of without fresh guardian—Fresh guardian appointed in execution proceedings—Minor's property sold without objection—Minor whether can sue for declaration that decrees and execution sale were invalid.

In execution of a decree obtained by one G against two minors V & N and one K, the husband of N, on a pro-note executed by K, the 1st defendant in the suit and the guardian of the minors, certain properties were sold and purchased in Court-auction by the appellant. The decree was passed on 20-4-1906. On 30-8-1906 defendants preferred a joint appeal. At the time of presenting the appeal, the minors were represented by their maternal grandmother S as guardian *ad litem*. S died on 24-9-1906, but this fact was not brought to the notice of the Court. The appeal was dismissed on 9-7-1907. On 12-9-1907, the decree-holder transferred his rights under the appellate decree to T. During the execution proceedings M, the mother of defendant K and the mother-in-law of one of the minors, was appointed guardian *ad litem* of the minors. The properties were sold in Court-auction without objection and delivered to the purchaser on 20-8-1908. The minors V and N sued for a declaration that the decree and the execution proceedings thereon were not binding on them, as they were not properly represented in the appeal, the guardian *ad litem* having died during the pendency of the appeal, and the appellate decree was obtained by fraud.

It was contended that the minors and K, the husband of one of them, raised a common defence to the suit, that they were represented by the same vakil at the hearing of the appeal, that their interests were duly protected, that there was no sufficient reason for disturbing a judicial sale which was properly conducted without any objection, and that the Court and the decree-holder were ignorant of the minor appellant's guardian's death when the appeal was argued and decided.

Held that, no guardian for the minors having been appointed, they were to all intents and purposes not parties to the appeal at all. That being so, the Court has no jurisdiction to sell the properties of persons who were not properly represented on the record, and as against them the decree and sale were a nullity. *Chundury Krishnayya v. Koripalli Raju*, 31 M.L.J. 39=35 Ind. Cas. 154.

SADASIVA AIYAR and MOORE, JJ.

References:—32 C. 296; 24 C. 26; 30 C. 1021; 18 O.L.J. 18; 28 A. 137; 31 A. 572=19 M.L.J.

Civ. Pro. Code (1908)—(Continued).

881; 37 A. 179; 19 M. 127; 38 M. 1076—28 M. L.J. 525; 22 M. 187; 19 M.L.T. 245; 12 B. 18; 84 B. 874, R.

(590) O. XXXIII. See No. 571, *supra*.

(591) O. XXXIII, rr. 5, 7, 15—*Application to sue in forma pauperis, effect of rejection under r. 5—Distinction if any between orders under r. 5 and r. 7.*

On the rejection of an application for leave to sue as pauper, the only course open to the applicant is to institute a suit in the ordinary way. There is no distinction between rejection under r. 5 and an order of refusal under r. 7. *Atul Chandra Sen v. Raja Peary Mohan Mookerjee*, 20 C.W.N. 669—38 Ind. Cas. 812.

HOLMWOOD and MULLICK, JJ.

(592) O. XXXIII, r. 5 (d)—*Application for leave to sue as pauper—Contract Act (IX of 1873), S. 30, agreements by way of wager—Suit to recover anything alleged to be won a wager—Lottery—Lotteries Act (V of 1844).*

An application for leave to sue as pauper ought to be dismissed without enquiry into the poverty of the applicant unless it discloses a cause of action.

Lottery is a game of chance in which the loss or gain of the prize is wholly dependent on the drawing of lots (a).

A lottery is really a bet between each subscriber and the promoter, the subscriber betting the price of his ticket that he will win, the promoter betting the total subscription that he will not.

There is no difference between "gaming and wagering" as used in the English Gaming Act and in the Indian Gaming Act XXI of 1848 and the expression "by way of wager" in the Indian Contract Act, and participating in a lottery is gaming or gambling (b).

If the money won in a lottery is paid to a third person as agent for the winner, the taint of the money would be purged by its passing into the hands of a person who was bound to account and the winner could bring a suit for recovery of the money as from an agent.

Secus if the person has taken away the money alleging himself to be the winner. (c) *Mg. San Ya v. The Indian Telegraph Association Club*, 9 Bur. L.T. 228.

YOUNG, J.

References:—(a) 1 M.H.C. 448, F. (b) 29 O. 461 (P.C.), F. (c) 15 Q.B.D. 363 and 1 Ex. Div. 13, F.

(593) O. XXXIII, r. 7. See No. 591, *supra*.

(594) O. XXXIII, rr. 10, 11—*Suit in forma pauperis—Decree for less amount than claimed—Defendant liable to pay Court-fees proportionately.*

Where, in a suit brought in *forma pauperis*, the plaintiff succeeded only in part and failed as to the rest of the claim, the lower Court ordered the defendant to pay the entire costs incurred by the plaintiff including the amount of Court-fees which would have been payable on the plaint. *Held*, that the costs of the Court-fees

Civ. Pro. Code (1908)—(Continued).

stamp which would have been payable on the plaint should be apportioned under the provisions of rr. 10 and 11 of O. XXXIII, Code of Civil Procedure, in the absence of any provision dealing with a case in which the plaintiff partially succeeded and partially failed. *Ganga Dahal Rai v. Gaura*, 14 A.L.J. 657—38 A. 469—35 Ind. Cas. 46.

PIGGOTT and LINDSAY, JJ.

Reference:—14 M. 163, F.

(595) O. XXXIII, r. 11. See No. 594, *supra*.

(596) O. XXXIII, r. 15. See No. 591, *supra*.

(597) O. XXXIV—*Limitation Act, 1908, Sch. I, Art. 181—Application for decree absolute—Right to apply when accrues—Limitation. Madho Ram v. Mehal Singh*, 18 A.L.J. 985—28 A. 21—30 Ind. Cas. 494. See Final Part, 1915, Col. 483.

(598) O. XXXIV, See No. 10, *supra*.

(599) O. XXXIV, r. 1. See MORTGAGE (GENERAL), No. 11, 8 Bur. L.T. 261.

(600) O. XXXIV, r. 1. See MORTGAGE (GENERAL), No. 44, 33 Ind. Cas. 760.

(601) O. XXXIV, r. 1. See Nos. 1-b, 212 and 308, *supra*.

(602) O. XXXIV, r. 2—Interest. See AMENDMENT OF DECREE, No. 2, 31 Ind. Cas. 320.

(603) O. XXXIV, r. 3—*Court Fees Act—Ad valorem fee—Appeal against final decree—Civ. Pro. Code, O. XXXIV, r. 3, stamp necessary for appeals from decrees under. Ram Dhan v. Chandhri Maqbul Ahmad Khan*, 18 O.C. 114—30 Ind. Cas. 492. See Final Part, 1915, Col. 484.

(604) O. XXXIV, rr. 3 and 5—Application to make final a conditional decree for sale of mortgaged properties. See LIMITATION ACT (1908), No. 280, 1 Pat. L.J. 364.

(605) O. XXXIV, r. 4—Decree passed in terms that the rights of prior mortgagees might not be prejudiced—Decree whether capable of execution. See EXECUTION OF DECREE, No. 2, 14 A.L.J. 324.

(606) O. XXXIV, r. 4. See No. 120-a, *supra*.

(607) O. XXXIV, rr. 4, 5—Meaning of 'mortgaged property.' See MORTGAGE (GENERAL), No. 14, 14 A.L.J. 502.

(608) O. XXXIV, rr. 4 (1), 5, 6—*Appendix D, Forms 4 and 11—Mortgage—Suit for sale—Purchaser of equity of redemption also impleaded—Personal liability of purchaser for plaintiff's costs. Venugopalachariar v. Padmanabha Row*, 29 M.L.J. 120—30 Ind. Cas. 188. See Final Part, 1915, Col. 485.

(609) O. XXXIV, r. 5. See Nos. 1-b, 120-a, 604, 607 and 608, *supra*.

(610) O. XXXIV, r. 5 (2)—Decree for sale upon mortgage—Default in payment of instalments—Sale of mortgaged property—Final decree need not be made. See BOM. ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), No. 8, 18 Bom. L.R. 475.

Civ. Pro. Code (1908)—(Continued).

(611) O. XXXIV, r. 6—*Decree—Ad valorem Court fee.*

A suit was brought on the basis of a mortgage against two mortgagors, and a decree was passed. One of the mortgagors paid up the whole decree. He then brought a suit for contribution. A decree was passed against the person and property of his co-mortgagor. The property being insufficient to satisfy the whole decree, he applied for a decree under O. XXXIV, r. 6, Civ. Pro. Code.

Held, that, the memoranda of appeal both in the Court below and in the High Court should be stamped as in an appeal against a decree and the amount should be calculated *ad valorem* on the amount decreed. *Tajammul Husain Khan v. Muhammad Husain Khan*, 14 A.L.J. 328=35 Ind. Cas. 158.

TUDBALL, J.

(612) O. XXXIV, r. 6—*Equitable mortgage, effect of—Mortgage, recovery of balance due on—Transfer of Property Act (1882), S 59.*

In places where the law permits equitable mortgages to be made, when there is a deposit of title-deeds the Court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage (a).

A mortgagor is personally responsible for all the money borrowed on his mortgage.

Per Fox, C.J.—In view of r. 6 of O. XXXIV permitting a Court to pass a final personal decree only when the balance due after sale of the mortgage property is legally recoverable from the defendant otherwise than out of the property sold, it would appear right to issue notice to the judgment-debtor to show cause before making a decree under the rule, except possible in cases in which the judgment and preliminary decrees have expressly made him liable personally. *Badler Rahman Chowdhry v. M.A. R. R. M. R. M. Chetty Firm*, 8 L.B.R. 450=9 Bur. L.T. 245=35 Ind. Cas. 288.

FOX, C.J.

References:—(a) (1877) L.R. 4 Ch. D. 605; 13 O. 322; 1 C.W.N. 225, F.

(613) O. XXXIV, r. 6—*Court Fees Act—Ad valorem fee—Civ. Pro. Code, O. XXXIV, r. 6, appeals against decrees under. Wasal Ali (Sayed) v. Jang Bahadur Singh*, 18 O.C. 121=30 Ind. Cas. 497. See Final Part, 1915, Col. 486.

(614) O. XXXIV, r. 6. See MORTGAGE (GENERAL), No. 46, 34 Ind. Cas. 48.

(615) O. XXXIV, r. 6. See No. 608, *supra*.

(616) O. XXXIV, r. 8. See No. 276, *supra*.

(617) O. XXXIV, r. 10—*In suit on mortgage wherein accounts if adjusted once for all in preliminary decree—Subsequent payment by mortgagee, if can be added.*

Account in a preliminary decree in a mortgage suit is not adjusted once for all. For instance, O. XXXIV, r. 10, Civ. Pro. Code, mentions the final adjustment of the amount. So the amount may from time to time vary.

Civ. Pro. Code (1908)—(Continued).

When after such a preliminary decree the mortgagee spends money for preservation of the property or pays rent due in respect of the mortgaged property to the landlord, the amount so paid should be added to the amount specified in the preliminary decree in spite of the absence of a covenant in the mortgage bond enabling the mortgagee to add such amount. After such preliminary decree a mortgagee is not bound to leave the property in jeopardy until the Court decides the matter in one way or the other. *Allahabad Bank, Ltd. v. Moti Lal Barman*, 35 Ind. Cas. 95.

FLKTOHER and TEUNON, JJ.

(618) O. XXXIV, r. 14—*Meaning of the term 'mortgagee'—Application of rule.*

The term 'mortgagee' in r. 14 of O. XXXIV of the Code was intended to mean the holder of a subsisting and effective mortgage which could still be set up by the mortgagees against a purchaser or would-be purchaser of the mortgaged property. A mortgage which has become inoperative or time-barred should not be deemed to be a mortgage which should bar the sale of the property. A simple mortgage was made of certain property on January 18, 1901, payable after two years. A suit was brought upon foot thereof against the heirs of the mortgagor, the suit being framed as one for a decree for money under S. 68 of the Transfer of Property Act, owing to the loss of a portion of the mortgage security, or, in the alternative, for the usual decree for sale upon a mortgage. The Court granted the former prayer making the amount realisable out of the assets of the mortgagor. The mortgagees then applied for the sale of the property mortgaged: *Held* that a suit upon the mortgage having become time-barred, there was no legal bar to the sale of the mortgaged property under O. XXXIV, r. 14, Civ. Pro. Code. *Ghedil Lal v. Saadat-un-nissa Bibi*, 14 A.L.J. 902=39 A. 36=35 Ind. Cas. 907.

WALSH and SUNDAR LAL, JJ.

(619) O. XXXIV, r. 14—*Effect of, on S. 99, Transfer of Property Act—Mortgagee purchasing equity of redemption under money decree—Validity of purchase. See MORTGAGE (REDEMPTION), No. 7, 18 P.R. 1916.*

(620) O. XXXIV, r. 14. See No. 99, *supra*.

(621) O. XXXVII, r. 2. See No. 369, *supra*.

(622) O. XXXVIII, r. 5—*Application for attachment before judgment—Summons to defendant to furnish security—Money paid into Court—Subsequent insolvency of defendant—Priority—Charge.*

In this case an application was made by the plaintiff for attachment before judgment of certain properties belonging to the defendant. Summons was issued to the defendant to furnish security for a certain amount or to show cause against it, and it was further ordered that certain goods belonging to the defendant should be attached until further notice. The defendant paid into Court the amount specified in the summons but subsequently became an insolvent.

Civ. Pro. Code (1908)—(Continued).

Held that the plaintiff had no charge on the money paid into Court as against the Official Assignee of the insolvent (a).

There is nothing in the language of r. 5 of O. XXXVIII of Civ. Pro. Code, to give the plaintiff a charge on the money furnished as security for this purpose, and, as in default of the security being given, the property is ordered to be attached, and it is well settled that such attachment before or after judgment does not confer title on the attaching creditor, it would be most anomalous that the plaintiff should acquire a charge on money which is merely paid as security for the production of the said property and to render attachment unnecessary.

When he furnished security by paying money into Court in obedience to an order issued under O. XXXVIII, r. 5 of the Code of Civil Procedure such payment will not create a charge in favour of the plaintiff. **Erelkulappa Chetty v. The Official Assignee of Madras**, 39 M. 903 = 32 Ind. Cas. 190.

WALLIS, C.J. and SESHAGIRI AYYAR, J.
References:—(a) 36 B. 156; (1903) 2 K.B. 41, R.

(623) O. XXXVIII, rr. 5, 6, O. XLIII, r. 1 (q)—*Appeal—Attachment before judgment, application for—Notice issued—Defendant showed cause—Application, dismissal of.*

The order contemplated by cl. (1) of r. 6 of O. XXXVIII of the Code is an order of attachment; the attachment which the Court is directed by cl. (2) of the said rule, to withdraw, is a conditional attachment made in terms of cl. (3) of r. 5.

Where the Court directed, on an application made by the plaintiffs for attachment before judgment, the issue of notice upon the defendants to show cause why an attachment should not issue before judgment, and at the same time directed the defendants not to part with the properties in any way:

Held, that the order was not in accordance with O. XXXVIII, r. 5 of the Code.

Where the Court upon the defendants appearing in the said notices and showing cause, hearing both parties and considering the affidavits filed by them, expressed an opinion that sufficient cause had not been made out for attachment and dismissed the application of the plaintiffs:

Held, that no appeal lay against the order of dismissal under O. XLIII, r. 1, cl. (g) of the Code. **Mahendra Narain Saha v. Gurudas Balragi**, 28 C.L.J. 392 = 33 Ind. Cas. 689.

MOOKERJEE and N.R. CHATTERJEE, JJ.

(624) O. XXXVIII, r. 6. See No. 623, *supra*.

(625) O. XXXVIII, r. 7. See No. 449, *supra*.

(626) O. XXXVIII, r. 10. See No. 144, *supra*.

(626-a) O. XXXVIII, r. 10—*Mortgaged property sold—Puisne mortgagee subsequently attaching sale proceeds—Simple creditor getting attachment before judgment—Absence of execution application prior to realisation—Rateable distribution.*

Civ. Pro. Code (1908)—(Continued).

A puisne mortgagee does not lose his rights as mortgagee simply because he attached the surplus sale proceeds. He in his capacity as puisne mortgagee has a charge over the surplus sale proceeds in Court after the property was sold at the instance of a prior mortgagee.

An attachment before judgment cannot by itself give a simple creditor priority over a mortgagee. It is also difficult to see how the attaching creditor is entitled to rateable distribution when there is no application for execution of the decree and the money was realized before he attached the property (a). **Prabhala Narasimha Somayajulu Garu v. Muthury Somappa**, 32 Ind. Cas. 944.

KUMARASAMY SASTRI, J.

References:—34 M. 25 = 7 Ind. Cas. 856 = 3 M.L.T. 226 = (1910) M.W.N. 688 = 19 M. 72 = 5 M.L.J. 151, F.

(627) O. XXXIX, r. 1—*Application for temporary injunction restraining plaintiffs from preventing defendants entering and worshipping certain temples—Not maintainable.*

An application for a temporary injunction by the defendants that the plaintiffs should, pending the disposal of the suit, be restrained by injunction from interfering with the defendant's right to worship in and to free access to, the temple does not fall either within cl. (a) or cl. (b) of O. XXXIX, r. 1, Civ. Pro. Code, 1908. **Karori Chand v. Maharaj Bahadur Singh**, 1 Pat. L.J. 500.

CHAMIER, C.J. and SHARFUDDIN, J.

(628 & 629) O. XXXIX, r. 1—*Injunction to restrain alienation and registration of a document—Validity. See MAHOMEDAN LAW (WAKF)*, No. 2, 14 A.L.J. 554.

(630) O. XXXIX, r. 2—*Temporary injunction—Breach—Refusal to commit—Appeal—Subsequent dismissal of suit, if affects Court's jurisdiction to pass orders on committal application previously presented—Attachment order, if should precede committal order.*

An appeal lies to the District Court from an order of the District Munsif refusing to take action under O. XXXIX, r. 2 (3), Civ. Pro. Code, for an alleged breach of a temporary injunction granted under O. XXXIX, r. 2 (2).

The subsequent dismissal of a suit does not affect the power of a Court to deal with an application for committal for breach of a temporary injunction presented while the suit was pending.

An order for attachment of properties is not a condition precedent to the validity of an order of committal for breach of a temporary injunction. **Suppl. v. Sayid Kunhi Koya**, 3 L.W. 420 = 19 M.L.T. 314 = 30 M.L.J. 523 = (1916) M.W.N. 328 = 39 M. 907 (F.B.) = 34 Ind. Cas. 598.

WALLIS, C.J., ABDUR RAHIM and SRINIVASA AYYANGAR, JJ.

(631) O. XL, r. 1—*Powers of Receiver—General powers of management of an estate*

Civ. Pro. Code (1908)—(Continued).

whether includes power to appoint Karnam—Effect of S. 15, Madras Act II of 1894—Receiver or Court whether 'proprietor.'

The term 'proprietor' in S. 4 of Madras Act II of 1894 includes any person who is in lawful management of the estate otherwise than as agent or servant of the proprietor or as mortgagee or lessee.

The powers of a Receiver appointed by a Civil Court under O. XL, r. 1 of the Code (as in the present case) are entirely conditioned by the terms of his appointment, subject to any subsequent modification by the Court under which he holds the appointment. Cl. (d) of the rule gives the Court complete discretion as to the powers to be conferred on the Receiver; and the Court may limit his powers in any way it thinks fit. But where the powers conferred amount to general powers of management, the effect of S. 4 of Madras Act II of 1894 would appear to be to attach to the Receiver the special powers conferred on a proprietor by the Act, and subject to any restrictions arising out of the terms of his appointment, there can be no question that he should be regarded as a proprietor within the meaning of the Act.

Whatever may be the control exercised by the Court on the Receiver, the Court cannot be deemed to be the "person in lawful management," for it only exercises control over the estate by the appointment of a Receiver and, until such appointment, is unable to exercise any powers of management (O. XL, Civ. Pro. Code). *Secretary of State v. Komaragiri Janardhana Rao*, 30 M.L.J. 456=32 Ind. Cas. 207.

AYLING and PHILLIPS, JJ.

(633) O. XL, r. 1—*Receivers—Their powers must be specified. Hoe Hin v. S. Balthazar*, 8 Bur. L.T. 154=30 Ind. Cas. 678. See Final Part, 1915, Col. 490.

(633) O. XL, r. 1. See BEN. ACT VIII OF 1885 (TENANCY), No. 46, 34 Ind. Cas. 83.

(634) O. XL, r. 1—"Just and convenient," meaning of—Appointment of Receiver—Principle—Discretion how to be exercised. See RECEIVER, No. 4, 23 O.L.J. 567.

(635) O. XL, r. 1. See Nos. 124 and 137, *supra*.

(636) O. XL, r. (1) and S. 141—*Receiver, if may be appointed in proceedings to appoint common manager—Bengal Tenancy Act (VIII of 1885), S. 93—Ex parte order, appointing receiver if necessarily bad—Remedy of aggrieved party.*

O. XL, r. 1 of the Civ. Pro. Code does not provide that the appointment of a receiver should be confined to a suit.

A proceeding for the appointment of a common manager is a proceeding in the nature of a suit within the meaning of S. 141 of the Civ. Pro. Code, and a receiver can be appointed during the pendency of such a proceeding, if it should appear to the Court just and convenient to appoint a receiver.

Civ. Pro. Code (1908)—(Continued).

In cases of emergency, when the issue of notice to other parties may so delay the proceedings as to defeat the object of the order, the Court has to pass such order *ex parte*, leaving the party aggrieved to object to it either in the Court making the order or by way of an appeal to a higher Court. *Asadali Chowdhury v. Syed Mohammad Hossain Chowdhury*, 20 C. W.N. 1009=43 O. 986=36 Ind. Cas. 177.

D. CHATTERJEE and BEACHCROFT, JJ.

(637) O. XL, r. 1, O. XLIII, r. 1 (3)—*Receiver, appointment of—Order refusing to appoint—Appeal from the order. Guresetji Dinshaw Bolton v. Gangaram Limbaji Galkwad*, 17 Bom. L.R. 680=30 Ind. Cas. 545. See Final Part, 1915, Col. 490.

(638) O. XL, r. 4, and S. 145—*Misappropriation by deceased Receiver—Liability of property in the hands of his legal representatives—Remedy whether in execution or by suit—'Property' whether includes income—Applicability of S. 145. Mullapali Taravathil Manager Ittunni Raman Nair v. Gopala Menon*, 18 M. L.T. 127=39 M. 584=30 Ind. Cas. 383. See Final Part, 1915, Col. 491.

(639) O. XLI, r. 1. See No. 291, *supra*.

(640) O. XLI, r. 3—*Judgment without findings—Report of Tahsildar or Naib-Tahsildar.*

A judgment in the following words:—"Counsel for the respondents admits that the evidence of the Naib Tahsildar in this Court is the best evidence available on either side. It follows that the appeal must be decreed. The appeal is, therefore, decreed with costs"—does not comply with the requirements of the law since it does not set forth the matters in dispute between the parties and since it does not record any findings.

The report of a Tahsildar or a Naib Tahsildar is only the result of the investigation made by him and is only an expression of opinion in the matter.

That report alone cannot be the sole basis of a decision in regard to a question of title. *Kuber Saitthwar Ram Tahal Upadhia v. Gupati Saitthwar*, 35 Ind. Cas. 237.

BANERJI, J.

(641) O. XLI, r. 4—*Dismissal of appeal against both sets of defendants, discretion regarding.*

Where the defendants first party and the defendants second party, in a suit for possession, had appealed from the whole decree, on the ground that the said decree proceeded upon a ground which was common as against all the defendants and after the dismissal of the appeal of the defendant's second party, the appeal of the defendant's first party was taken up and the Judge dismissed the suit as against all the defendants, held that the Judge had the discretion under O. XLI, r. 4, Civ. Pro. Code, 1908, to dismiss the suit as against both sets of defendants. *Ishar Dutt v. Musal Dube*, 31 Ind. Cas. 886.

PIGGOTT, J.

Civ. Pro. Code (1908)—(Continued).

(643) O. XLI, rr. 4 and 38—*Scope—Powers of Court—Appeal by one of two defendants—Grounds common to all the defendants—Effect against the other defendants.*

O. XLI, r. 38, read with O. XLI, r. 4, would seem to give the Court power to interfere with a decree, if that decree was based upon grounds common to all the defendants, although only one of such defendants had appealed against that decree. It is a question in each case to be judged upon the circumstances whether the decree appealed against has proceeded on a ground common to all.

There is no justification for the proposition that a defendant who suffers a decree to be passed *ex parte* against him cannot benefit by the appeal of his contesting co-defendant.

The object of rr. 4 and 38 of O. XLI is to prevent contradictory decisions in the matter of the same suit. *Ram Tahal Singh v. Sukumar Rayaln*, 1 Pat. L.J. 143—35 Ind. Cas. 547.

MULLICK, J.

Reference:—13 W.R. 114, F.

(642-a) O. XLI, rr. 4 and 38—Incompetency of non-appealing co-defendant to support appeal—Parties to be confined to their own objections—One defendant cannot avail of the plea raised by another. See PRACTICE AND PROCEDURE, No. 1, 109 P.W.R. 1916.

(643) O. XLI, r. 5. See No. 498, *supra*.

(644) O. XLI, r. 5 (2)—Appeal infructuous—Order—Execution—Filing of appeal—Stay of execution—Duty of Court of appeal. See APPEAL (GENERAL), No. 6, 23 O.L.J. 310.

(644-a) O. XLI, r. 6—Death of decree-holder—Discharge of surety—Security—Contract Act, 1872, S. 130.

A security under O. XLI, r. 6, Civ. Pro. Code, 1908, when he offered himself must be taken to have accepted all natural risks. He cannot be allowed to set up the position that he did not anticipate the death of the decree-holder for whom he stood surety pending appeal. So the surety is not entitled to be discharged on the death of the decree-holder. Such a suretyship is not a continuing guarantee within the meaning of S. 130 of the Contract Act. No arrangement between the surety and the decree-holder, long after the execution of the security bond can have any effect on the absolute undertaking given by the surety in the security bond. *Kumari v. Nilkanth Narayan Singh*, 32 Ind. Cas. 807.

BEACHOROT and MULLICK, JJ.

(645) O. XLI, r. 10. See No. 257-a, *supra*.

(645-a) O. XLI, r. 10, O. XXV, r. 1—Appeal—Security for costs.

There is no hard and fast rule that unless the plaintiff-appellant has no interest in the litigation but is a mere puppet in the hands of others, there cannot be any order for security for costs. *Ghandra Kanta Ganguly v. Sarojini Debi*, 32 Ind. Cas. 786.

HOLMWOD and IMAM, JJ.

Civ. Pro. Code (1908)—(Continued).

References:—14 O. 538, R. & Expl.; 5 Bom. L.R. 661, Appr.

(646) O. XLI, r. 11. See No. 291, *supra*.

(647) O. XLI, rr. 11, 31—Duty of appellate Court to consider grounds of appeal and write a full judgment—Nature of discretion given by O. XLI, r. 11.

The provisions of O. XLI, r. 31, Civ. Pro. Code (=old S. 574) are not applicable in their entirety to the dismissal of an appeal under O. XLI, r. 11 (=old S. 551), and every case must stand on its own merits.

But the discretion given by O. XLI, r. 11, is not an arbitrary discretion but a judicial discretion. The Judge of the appellate Court should at least show that he understood the case and considered the grounds of appeal; and in cases where questions of fact are involved, he should write a full judgment after going through the records. The appellate Judge would be committing an error of procedure if he should omit to give reasons for his decision. *Nga San Baw v. Nga Lu E*, U.B.R. (1915), 4th Qr., p. 92—39 Ind. Cas. 666.

MCCOLL, J.C.

References:—30 A. 919, F.; 25 O. 97; 36 B. 116; 37 B. 610; 13 C.W.N. 1631, Cons.

(648) O. XLI, r. 11, O. XLVII, r. 4, *Proviso—Ejectment, suit for—Sub-lease for more than 9 years—Sale of holding in execution of decree for arrears of rent—Estoppel—Invalidity of lease—Sub-lease how annulled—Bengal Tenancy Act (VIII of 1885), Ss. 85 (1), (2), 167—Review—Order dismissing an appeal summarily—Notice, if to be given to respondent—Opposite party—Appeal, hearing of, if to be restricted on points mentioned in grounds of appeal. Janaki Nath Hore v. Prabhasini Dasl*, 22 C.L.J. 99—19 O.W.N. 1077—43 C. 178—30 Ind. Cas. 898. See Final Part, 1915, Col. 495.

(649) O. XLI, r. 14—Appeal—Omission to specify date of hearing in notice of appeal—*Ex parte* decree—Right of re-hearing.

Where the respondent to an appeal applied for setting aside the *ex parte* decree passed against him in the appeal, on the ground that the notice of appeal served on him did not specify the date of hearing and he was absent in consequence on that date, he was entitled to have the decree set aside and the appeal re-heard. *Jadu Kanta Sarma v. Hema Kanta Goswami*, 36 Ind. Cas. 624.

RICHARDSON and SMITHER, JJ.

(649-a) O. XLI, r. 17—Appeal set down for hearing, and ordered to be heard next day—Date not communicated—Dismissal for default—Restoration—Appeal.

The Legislature has provided no appeal from an order dismissing an appeal for default under O. XLI, r. 17, Civ. Pro. Code, but it has provided an appeal from an order refusing to readmit an appeal dismissed for default. Held under the circumstances of the case that there was sufficient cause for the restoration of

Civ. Pro. Code (1908)—(Continued).

the appeal. **Bali Nath v. Wali Hasan**, 32 Ind. Cas. 936.

PIGGOT and WALSH, JJ.

(650) O. XLI, r. 17—*Appearance—Party present in Court, asking for postponement—Dismissal for default.* **Nanda Kumar Barua v. Nabin Chandra Barua**, 22 C.L.J. 72=30 Ind. Cas. 878. See Final Part, 1915, Col. 495.

(651) O. XLI, r. 22—*Memorandum of objections—One month allowed by the rule—Mode of calculation—Respondent served with notice of appeal in February—Expiry of corresponding date in March—Presentation thereafter—Bar of limitation.* **Chennamma Shetttili v. Krishnayya Settil**, 29 M.L.J. 182=30 Ind. Cas. 832. See Final Part, 1915, Col. 497.

(652) O. XLI, r. 22—*Dismissal of appeal as time-barred—Memo. of cross-objections if can be heard.* See APPEAL (GENERAL), No. 1, 3 L.W. 109.

(653) O. XLI, rr. 22 (3), 33—*'Party affected,' meaning of—One respondent if can urge cross-objection against another respondent.* See CONTRACT, No. 2, 23 C.L.J. 26.

(654) O. XLI, r. 23—*Remand—Adoption, suit to set aside—Fraud not proved—Undue influence found to have been exercised—Remand by appeal Court for framing new issues and fresh decision—Remand order not valid—Undue influence is a branch of fraud in equity—Specific Relief Act, S. 38.*

A suit to set aside an adoption was dismissed by the trial Court on the ground that no fraud was proved to have been practised on the adopting widow. It was urged in appeal that the adoption should be set aside on the ground of undue influence. The lower appellate Court, being of opinion that the transaction was unconscionable, granted leave to amend the plaint and remanded the suit to the trial Court in order that it "should, after taking a supplementary written statement, frame the issues raised by the new pleadings and decide the case on the merits." The defendants having appealed:

Held, (1) that the lower appellate Court had committed a material irregularity, inasmuch as it could re-appreciate the evidence and allow necessary amendments of the pleadings consistent with the case made before that Court, but it could not require the trial Court to reconsider the whole case *de novo* and write another judgment;

(2) that there was nothing to prevent the lower appellate Court from giving relief if it found a case of undue influence established, since such a case would not be inconsistent with the allegations in the pleadings, as undue influence was a branch of fraud in equity, and invited the same relief under S. 38 of the Specific Relief Act. **Narayanbhat Bhimbhat Joshi v. Akkubai Manoharbhat Joshi**, 18 Bom. L.R. 27=33 Ind. Cas. 576.

SCOTT, C.J. and SHAH, J.

(655) O. XLI, r. 23—*Appellate Court—Powers of remand—Court-fee when to be*

Civ. Pro. Code (1908)—(Continued).

refunded—S. 13, Court Fees Act—Ss. 562, 564, Civ. Pro. Code (1882).

The Code of Civil Procedure, 1908, contains only a single Rule expressly allowing a Court of first appeal to remand a case for a second decision by the original Court, namely, O. XLI, r. 23, which is an amended version of S. 562 of the Code of 1882; and it is only when a remand is made under this Rule that S. 13, Court Fees Act, permits and directs the refund of the Court-fee paid on the memorandum of appeal. S. 564 of the earlier Code, which expressly forbade a remand for a second decision, except under S. 562 thereof has not been reproduced in the present Code, because it was found to be unduly restrictive, and experience had proved that exceptional cases sometimes occur in which defects of trial are so radical as to be incurable otherwise than by a re-trial *de novo*; and the discretion of the appellate Court was left unbound to provide for such cases. But the policy of the law, and therefore the intention and rule of the law, remains that, except under O. XLI, r. 23, no case shall be remanded for a second decision by the trial Court which can finally be disposed of by the first appellate Court; and, for this purpose, plenary powers have been given to the latter tribunal under several Rules of O. XLI, of the Civ. Pro. Code, 1908. **Jagannath v. Maruti**, 12 N.L.R. 126=36 Ind. Cas. 241.

STANYON, A.J.C.

(656) O. XLI, r. 23. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 52, 85 Ind. Cas. 105.

(657) O. XLI, r. 23. See Nos. 41, 198, 199, 209-a, 210, 211, 292 and 535, *supra*.

(658) O. XLI, r. 23, S. 109 (c)—*Application for leave to appeal to His Majesty in Council—Final order—Suit remanded.*

The Ganges Sugar Works Company made an application, under Sch. II, r. 17 of the Code of Civil Procedure, to file an alleged contract to submit to arbitration. The Court of first instance dismissed the application on the sole ground that the agreement not being under the seal of the company was invalid. No evidence was recorded. There were several other objections to the agreement, *e.g.*, fraud, vagueness, misrepresentation, etc. The High Court reversed the decree of the Court below and remanded the case for trial of the other issues under O. XLI, r. 23 of the Code. After the remand the Court below tried the case and decided against the objector. An appeal from that decree was pending in the High Court. The objector filed an application for leave to appeal to His Majesty in Council from the order of remand:

Held that, that having regard to all the circumstances, the order of remand in the present case could not be called a "final order" within the meaning of S. 109 of the Code, nor was there a question of law of general importance so as to lead the High Court to grant the requisite certificate. **Nuri Malin v. Ganges**

Civ. Pro. Code (1908)—(Continued).

Sugar Works, Ltd., Cawnpore, 14 A.L.J. 50—38 A. 150—32 Ind. Cas. 360.

RICHARDS, C.J., TUDBALL and RAFIQ, JJ.

(659) O. XLI, rr. 23, 25. See **HINDU LAW (MARRIAGE)**, No. 1, 14 A.L.J. 754.

(660) O. XLI, rr. 23, 25, 27—*Costs—Remand—Conditional order.*

The High Court set aside the order of the lower appellate Court remanding a case (wherein the first Court recorded findings on all points) under O. XLI, r. 23 for trial (on plaintiff depositing defendant's costs in both Courts in 7 days) and directed the lower appellate Court to take up the case at the stage where it had left off and to not under O. XLI, r. 27 if it was of opinion that either of the parties had made out a case for the reception of additional evidence. **Ram Sarup Sahu v. Ratan Sen Singh**, 35 Ind. Cas. 239.

KNOX and LINDSAY, JJ.

(660-a) O. XLI, r. 23, O. VI, rr. 17, 18—*Remand—Plaint amended in appeal.*

There are other provisions for remand under the Code of Civil Procedure besides those given under O. XLI, r. 23. The new rr. 17 and 18, O. VI, admittedly render a remand necessary when the plaint is amended in appeal and the defendant desires to traverse the facts stated in the amendment. **Manmatha Nath Bose v. Krishna Prasad Das**, 32 Ind. Cas. 906.

HOLMWOOD and IMAM, JJ.

References:—5 C.W.N. 273, R.; 12 C. L. J. 368, *Appr.*; 41 O. 108, *disapproved*.

(661) O. XLI, r. 24—Adverse possession not pleaded, if may be allowed in the Court of appeal. See **TRESPASS**, No. 1, 20 C.W.N. 773.

(662) O. XLI, r. 25. See Nos. 210, 535, 659 and 660, *supra* and No. 670, *infra*.

(663) O. XLI, r. 27—*Provisions when to be applied.*

The plaintiff brought a suit for pre-emption based on the Muhammadan Law. He alleged that he had made the demands but did not specify the day on which he had done so. He was examined and cross-examined in the Court of the Munsif who decreed his suit. Upon appeal the District Judge made an order that the plaintiff should be examined "in order to enable him to pronounce judgment." The District Judge purported to take action under O. XLI, r. 27 of the Civ. Pro. Code.

Held, that as the plaintiff was a witness in the Court of Munsif, was examined and cross-examined there, and there was no gap in the evidence, the provisions of O. XLI, r. 27 of the Code did not apply as they were never intended to be put into force under such circumstances. **Muhammad Siddiq v. Mahmud-un-nissa Bibi**, 14 A.L.J. 121—38 A. 191—33 Ind. Cas. 334.

RICHARDS, C.J. and TUDBALL, J.

(664) O. XLI, r. 27—*Appellate Court—New evidence, admission of—No application made—No reasons recorded—Legality.*

Civ. Pro. Code (1908)—(Continued).

Where the lower appellate Court admitted a document in evidence without recording any reasons as required by O. XLI, r. 27, Civ. Pro. Code, and in the absence of an application for the admission of this evidence, and where no reasons were shown for the failure to produce the said document in the Court of first instance.

Held, that the admission of the document in evidence was illegal. **Kaki Mutyalu v. Kani-gola Siva Raghavayya**, 3 L.W. 163—32 Ind. Cas. 326.

AYLING and PHILLIPS, JJ.

(665) O. XLI, r. 27—*Scope and effect of—Additional evidence in appeal—Admissibility of.*

O. XLI, r. 27 of the Code of Civil Procedure does not mean that in order to enable the appellate Court to pronounce judgment in favour of a particular party additional evidence should be admitted in appeal; it means only that where it is impossible to pronounce judgment at all on the evidence the Court may call for a document. **Kalika Dutt Mandar v. Tulsi Mandar**, 1 Pat. L.J. 435.

ROE and JWALA PRASAD, JJ.

(665-a) O. XLI, r. 27—*Appellate Court whether can admit document itself when secondary evidence alone re the same was given at trial.*

An appellate Court can admit a document material to the plaintiff's case (not found at trial but secondary evidence of whose contents were given) since it filled up a lacuna in the plaintiff's case. **Marchala Narayana Murthy v. Perumetha Venkatapatiraju**, 32 Ind. Cas. 711.

COUTTS-TROTTER and MOORE, JJ.

References:—31 B. 331—5 O.L.J. 5—11 C.W.N. 741—17 M.L.J. 347—4 A.L.J. 461—9 Bom. L.R. 671—34 I.A. 115—2 M.L.T. 435 (P.C.), *F.*

(666) O. XLI, r. 27—*Appeal—Additional evidence, produced after arguments heard—Admission of such evidence by the appellate Court, if proper—Reasons not recorded for admission of the evidence, effect of.*

An appellate Court ought not to admit in evidence documents produced by a party after the appeal has been heard, arguments have been addressed, and judgment has been reserved, inasmuch as the other party thereby gets no opportunity of rebutting the evidence contained in the documents, and his pleader also has no opportunity of arguing the effect of them.

The judgment of the appellate Court is also to be set aside where no reason has been accorded for the admission of the additional evidence as required by O. XLI, r. 27 of the Code of Civil Procedure. **Gajadhar Prasad v. Musamat Lohla**, 24 O. L. J. 457—35 Ind. Cas. 698.

SANDERSON, C.J. and MOOKERJEE, J.

(666-a) O. XLI, r. 27—*Disputes as to nature of tenancy—Production of record of rights in appellate Court—Opportunity to*

Civ. Pro. Code (1908)—(Continued).

opposite party to rebut presumption from production of such document.

Where in a suit for rent the question was whether the rent was payable upon *danabandi* system or upon the *batai* system and a Record of Rights was produced in the appellate Court by the defendants, it was the obvious duty of the Court in the exercise of its judicial discretion to allow the plaintiffs an opportunity to tender rebutting evidence, so as to enable them to tender evidence to rebut the presumption arising from the Record of Rights. *Kandhdeo Narain Singh v. Dewa Singh*, 36 Ind. Cas. 955.

MULLICK and ATKINSON, JJ.

(667) O. XLI, r. 27—*Evidence, admission of, in appeal—Discretion.*

It would be better, if Court of first appeal, in admitting evidence in appeal, would be content to follow strictly the procedure laid down by O. XLI, r. 27, Civ. Pro. Code., 1908 and specially by the second clause of the said rule. *Gauri Rai v. Bhagglina*, 31 Ind. Cas. 873.

FIGGOTT, J.

(668) O. XLI, r. 27. See Nos. 184 and 660, *supra*.

(669) O. XLI, r. 27 (b)—*Appellate Court—Power to admit additional evidences on appeal—Test—Meaning of 'any other substantial cause.'* *Ambuja Ammal v. Appadurai Mudali*, 38 M. 414—30 Ind. Cas. 402. See Final Part, 1915, Col. 500.

(670) O. XLI, rr. 28, 25—*Court of second appeal—Issues remanded to first appellate Court—Power of latter Court to direct original Court to take additional evidence.* See REMAND, No. 2, 9 S.L.R. 148.

(671) O. XLI, r. 31—*Judgment, contents of—Appellate Court, duty of.*

An appellate Court should not dispose of appeals coming before it in a judgment which does not show the points raised and the reason for its decision. *Mi Nyin Tha Ma v. Mi Nyo Wun Ma*, 9 Bur. L.T. 59—31 Ind. Cas. 896.

U KIN, J.

References:—31 M. 469—18 M.L.J. 34—9 M.L.T. 71; 10 O. 992 at p. 935, R.

(672) O. XLI, r. 31—*Judgment of appellate Court, contents of—Second appeal, grounds of—Findings of fact—Consideration of evidence on record—Disposal of all grounds of appeal.*

A judgment of appellate Court should state, *inter alia*, (a) the points for determination, (b) the decision thereon and the reasons for the decision. The judgment should show that the Court has considered the evidence on record. It should deal with all the points involved in the case and should dispose of all the grounds of appeal. *Ladha Ram v. Gurdas*, 108 P.L.R. 1916—182 P.W.R. 1916—36 Ind. Cas. 6.

SCOTT-SMITH, J.

(673) O. XLI, r. 31—*Appellate judgment—Reversal of judgment of original Court—*

Civ. Pro. Code (1908)—(Continued).

Necessity to state reasons for reversal—Remand—Jotedar—Meaning.

The expression 'jotedar' may mean either tenure-holder or raiyat.

Where the appellate judgment is one of reversal the aggrieved party is entitled to a consideration of the points upon which the lower Court relied for the purpose of giving the successful party a decree.

Where an appellate Court had disposed of an appeal in the following words:—'I am unable to agree with the Munsif that this entry (Record-of-Rights) is proved to be wrong. The evidence is not, in my opinion, sufficient to come to such a conclusion.'

Held, that the judgment was not in accordance with the terms of O. XLI, r. 31, Civ. Pro. Code. *Ganga Ram Rai v. Sheikh Mahla Bahah*, 34 Ind. Cas. 186.

MULLICK, J.

(674) O. XLI, r. 31—*Reversal of judgment of lower Court—Duty of appellate Court to give reasons for its judgment.*

An appellate Court is bound to discuss the evidence on the record and adduce reasons for its opinion, especially when it reverses the decision of the lower Court. *Habib Ullah Shah v. Bakht Ball Singh*, 30 Ind. Cas. 292.

LINDSAY, J.C. and KANHAIYA LAL, A.J.C.

(675) O. XLI, r. 31. See No. 647, *supra*.

(676) O. XLI, r. 33—*Appellate Court's powers to add party exonerated—Memorandum of objection.*

Civ. Pro. Code, 1882, did not contain provisions similar to those found in O. XLI, r. 33, Civ. Pro. Code, 1908, introduced for the first time in the new Code (a).

A person erroneously exonerated in the Court of first instance can be added as party by the appellate Court (b).

If there is already a memorandum of objection seeking to make such a person liable and the appeal is pending, a High Court will not interfere in revision with an interlocutory order of the lower appellate Court making him a party.

As to the question whether under O. XLI, r. 22 sub-rr. (3) and (4) an appellate Court can make a party exonerated by the first Court, a party to the memorandum of objections though he was not made a party in the appeal memorandum, no final opinion was given. *Rebaler Babu Reddi v. Doola Rami Reddi*, 31 Ind. Cas. 978.

SADASIVA AIYAR, J.

References:—(a) 31 M. 442, D. (b) 15 O.L.J. 61; 38 M. 705; (1913) M.W.N. 1024, F.³

(677) O. XLI, r. 33—*Appellate Court's power to reverse decree against non-appealing party.*

An appellate Court cannot reverse a decree against a non-appealing defendant if the memorandum of cross-objections by the other defendants did not proceed on any ground

Civ. Pro. Code (1908)—(Continued).

common to them and the non-appealing defendant. **Mayandi Chetti v. Thirumalai Aiyangar**, 31 Ind. Cas. 986.

SESHAGIRI AIYAR and PHILLIPS, JJ.
Reference:—34 A. 32, F.

(678) O. XLI, r. 33—*Appeal—Absence of cross-appeal—Variation of decrees of lower Court—Power of appellate Court.*

O. XLI, r. 33 of the Code applies only to cases in which for the ends of justice and for the equitable execution of a decree the appellate Court considers it necessary to make a material variation in the decree. The appellate Court is not thereby enabled in a case in which there has been no cross-appeal to wipe off the whole amount decreed on considerations of its own. **Ram Chandra Chowdhury v. Madho Prasad Chatterji**, 36 Ind. Cas. 537.

SHARFUDDIN and ROE, JJ.

(679) O. XLI, r. 33—*Appellate Court, powers of—Prayer for alternative decree—No appeal by plaintiff. Ananga Mohun Chakraverty v. Bejoy Chandra Dutta, 22 C.L.J. 391=32 Ind. Cas. 491. See Final Part, 1915, Col. 502.*

(680) O. XLI, r. 33—*Leave to withdraw from suit—Appeal from a part of decree by defendant—No cross appeal or cross objection by the plaintiff. Akimannessa Bibi v. Bepin Behari Mitter, 22 O.L.J. 397=20 C.W.N. 544=32 Ind. Cas. 499. See Final Part, 1915, Col. 503.*

(681) O. XLI, r. 33—*Scope of—Plaintiff, appeal by, from partial decree—No cross-appeal or cross-objection—Suit, if can be dismissed by the appellate Court. Abjal Majhi v. Intu Bepari, 22 O.L.J. 394=20 C.W.N. 542=32 Ind. Cas. 494. See Final Part, 1915, Col. 503.*

(682) O. XLI, r. 33. See **CONTRACT**, No. 13, 20 C.W.N. 1054.

(683) O. XLI, r. 33. See Nos. 294, 361, 362, 642, 642-a, 653, *supra*.

(684) O. XLI, XLII. See **PRACTICE AND PROCEDURE**, No. 6, 34 Ind. Cas. 706.

(685) O. XLII. See No. 684, *supra*.

(686) O. XLIII, r. 1. See Nos. 198, 199, 201, 208, 349, 380, 388, 553, 569, 623, 637, *supra*.

(687) O. XLIII, r. 1, and Sch. II, para. 21—Reference to arbitration without the intervention of Court—Application for filing award—Objection dismissed—Appeal whether lies. See **APPEAL (GENERAL)**, No. 5, 14 A.L.J. 332.

(688) O. XLIII, r. 1 (w); O. XLVII, r. 7—*Order granting review whether appealable.*

Under O. XLIII, r. 1 (w), Civ. Pro. Code, an appeal lies against an order granting a review, but that is subject to the provisions of O. XLVII, r. 7, Civ. Pro. Code.

An order granting a review merely for sufficient ground is not appealable. **Sundar Mall v. Upendra Nath Seal**, 1 Pat. L.J. 193=35 Ind. Cas. 15.

MULLICK, J.

(689) O. XLIII, r. 1 (w)—O. XLVII, r. 7—*Review—Appeal.*

The order of a Court granting a review is not

Civ. Pro. Code (1908)—(Continued).

appealable under O. XLIII, r. 1 (w) of the Code of Civil Procedure except on the grounds specified in O. XLVII, r. 7 of the Code. **Mulambath Kunhammad v. Parakat Kathiri Kutil**, 31 M. L.J. 327=5 L.W. 472.

AYLING and SRINIVASA AIYANGAR, JJ.

(690) O. XLIV, r. 1—*Application for leave to appeal as a pauper—Unstamped memorandum of appeal—Presentation of both on the same day—Dismissal of former application—Time granted for paying Court-fees on appeal memorandum—Court-fees paid within time—Memorandum of appeal not barred—Power of Court to grant time—Civ. Pro. Code, S. 149, O. VII, r. 11.*

The appellant filed a memorandum of appeal in time and also filed on the same date an application, in accordance with O. XLIV, r. 1, Civ. Pro. Code, for leave to appeal as a pauper. The latter application was dismissed on 31-12-1914 during the Christmas holidays. On the re-opening day, i.e., 4-1-1915, the appellant wanted time to pay the necessary Court-fees on the appeal memorandum and he was granted time till 25-1-1915 within which date he paid the necessary Court-fee. It was contended that when the application for leave to appeal as a pauper was dismissed, the unstamped appeal memorandum also must be deemed to have been rejected. *Held*, that the appeal was not out of time (a).

The Court has power to direct the appellant to pay stamp duty within a time to be fixed by Court (*vide* O. VII, r. 11 (e) and S. 149, Civ. Pro. Code (1908).)

The rejection of an application for leave to appeal as a pauper does not *ipso facto* carry with it the rejection of the memorandum of appeal. **Nellavadiwu Ammal v. Subramanaya Pillai**, 31 M.L.J. 269.

OLDFIELD and SADASIVA AIYAR, JJ.

References:—(a) 2 A. 241; 15 M. 78; 33 B. 41; 26 C. 925; 22 B. 856; (1915) M.W.N. 228, R.

(691) O. XLV, r. 2. See No. 217, *supra*.

(692) O. XLV, r. 3. See Nos. 217, 223, 224, *supra*.

(693) O. XLV, r. 5—*Investigation as to amount or value of subject-matter of suit—Power of Court of first instance to remit the investigation to some other officer.*

O. XLV, r. 5, Civ. Pro. Code, does not empower the Court of first instance to remit to some other officer the investigation as to the amount or value of the subject-matter of suit. The investigation must be carried out by that Court. **Hanuman Jha v. Bahuji Jha**, 43 C. 225=34 Ind. Cas. 203.

JENKINS, C.J. and HOLMWOOD, J.

(694) O. XLV, r. 5—*Leave to appeal to Privy Council—Value of subject matter of suit—Admission in pleadings—Necessity for investigation.*

In an application by the defendants for leave to appeal to the Privy Council the applicants

Civ. Pro. Code (1908)—(Continued).

valued the subject-matter in dispute on appeal at more than Rs. 10,000 and the application was opposed on the ground that this value was excessive. It was found that the value of the subject-matter of the suit was placed by the plaintiffs in their plaint at less than Rs. 10,000 and no objection was raised by the defendants as to the said valuation. The question now was whether in view of the above facts, the defendants were entitled to say that the true value of the property in dispute on appeal was over Rs. 10,000. *Held* that the value of the property was a question of fact and that the question had been settled by the defendants and their own admissions. They could not now be heard to say that in spite of their admissions, the property was worth over Rs. 10,000 and claim that they had a right to have this matter investigated for the purpose of determining the question of their right to appeal to the Privy Council. *Jagannath Bakhsh v. Mendana*, 30 Ind. Cas. 204.

LINDSAY, J.C., and KANHAIYA LAL, A.J.C.

References:—15 M. 237; 7 M.I.A. 428=1 Suth. P.C.J. 451=1 Sar. P.C.J. 739=19 E.R. 370; 9 M.I.A. 268=1 Sar. P.C.J. 874=19 E.R. 632; 1 I.A. 317=18 W.R. 494, R.

(695) O. XLVI, r. 1. See Nos. 227, 289, *supra*.

(696) O. XLVI, r. 7 and S. 115—*Reference by District Judge of case tried by Small Cause Court, S. 25—Small Cause Courts Act (IX of 1887)—Interference by High Court on question of fact.*

The plaintiff brought his suit in the Court of Small Causes for recovery of damages against the defendant who was said to have held some land under a contract to take half the proceeds as remuneration for his labour and expense. The Small Cause Court found that the defendant was a servant remunerated by the receipt of half the produce and decreed the suit. On a reference by the District Judge recommending the setting aside of the decree of the Small Cause Court Judge on the ground that the defendant should have been held to be a tenant against whom the suit could not be entertained; *Held*—That the Court of Small Causes was a Court subordinate to the District Judge and O. XLVI, r. 7, contemplated a reference by the District Judge of cases tried by such Court.

That in cases of revision under S. 115; Civ. Pro. Code, or under S. 25 of the Small Cause Courts Act, the High Court does not generally interfere with findings of fact arrived at by the first Court if those proceedings are supported by evidence before the Court.

No case having been made out for interference on a question of fact, the reference was discharged. *Sheikh Ratan Bepari v. Hira Lal Sarkar*, 20 C.W.N. 1110.

D. CHATTERJEE and NEWBOULD, JJ.

(697) O. XLVII, r. 1—*Review—Second application for.*

There is nothing in the Code of Civil Procedure preventing a second application for review,

Civ. Pro. Code (1908)—(Continued).

a previous application therefor having been made and rejected. *Palla v. Mathura Prasad*, 14 A.L.J. 204=32 Ind. Cas. 622=38 A. 280.

TUDBALL and WALSH, JJ.

(698) O. XLVII, r. 1—*Review, application for—Grounds.*

An application for review cannot be granted when it is made not on the ground of the discovery of new and important matter but on the ground that the judgment is erroneous on the merits. The applicant is not entitled to re-argue the whole case (a). *Khalil v. Yaglu-Ud-Din*, 135 P.L.R. 1916=147 P.W.R. 1916=35 Ind. Cas. 342.

SHADI LAL, J.

References:—(a) 14 Ind. Cas. 837=5 Bur. L.T. 57; 24 Ind. Cas. 785=208 P.W.R. 1913=103 and 197 P.L.R. 1914, R.

(699) O. XLVII, r. 1—*Review, application for, maintainability of, when appellate—Court seized of case—Review application, pendency of, if bars appellate Court from hearing appeal—Second appeal—Discretion, interference with—Costs, award of.*

Where an appellate Court is seized of a case, and is empowered by law to grant the relief claimed by an applicant, the latter should have recourse to the appellate Court and not to the original Court.

Therefore, where a party to an appeal can present his case to the Court of appeal by way of cross-objection or otherwise, an application for review to the original Court is incompetent and cannot be maintained.

The pendency of an application for review in the original Court does not preclude the appellate Court from hearing the appeal, and if the appellate Court in its discretionary power refuse to entertain an application for extending time for filing cross-objections, the Chief Court on second appeal will not interfere without adequate reason.

There is nothing unreasonable or contrary to law in awarding full costs to a successful co-defendant. *The Punjab Sindh Bank, Ltd., Lyallpur v. Ram Kishan*, 156 P.L.R. 1916=35 Ind. Cas. 529.

SHADI LAL and LE ROSSIGNOL, JJ.

(700) O. XLVII, r. 1—*Application for review after filing of appeal.*

An application for review of a decree subsequent to the preferring of an appeal against it is not maintainable. *Muhammad Yusuf v. Raja Ram*, 35 Ind. Cas. 867.

RAFIQ, J.

(701) O. XLVII, r. 1. See Nos. 288, 381, *supra*.

(702) O. XLVII, rr. 1, 4 and 7—*Order granting application for review for "other sufficient reason," whether appealable—Revision—Not competent where appeal lies from the final decree—No revision where judgment bad in law.*

Held, that no appeal lies under O. XLVII, r. 7, of the Civ. Pro. Code against an order

Civ. Pro. Code (1908)—(Continued).

granting an application for review for "other sufficient reason" within the meaning of r. 1 (a).

Held, also that such an order cannot be interfered with in revision, especially as there is a right of appeal from the final decree, or only because it is bad in law. *Banheshar Nath v. Ramkishan*, 48 P.W.R. 1916=32 Ind. Cas. 860.

SHADI LAL, J.

References:—(a) 11 P.R. 1918=278 P.W.R. 1912=16 Ind. Cas. 995, F.

- (703) O. XLVII, r. 2—*Judge who did not decide case but signed the decree if may entertain review application under r. 2—“Judge who passed decree” meaning of—Review granted without notice by Judge who decided case if authorises Judge who signed decree to entertain review application.*

An application under O. XLVII, r. 2, of the Civ. Pro. Code, for a review of a decree upon some grounds other than the discovery of new and important matter or evidence or the existence of a clerical or arithmetical mistake cannot be made to a Judge who signed the decree but did not write or deliver the judgment in accordance with which the decree was drawn up. The expression "the Judge who passed the decree" in r. 2, O. XLVII, Civ. Pro. Code, means the Judge who decided the case and not the Judge who merely signed a decree after satisfying himself that it has been drawn up in accordance with the judgment delivered by his predecessor, and the fact that the former had granted an application for review which was set aside on the ground of the order having been passed without notice to the other side did not authorise the latter to entertain the application. *Tamijuddi Shelkh v. Satya Sankar Ghoshal*, 20 C.W.N. 391=32 Ind. Cas. 101.

N.R. CHATTERJEE and NEWBOULD, JJ.

- (704) O. XLVII, r. 2. See REVIEW, No. 4, 24 O.L.J. 517.

- (705) O. XLVII, r. 4. See Nos. 291, 648, 702, *supra*.

(706) O. XLVII, rr. 4 (2), 7 (1) (b)—*Review—Decrees passed on award—No objection in original Court as to invalidity of arbitrator's appointment—Objection raised in appeal—Objection allowed on review by appellate Court—Appeal—Maintainability—Revision. See ARBITRATION, No. 4, 115 P.R. 1916.*

(707) O. XLVII, r. 7—*Review rejected—Appeal. See U. P. ACT II OF 1901 (AGRA TENANCY), No. 49, 31 Ind. Cas. 912.*

- (708) O. XLVII, r. 7. See Nos. 291, 688, 689, 702, 706, *supra*.

(709) O. XLVII, r. 7 and O. XLIII (u)—*Order granting a review—Appeal—Grounds of appeal—Grounds other than those mentioned in O. XLVII, r. 7—Competency of appeal—Civ. Pro. Code, O. XLIII (u).*

Civ. Pro. Code (1908)—(Continued).

When a review is granted, O. XLIII, cl. (u) does not give any general right of appeal, but is controlled by O. XLVII, r. 7 (a).

Under the present Code, it is not necessary that, when granting a review, the Judge should record reasons for doing so, although it was necessary under the old Code. The grounds which satisfied a Court that its own judgment requires re-consideration should not be subject to adverse comment in the Court of Appeal (b).

The word 'application' in r. 7 means an 'order.' Difference between the old and the new Codes pointed out. *Brahmayya v. Yellamma*, 31 M.L.J. 609=(1916) 2 M.W.N. 278=4 L.W. 408=36 Ind. Cas. 437.

SESHAGIRI IYER and PHILLIPS, JJ.

References:—(a) 41 C. 746; 27 A. 695; 2 L. W. 366, F. (b) 2 C. 131 (P.C.), R.

- (710) O. XLVII, r. 8—*Decree of Division Bench of High Court of two Judges found erroneous, giving plaintiff more than he claimed—Application for amendment before one of them—Jurisdiction of single Judge to amend decree—Court in granting application for review if bound to re-hear whole case—Re-hearing of case by single Judge without authority from Chief Justice—Jurisdiction.*

An application for amendment of a decree made in favour of the plaintiff by a Division Bench of the High Court of two Judges was moved by some of the defendants before one of them (the other Judge having left the Court) and a Rule was issued on the plaintiff to show cause why the decree should not be set aside or amended, or why such other order should not be made as might seem fit, on the ground that the decree purported to give plaintiff a relief not claimed by him. The Judge made the Rule absolute, and then in terms of r. 8, O. XLVII, Civ. Pro. Code, proceeded to re-hear the case with the result that the judgment and decree of the Division Bench were amended. The plaintiff appealed against this last decision.

Held—(Per *Jenkins, C.J.* and *N.R. Chatterjee, J.*)—That in the absence of an order by the Chief Justice authorising the learned Judge alone to sit for the hearing of the case, his decision was without jurisdiction.

The case thereafter was heard before the Regular Bench, the Judges whereof refused to re-hear the whole case, and, confining themselves to the point of amendment only, passed a decree amending the judgment and decree. Some of the defendants having applied for review of this last decree, on the ground that the learned Judges should have re-heard the whole appeal.

Held—That the decree of the Division Bench stood amended, as soon as the Rule to amend it was made absolute, and all subsequent proceedings were superfluous.

That as the last decree of the High Court only affirmed that order, it was not necessary to set it aside.

Per *Moorkjee, J.*—R. 8 of O. XLVII of the Civ. Pro. Code, clearly leaves it optional with

Civ. Pro. Code (1908)—(Continued).

the Court to determine whether, when a review is granted, the case should be re-opened in part or in its entirety. *Gour Sundar Bhowmik v. Rakhal Raj Bhowmik*, 20 C.W.N. 1165=34 Ind. Cas. 592.

SANDERSON, C.J. and MOOKERJEE, J.

(711) Sch. I, App. D, No. 17. See ADMINISTRATION SUIT, No. 1, 8 L.B.R. 338.

(712) Sch. II—Applicability to proceedings under the Provincial Insolvency Act. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 67, 50 P.R. 1916.

(718) Sch. II. See Nos. 162, 258, *supra*.

(714) Sch. II, S. 104 (6) — *Filing an award—Private arbitration—Appeal—Arbitrator—Power to divide property—Awarding extra amount—Withdrawal of question—Right to challenge—Questions not decided.*

Disputes arose among the parties and they were referred to arbitration without the intervention of the Court. The arbitrator was required among other matters to ascertain what was the divisible property of the family and to divide it up. In doing so he awarded to one D an unmarried member of the family an extra sum equivalent to what had been spent in marriages of other members. He was also required to decide about the appellant's right of residence in the family house. There were other matters about certain expenses referred to him which were withdrawn by the parties. The arbitrator gave an award deciding all questions except the last two. He stated that the appellant and other members of the family had agreed that the lady would be allowed to live in a certain house and he therefore did not think it necessary to give any decision upon the question. He further stated that, as he was asked not to decide the question about expenses by all the parties, he did not decide it. The Court below passed a decree in accordance with the award. *Held*, the order being one filing an award in an arbitration without the intervention of the Court, an appeal lay against it.

Held also, that the arbitrator was justified in awarding D, an extra sum equivalent to what has been spent in marriages of other members.

Held also, that the agreement of the parties whereby the appellant was given a right to reside in the family house did not absolve the arbitrator from deciding the question.

Held also, that when the parties withdraw certain questions from the arbitrator they cannot complain of there being no decision on those questions. *Hari Kunwar v. Lakshmi Ram Jaul*, 14 A.L.J. 481=38 A. 390=35 Ind. Cas. 833.

TUDBALL and PIGGOTT, JJ.

(715) Sch. II, r. 1. See No. 587, *supra*.

(716) Sch. II, cl. 1, and Ss. 114, 115—*Agreement to refer signed by adult parties and by guardian ad litem of a minor party—Application for order of reference assented to by guardian but not signed by him—Proceedings if valid—Decree upon award—Revision—Review.* *Thakur Umed Singh v. Rai Bahadur Seth*

Civ. Pro. Code (1908)—(Continued).

Sobhag Mal Dhadha, 20 C.W.N. 137= (1916) M.W.N. 67=30 M.L.J. 67=3 L.W. 145=19 M.L.T. 108=23 C.L.J. 130=14 A.L.J. 97=18 Bom. L.R. 308=43 C. 290=32 Ind. Cas. 161 (P.C.). See Final Part, 1915, Col. 508.

(717) Sch. II, paragraphs 1, 15 and 16—*Arbitration—Reference at the instance of plaintiff and one defendant—Other defendants ex parte, not joining in reference—Award, validity of—Appeal, competency of—Person interested.* *Vythinaltha Aiyar v. Valthilinga Mudaliar*, 2 L.W. 960=18 M.L.T. 374= (1915) M.W.N. 847=31 Ind. Cas. 206. See Final Part, 1915, Col. 507.

(718) Sch. II, S. 1 (1). See ARBITRATION, No. 1, 3 L.W. 375.

(719) Sch. II, r. 3. See No. 560, *supra*.

(720) Sch. II, rr. 3, 8 and 15—*Arbitration—Order of reference authorising arbitrator to extend time made by consent of parties—Arbitrator extending time after the period originally fixed by Court had expired—Arbitrator after such time, if functus officio—Award submitted within such extended time, if must be set aside—Arbitrator's interest in subject-matter in suit, when insignificant and unknown to him, it would invalidate award.* *Co-operative Hindustan Bank, Ltd. v. Bhola Nath Borooah*, 19 C.W.N. 165=31 Ind. Cas. 597. See Final Part, 1914, Col. 420.

(721) Sch. II, r. 8. See No. 720, *supra*.

(722) Sch. II, cls. 10, 14 (b)—*Expression in an award—"Indefinite or incapable of execution."*

The fact that a particular expression used in an award is capable of more than one interpretation does not show that it is indefinite and certainly does not show that it is so indefinite as to be incapable of execution. The expression will have to be interpreted in execution proceedings resulting from the decree following the award. *Raghuraj Bahadur Singh v. Rajeshwar Ball*, 35 Ind. Cas. 761.

STUART and KANHAIYA LAL, A.J. OS.

(723) Sch. II, Art. 12—*Award—Decree—Revision when lies—Material irregularity—Misconduct of arbitrator—Court's power to modify award.* See AWARD, No. 8, 78 P.R. 1916.

(724) Sch. II, r. 14. See No. 722, *supra*.

(725) Sch. II, para. 15—*Difference between S. 521 of the old Civ. Pro. Code and.* See AWARD, No. 4, 44 P.W.R. 1916.

(726) Sch. II, r. 15. See Nos. 355, 588, 717, 720, *supra*.

(727) Sch. II, paragraphs 15 and 16—*Decree based on invalid award—No appeal.* See ARBITRATION, No. 5, 1 Pat. L.J. 306.

(728) Sch. II, para. 16—*Arbitration—Award—Decree—Appeal—Revision.*

There is no appeal from a decree in accordance with an award by arbitrators, except in so far as the decree is in excess of or not in accordance with the award.

Civ. Pro. Code (1908)—(Concluded).

A Court in its discretion can grant or refuse time for the production of evidence to support objections to an award. Where such discretion has been exercised with due care and attention, the High Court will not interfere with it in revision(a): *Kharagnath Misra v. Nakheddi Jha*, 85 Ind. Cas. 914.

CHAMBER, C.J., and JWALA PRASAD, J.
Reference:—(a) 14 A.L.J. 425, R.

(729) Sch. II, r. 16. See Nos. 259, 260, 588, 717, 727, *supra*.

(730) Sch. II, r. 17. See No. 202, *supra*.

(731) Sch. II, cls. 17 and 20—*Mutation of names*—Question of title referred to arbitration by private agreement—Award—Limitation Act (1908), Sch. I, Art. 178. *Ram Ugrah Pande v. Acharj Nath Pande*, 13 A.L.J. 1115=38 A. 85=31 Ind. Cas. 899. See Final Part, 1915, Col. 509.

(732) Sch. II, r. 20. See ARBITRATION, No. 7, 93 Ind. Cas. 467.

(733) Sch. II, r. 20. See Nos. 203, 731, *supra*.

(734) Sch. II, r. 21. See No. 687, *supra*.

(735) Sch. II, para. 21, cl. (1)—Performance of award between date of award and date of decree thereon—Effect. See AWARD, No. 3, (1916) M.W.N. 203.

Civil Rules of Practice (Madras).

(1) R. 49 of the Civil Rules of Practice—Printed copy of judgment—Necessity in case of appeal—Rule whether ultra vires—Rule invalid under the Civ. Pro. Code of 1882—Its validity under the new Code—S. 157 and O. XLI, r. 1, Civ. Pro. Code (1908), Ss. 541, 652, Civ. Pro. Code (1882). *Ramakrishna Pillai v. Muthuperalam Pillai*, 29 M.L.J. 663=31 Ind. Cas. 924. See Final Part, 1915, Col. 610.

(2) Rules 240, 241, 242 and Forms 92, 94—Whether ultra vires. See GUARDIANS AND WARDS ACT, No. 7, 30 M.L.J. 508.

(3) R. 241. See No. 2, *supra*.

(4) R. 242. See No. 2, *supra*.

(5) Form 92. See No. 2, *supra*.

(6) Form 94. See No. 2, *supra*.

Civil Suits.

What are—Ubhayakar's right if civil in nature. See CIV. PRO. CODE (1908), No. 13, 3 L.W. 512.

Claim Petition.

(1) In a suit to set aside an order dismissing a claim petition, the burden will be on the plaintiff to show that he was entitled to the property. *Nachlappa Chetty v. Chinnaiah Ambalam*, 4 L.W. 862=36 Ind. Cas. 794.

SRINIVASA AIYANGAR, J.

(2) *Letters Patent Appeal*—Order of a single Judge on claim petition—Only one decree in a suit and that is appellate decree—Art. 11, Limitation Act. *Venugopal Mudali v. Venkatasubbiah Chetty*, (1915) M.W.N. 211=

Claim Petition—(Concluded).

17 M.L.T. 208=38 Ind. Cas. 867=39 M. 1196. See Final Part, 1915, Col. 511.

(3) O. XXI, rr. 58, 61, 62, Civ. Pro. Code—Applicability to claims founded on mortgage—Order refusing to recognise mortgage—Suit to set aside the order—Limitation—Art. 11, Limitation Act (1908)—Applicability to orders made after full investigation and to orders passed on default. See CIV. PRO. CODE (1908), No. 476, 31 M.L.J. 247.

(4) Dismissal of—Declaratory suit—Dismissal for default—Fresh attachment and fresh proclamation—Subsequent suit for declaration—Maintainability—Limitation. See CIV. PRO. CODE (1908), No. 379, 66 P.R. 1916.

(5) Purchaser of property not directly mentioned in and affected by decree—Whether a legal representative of judgment debtor—Claim petition by such purchaser—Appeal—Second appeal. See CIV. PRO. CODE (1908), No. 86, 3 L.W. 289.

(6) Suit against order on—Plaintiff's right to declaration and consequential relief—Sale of property before order on the claim petition—Limitation. See CIV. PRO. CODE (1908), No. 486, (1916) 2 M.W.N. 207.

Claim Proceeding.

(1) Attachment—Claim—Evidence of possession not adduced—Decision on title. See CIV. PRO. CODE (1908), No. 478, 32 Ind. Cas. 34.

(2) Investigation essential to make order operative so as to necessitate institution of suit—Investigation, nature of. See CIV. PRO. CODE (1908), No. 475, 19 O.O. 357.

Clubs.

(1) Suits by, or against Corporations—Unincorporated societies or. See CIV. PRO. CODE (1908), No. 304, 9 Bur. L.T. 247.

Co-defendants.

(1) Decree satisfied—Claims of judgment-debtors *inter se* as to possession of property which was the subject-matter of the decree—Applicability of S. 47, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 89, (1916) M.W.N. 468.

(2) *Res judicata* between. See CIV. PRO. CODE (1908), No. 22, 34 Ind. Cas. 929.

(3) Admission of one defendant when evidence against others. See EVIDENCE ACT, No. 9, 20 C.W.N. 1217.

Codfoll.

Effect of. See WILL, No. 12, 112 P.W.R. 1916.

Coercion.

(1) And undue influence—Difference—Threat to commit suicide whether amounts to 'coercion.' See CONTRACT ACT, No. 11, 3 L.W. 490.

(2) See LANDLORD AND TENANT, No. 31, 31 M.L.J. 712.

Collection Charges.

Mokarrari lease—Provision for enhanced rent for—Construction of contract. See ABWAB, No. 1, 36 Ind. Cas. 404.

Collector.

Order of Deputy, debaring one from appearing as Vakil for parties in Village Courts, *ultra vires*—Specific Relief Act (I of 1877), S. 42—Suit for declaration of invalidity of order, maintainability of. See MAD. ACT I OF 1889 (VILLAGE COURTS), No. 2, 39 M. 808.

Collision Case.

Decision of trial Judge—Weight to be attached—Trial with aid of Nautical Assessors—Interference by Court of Appeal. See ADMIRALTY JURISDICTION, No. 1, 20 C.W.N. 1022.

Collusion.

(1) Attachment of property in execution—Dispute between judgment-debtor and decree-holder regarding amount of property attached—Allegations of, between Amin and decree-holder—Duty of executing Court to enquire. See CIV. PRO. CODE (1908), No. 90, 1 Pat. L.J. 558.

Colonization Act.

See PUNJAB ACT V OF 1912.

Commission.

(1) Conduct of counsel, in the matter of cross-examination of witnesses examined on commission, commented upon. **Baqar Mirza v. Mehdi Hasan**, 19 O.C. 246.

LINDSAY, J.C. and KENDALL, A.J.C.

(2) *Mortgage—Agreement to pay commission to mortgagee—Mortgage entered into deliberately and voluntarily—Liability of mortgagor to pay commission.*

During the negotiations preliminary to the execution of a mortgage-deed, the mortgagor agreed to pay certain commission on the loan, since the money had been lying unused during the period of the negotiations. It was found that the mortgagor had not been deceived or taken by surprise nor had there been any improper pressure or unfair dealing in the matter of the execution of the mortgage-deed. Both the mortgagor and mortgagee knew perfectly well what they were doing. Their acts were voluntary and in pursuance of a deliberate bargain.

There was no mistake of fact, no pressure, and no advantage taken of the position of the mortgagor. The parties were completely on equal terms. *Held*, that the mortgagor could not plead non-liability for the commission paid, in a suit brought to enforce the mortgage. **Babu Narendra Bahadur v. The Oudh Commercial Bank, Limited**, 30 Ind. Cas. 323.

STUART, A.J.C.

References:—(a) 4 A.L.J. 109=11 C.W.N. 349=5 C.L.J. 106=17 M.L.J. 43=9 Bom. L. R. 304=3 M.L.T. 75=34 I.A. 9=34 C. 150, R.

(3) *Purchase by firm—Claim of firm to commission.*

Where a purchase is made by a firm on its

Commission—(Concluded).

own behalf it is not entitled to a commission on the goods purchased. **Fatch Lal v. Mr. Charles Edward Gray**, 36 Ind. Cas. 210.

RICHARDS, C.J. and RAFIQUE, J.

(4) Works done by defendant for plaintiff—No proof of agreement as to payment of—Award of reasonable compensation. See CONTRACT ACT, No. 79, 30 Ind. Cas. 223.

Commissioner.

(1) Legal evidence—Hearsay evidence, objection to admission of—Hearsay statements recorded by—If should be allowed to be read in Court. See MAHOMEDAN LAW—MARRIAGE, No. 3, 36 Ind. Cas. 20=21 C.W.N. 345.

(2) Taking of accounts—Power to decide questions of law—Court's jurisdiction to decide the questions. See QUESTION OF LAW, No. 1, 18 Bom. L.R. 798.

(3) Jurisdiction of District Judge over them—Nature and extent of. See RULES OF THE HIGH COURT, No. 1, 34 Ind. Cas. 855.

Common Manager.

(1) Account, suit for—Principal and agent—Proprietor appointed by a co-proprietor as, for payment of debts on the estate, whether an agent of latter and, on his death, of his sons—Limitation. See ACCOUNTS, No. 4, 20 M.L.T. 430.

(2) See BEN. ACT VIII OF 1885 (TENANCY), No. 46, 34 Ind. Cas. 83.

(3) Co-sharer with separate account in Collectorate—Continuance as "co-owner"—Appointment of. See BEN. ACT VIII OF 1885 (TENANCY), No. 44-b, 36 Ind. Cas. 448.

Commutation of Rent.

(1) Suit—No definite order for commutation—No appeal and second appeal where no decree was passed. See MAD. ACT I OF 1908 (ESTATES LAND), No. 27, 34 Ind. Cas. 460.

(2) See MAD. ACT I OF 1908 (ESTATES LAND), No. 16-b, 22 Ind. Cas. 493.

(3) Grant to Brahmin before Permanent Settlement for subsistence—Onus—Suit for. See MAD. ACT I OF 1908 (ESTATES LAND), No. 4-a, 32 Ind. Cas. 229.

Companies Act (VI of 1882).

(1) S. 58—Company—Register of share-holders—Rectification of register—Transfer of share—Transferee's name not registered—Company not guilty of default or unnecessary delay—Liquidation—Liability of transferee as contributory. *In re the Indian Specie Bank*, 17 Bom. L.R. 342=28 Ind. Cas. 983=40 B. 134. See Final Part, 1916, Col. 42.

(2) S. 68—Debenture deed providing that Company shall have power to carry on business until a certain event—Happening of the event, effect of—Charge created in favour of officers of Company, when valid—Floating security, nature of—"Officers of the Company," meaning of.

The right of a Company to create a charge

Companies Act (VI of 1882)—(Continued).

on its assets when the Company is a going concern is incident to its right to carry on business; but no such charge can be created after the Company has actually stopped business or after the debenture-holder has intervened under the powers reserved to him to stop the business by obtaining the appointment of a receiver or petitioning for the winding up of the Company.

But where the debenture deed provides that the Company should have power to go on carrying on business and creating charges after the happening of any of the events which determine its right to carry on business, the right to carry on business is not determined automatically by the happening of the events indicated, but continues until the debenture holder intervenes to show his desire that it should cease, as by applying for a receiver (a).

It is of the essence of a floating security that it should remain dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes (b).

A charge created in favour of officers of the Company and not registered as required by S. 68 of the Indian Companies Act of 1882 is void (c).

A person who does not hold any office in the Company at the time the charge is created, is not an officer of the Company within the meaning of S. 68 of the Indian Companies Act of 1882. *Balasubramania Aiyar v. Kandasami Pillai*, 32 Ind. Cas. 91.

WALLIS, C.J., and SESHAGIRI AIYAR, J.

References:—(a) (1903) 2 K.B. 367=72 L.J. K.B. 771: (1910) 2 K.B. 979=79 L.J. K.B. 970=54 S.J. 560=26 T.L.R. 509, *F.* (b) (1897) A.C. 81=66 L.J. Ch. 101=75 L.T. 553=45 W.R. (Eng.) 353, *F.* (c) 19 A.O. 371=56 L.J. Ch. 873=56 L.T. 782=36 W.R. 17 (Eng.)=52 J.P. 179; 7 Ch. Ap. 289=26 L.T. 228=20 W.R. (Eng.) 347; 11 Ch. D. 579=48 L.J. Ch. 480=40 L.T. 572=27 W.R. (Eng.) 845, *F.*

(3) S. 68—*Debenture-deed charging assets of the Company—Provision that Company should have power to carry on business until default—Business carried on notwithstanding default—Non-intervention of debenture-holders—Charge in favour of officers of the Company for salary—Not registered—Validity*, *S.V. Nallaperumal Pillai v. S. D. Krishna Aiyangar*, 29 M.L.J. 110=30 Ind. Cas. 286. See Final Part, 1915, Col. 48.

(4) Ss. 81, 125, 151—*Contributory, liability of—Unpaid portions of calls—Company's right to recover such calls—Limitation*.

Once a member of a Company is upon the list of contributories, unless he succeeds in showing as against the liquidator that he should not have been put on the list of contributories, he is liable for all those matters in respect of which he may be charged in the event of the Company being wound up, that is to say, to the extent of his original share held in the Company which remains unpaid, he is liable to contribute

Companies Act (VI of 1882)—(Continued).

to the assets of the Company, for payment of the debts due to creditors and the expenses of the winding-up under S. 61, Companies Act (1882), although the unpaid calls may have become time-barred and ceased to be a recoverable debt. *Jagannath Prasad v. U. P. Flour and Oil Mills Co., Ltd.*, 14 A.L.J. 349=38 A. 347=35 Ind. Cas. 159.

FIGGOTT and WALSH, JJ.

(5) S. 125. See No. 4, *supra*.

(6) S. 136, *object of—Decree in favour of bank—Revision proceeding by defendant judgment-debtor—Liquidation of bank during pendency of revision proceedings—Leave of Court if necessary to proceed with revision petition*.

It is necessary to obtain the leave of the Court before proceeding with certain revision proceedings against a decree in favour of a plaintiff Bank which went into liquidation during the pendency of the revision petition.

The revision proceeding against the decree obtained by the Company is a proceeding "against the Company" within the meaning of S. 136 of the Companies Act, and consequently cannot be proceeded with without the leave of the Court.

The object of S. 136 is to prevent all litigation against the Company except with the consent of the District Judge, and all proceedings in which the Company is either a defendant or a respondent are proceedings against the Company.

A revision is no essential or inevitable portion of a suit, and there is no authority for holding that a suit and a revision are synonymous terms. *Milawa Ram v. People's Bank of India*, 91 P.R. 1916=36 Ind. Cas. 618.

CHAVIS and LE-ROSSIGNOL, JJ.

(7) Ss. 137 and 141—*Company wound up—Winding up order, passed—Effect of order on Company's properties—Discharge of servants of Company—Appeal against order appointing Official Liquidator—Managing Director, if competent to appeal on Company's behalf—Practice*.

An order winding up a Company has the legal effect of discharging all its servants including its Managing Director and consequently such a Director is incompetent to institute proceedings for the Company after the winding up order has been made (a).

The appointment of Director continues, however, for the purpose of appealing against the winding up order and for the enforcement of their liability (b).

No appeal lies at the instance of the Managing Director of a Company which has been wound up against an order appointing an Official Liquidator or against an order refusing re-hearing of the appointment proceedings since the Director's appointment has ceased at the time of presentation of the appeal and he is not therefore competent to prefer the appeal on behalf of the Company. *South Indian Mills Co., Ltd. v. Shivalal Motilal*, 4 L.W. 228= (1916) 2 M.W.N. 250=39 Ind. Cas. 617.

OLDFIELD and SADASHIVA IYER, JJ.

Companies Act (VI of 1882)—(Continued).

References:—(a) (1893) 1 Ch. 724; (1910) 1 Ch. 336, R. (b) (1866) L.R. 2 Q.B. 37; (1879) 13 Ch. D. 400, R.

(8) S. 141. See No. 7, *supra*.

(9) S. 150—"Money due from him to the Company," interpretation of—*Winding up*—*Contributory*—*Debt due on pro-note to Company*—*Summary jurisdiction of Court*—*Marginal notes to sections, reference to—Interpretation of Statute.*

Held, that a debt due on a pro-note by a contributory is "money due from him to the Company" within the purview of S. 150 of the Companies Act (1882).

Held also, that under S. 150 of the Companies Act, the Court has, upon a summary application presented to it, the power to direct the contributory to pay not only all moneys due from him as a member, but also any debt due from him to the Company. The jurisdiction is permissive, but when a case is made out for the exercise thereof, it should not be declined unless very cogent reasons to the contrary are shown (a).

Semble.—The marginal note to a section cannot be relied upon in clearing up the ambiguity in the text of the written law, but it may with advantage be referred to when it confirms the conclusion warranted by the language of the section. *The Lahore Bank v. Kildar Nath*, 4 P.W.R. 1916=36 P.R. 1916=46 P.L.R. 1916=31 Ind. Cas. 746.

RATTIGAN and SHADI LAL, JJ.

References:—(a) 31 Ind. Cas. 54=59 P.R. 1915=139 P.W.R. 1915; 4 Ch. App. 475=38 L.J. Ch. 698=20 L.T. 553=17 W.R. 694, R.

(10) S. 150—*Contributory*—*Power of Court to require him to pay debt due to Company—Discretion of Court.* *Kamta Pershad v. Industrial Bank of India (In liquidation)*, 59 P.R. 1915=139 P.W.R. 1915=31 Ind. Cas. 54. See Final Part, 1915, Col. 43.

(11) S. 151. See No. 4, *supra*.

(12) S. 163—*Appeal against orders made in winding-up proceedings—Limitation—Extension of time—Principles—Special circumstances.*

Held, that the general principles for extending time in winding-up appeal cases are as follows:

(i) The object of the Act (VI of 1882), being that matters should be settled speedily and that winding up proceedings should not be protracted unduly, an extension of time will not be granted except under 'special' circumstances;

(ii) in the absence of 'special' circumstances, a litigant who has obtained a judgment which, by expiration of the time limited for appeal, has become absolute, ought not to be deprived of it;

(iii) a person who applies for an extension of time must show, not on equity properly so called, but something which entitles him to ask for the indulgence of the Court to relieve him from the legal bar that is imposed by the Act of the Legislature (a).

Held, also, that, under S. 169 of Act VI of

Companies Act (VI of 1882)—(Concluded).

1882, the "special circumstances" which entitle a person to ask for extension of time require that he will not be granted the indulgence unless he can satisfy the Court that he himself has acted with reasonable diligence and that the delay in prosecuting his appeal was due either to the respondents' conduct or to some action or inaction on the part of the Court below (b). *Blahen Das v. The Liquidator*, 5 P.W.R. 1916=42 P.L.R. 1916=31 Ind. Cas. 725.

RATTIGAN and SHADI LAL, JJ.

References:—(a) 11 Ind. Cas. 562=13 Bom. L.R. 558, R. (b) 95 P.R. 1908=165 P.W.R. 1908; 184 P.W.R. 1914=22 Ind. Cas. 793=68 P.R. 1914; 100 P.W.R. 1911=10 Ind. Cas. 433. 46 P.R. 1915=71 P.W.R. 1915=29 Ind. Cas. 265; 4 Ind. Cas. 872=19 M.L.J. 511; 22 M. 291, R.

(13) S. 169—*Appeal—Code of Civil Procedure* (1908), O. XXI, rr. 53, 63.

The right of appeal under the provisions of S. 169 of the old Companies Act is co-extensive with the right of appeal conferred by the Code of Civil Procedure. Hence where in liquidation proceedings a person described as the proprietor of a firm was directed to pay a certain sum as a contributory, and the order was sent to the District Judge of Agra to be executed, and another person claimed to be sole proprietor of the firm which claim the District Judge declined to adjudicate upon, *held* that the claim purported to be under O. XXI, r. 58 of the Code of Civil Procedure and the Order passed was under r. 63 of the same order and consequently there was no appeal. *Santi Lal v. The Indian Exchange Bank, Lahore*, 14 A.L.J. 722=38 A. 537=35 Ind. Cas. 6=36 Ind. Cas. 498.

PIGGOTT and LINDSAY, JJ.

(14) S. 203—*Sanctioning bona fide and workable scheme.*

A Court can sanction only a bona fide and workable scheme under the provisions of S. 203 of the Act. *South Indian Mills Co., Ltd. v. Burn & Co., Ltd.*, 30 Ind. Cas. 386.

WALLIS, C.J., and SESHAGIRI Aiyar, J.

Companies Act (VII of 1913).

(1) S. 2—S. 3 of Act VI of 1882—*Transfer of shares after insolvency of a company—Informal transfer by a director of his shares—His liability as a contributory.* *Hakim Rai v. The Office Liquidator of Peshawar Bank, Limited Multan*, 162 P.W.R. 1915=31 Ind. Cas. 865. See Final Part, 1915, Col. 100.

(2) Ss. 3, 284—*Winding up proceedings pending in District Courts on the date on which the new Companies Act came into force, 1-4-1914—Jurisdiction of District Courts whether ousted—Scope of S. 284—Canons of construction.* *Daulat Rai v. Liquidators, Hindustan Bank, Ltd.*, 20 P.R. 1915=29 Ind. Cas. 272=85 P.L.R. 1916. See Final Part, 1915, Col. 101.

(3) S. 38—*Rectification of Register—Power of Court—Directors' power to refuse to*

Companies Act (VII of 1913)—(Continued).

register a share-holder—Court's power to interfere with the discretion—Appeal to High Court.

The proviso to S. 38 of the Indian Companies Act, 1913, should not be confined to the last clause, but must be read as a general reservation imposed on all the clauses of the section.

The conditions precedent to the existence of an appeal under S. 38 are that the lower Court should have directed an issue to be tried in which some question of law was raised, and that that Court should have come to a decision on such issue.

The purchaser at a Court-sale of the right, title and interest of a share-holder is not entitled as of right to have his name entered in the register of the company as a share-holder; but he is subject to the same rules on the point as a private purchaser is. **Mansil Brijlal Shah v. The Gordhan Spinning and Manufacturing Co., Ltd.**, 18 Bom. L.R. 982=41 B. 76.

BACHELOR, A. C. J., and SHAH, J.

(4) S. 153—*Creditors, meeting of, after Bank stopped payment—Agreement by majority of creditors to re-open and conduct Bank's business, effect of.* **Raghubar Dayal v. The Bank of Upper India, Ltd., Lucknow**, 18 O.C. 275=32 Ind. Cas. 461. See Final Part, 1915, Col. 101.

(5) Ss. 158 and 163—*Winding up of company—Application by fully paid up share-holder—Effect of appointment of Receiver—Acquiescence to jurisdiction.*

Where in a case, which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute jurisdiction of the Judge upon the ground that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit (a).

A fully paid up share-holder is a contributory and may present a petition for winding up of the company, subject to certain conditions (b).

The appointment of a Receiver to take charge of the assets of a company has not the effect of transferring the ownership therein from the partners to the Receiver (c). **The Imperial Oil Soap and General Mills, Co. Ltd., Delhi v. Ramchand**, 36 Ind. Cas. 980.

SHADI LAL, J.

References:—(a) 9 A. 191=13 I.A. 134=4 Bur. P.C.J. 741=5 Ind. Dec. (N.S.) 661, R. (b) 1866, 1 Ch. Ap. Cas. 547=35 L.J. Ch. 808=12 Jur. (N.S.) 697=15 L.T. 127=14 W.R. 1005, R. (c) (1881) 19 Ch. D. 77=51 L.J. Ch. 302=45 L.T. 325; 17 M. 501=6 Ind. Dec. (N.S.) 347, R.

(6) S. 163. See No. 5, *supra*.

(7) S. 207—*Voluntary liquidation—Decree against company—Jurisdiction to stay execution of decree.*

A decree had been obtained against a company which subsequently went into voluntary liquidation. The decree-holder applied for execution of the decree which was allowed by the Court of first instance. Upon appeal the District Judge stayed execution. *Held*, that the District

Companies Act (VII of 1913)—(Concluded).

Judge had no jurisdiction to order stay of execution, the High Court alone having such power on being moved in that direction by either the liquidator or any other creditor dissatisfied with the action taken by a decree-holder.

S. 207, Companies Act, is no bar by itself to the progress of execution unless and until an order has been obtained from a Court having jurisdiction under the Companies Act, either for winding-up or for stay of proceedings. **Suraj Bhan v. The Boot and Equipment Factory**, 14 A.L.J. 513=38 A. 407=36 Ind. Cas. 397.

PIGGOTT and WALSH, J.J.

(8) S. 215—*Winding up—When proceedings in Courts against Company in liquidation may be stayed.* Liquidators of the **Marwar Bank, Limited v. Kanshi Nath**, 182 P.L.R. 1915=124 P.W.R. 1915=30 Ind. Cas. 657. See Final Part, 1915, Col. 104.

(9) S. 284. See No. 2, *supra*.

Company.

(1) *Liquidation, attachment prior to—Property attached if vests in liquidator—Property attached sold and proceeds brought into Court—Proceeds how to be distributed.*

Where, after property belonging to a limited liability Company had been attached by a creditor, the Company went into voluntary liquidation.

Held—that, after the property had been sold and the proceeds brought into Court, the distribution thereof must be governed by the provisions of the Code of Civil Procedure.

That the attachment and sale could not be set aside at the instance of the liquidator.

The liquidator of a Company differs in this respect from Official Assignee in that the property of the Company does not vest in him. **Amrita Lal Kundu v. Anukul Chandra Das**, 20 C.W.N. 358=43 O. 586=34 Ind. Cas. 253.

JENKINS, C.J. and HOLMWOOD, J.

(2) *Documents, inspection of—Report of Company's agent for the express purpose of laying it before Company's Solicitor, whether privileged.*

A letter written by an agent of a Company giving details of a claim, in pursuance of an order of the Company to submit reports in all cases of claims of a serious nature, not merely as an ordinary duty but expressly to be laid before the Company's Solicitor, is privileged, and its inspection cannot be granted in a suit for such a claim if there is nothing to show that the letter was sent for any other purpose. **Yang Tze Insurance Association, Ltd. v. The British Indian Steam Navigation Co., Ltd.**, 8 Bur. L.T. 274=30 Ind. Cas. 974.

ROBINSON, J.

References:—2 Ch. D. 644=45 L.J. Ch. 449=35 L.T. 76=24 W.R. 624; 3 Q.B.D. 315=47 L.J. Q.B. 258=26 W.R. 341; 4 C.P. 602=38 L.J. C.P. 317=30 L.T. 813=17 W.R. 660; (1889) 6 T.L.R. 22, R.

(3) *Company accepting certain person for many years as director—Right of third*

Company—(Concluded).

person to question his powers—Share-holder estopped.

When a Company is shown to have accepted a certain person for many years as its director and has never on any occasion repudiated any of his acts as such, it is not open to one who has no concern with the Company to challenge the appointment of such director or to contest his authority to act on behalf of the Company.

A share-holder taking part in almost all the general meetings of the Company and joins also in the annual appointment of its director without taking exception to his appointment is debarred by his conduct from objecting to the validity of such director's appointment or to his authority to act for and on behalf of the Company. *Imperial Oil, Soap and General Mills, Co., Ltd. v. Wazir Singh*, 31 Ind. Cas. 595.

RATTIGAN and SHADI LAL, JJ.

(4) *Company, director of, duties of—Meeting of directors—Personal interest of directors.*

No one who has a duty to perform shall place himself in a situation in which his interest conflicts with his duty and he must not make profit by the trust.

A director of a company cannot, as a rule, enter into a contract with the company for profit to himself. The directors of a company are agents of the company and trustees of the share-holders of the powers committed to them.

Where the intention of the articles of a company was that the company should only be bound if two of the directors exercised authority, considered its interests and acted on its behalf, the appointment of one of the two directors who were alone present at a meeting of the directors as managing director and co-editor of a paper run by the company held to be invalid since there was in law and in fact only one director acting on behalf of the company the other being incapacitated by his personal interest. *Ramaswami Iyer v. Madras Times Printing & Publishing Company*, 32 Ind. Cas. 350 = 38 M. 991.

BAKEWELL, J.

(5) *Right to forfeit shares how to be exercised—Winding up proceedings—Person when to be placed on the list of contributories.* *Kanshi Ram v. Kishor Chand*, 37 P.R. 1915 = 101 P.W.R. 1915 = 2 P.L.R. 1915 = 29 Ind. Cas. 567. See Final Part, 1915, Col. 516.

Compensation.

(1) *Improvements—Compensation—Bona fide belief as to title.*

It was found that the defendant had rebuilt the houses in dispute having purchased the same while the plaintiff's suit for possession was pending against the persons from whom the defendant had purchased the houses. It was further found that the defendant and his transferees had a *bona fide* belief that their title was good.

Held, that the defendant was entitled to claim compensation from the plaintiff before decree for possession could be executed by him.

Compensation—(Concluded).

Amir Chand v. Durga Das, 70 P.L.R. 1916 = 92 P.W.R. 1916 = 34 Ind. Cas. 957.

SHADI LAL and LE ROSSIGNOL, JJ.

(2) For removal of fixtures by Calcutta Municipal authority—Whether payment of compensation is a condition precedent to such removal—Court by which claim to such compensation is cognizable. See BEN. ACT III OF 1899 (MUNICIPAL), No. 3, 18 Bom. L.R. 878.

(3) Suit for, for illegal ejection—Parties—Limitation. See OUDH ACT XXII OF 1886 (RENT), No. 34, 31 Ind. Cas. 447.

(4) Right of vendee to, for litigation in connection with pre-empted property—Consideration of equitable circumstances. See PUN. ACT II OF 1905 (PRE-EMPTION), No. 5, 30 Ind. Cas. 517.

(5) Breach of promise to marry, for. See BUDDHIST LAW (MARRIAGE), No. 2, 9 Bur. L.T. 77.

(6) For pre-emptor remaining out of possession of pre-empted property—Interest. See CIV. PRO. CODE (1908), No. 287, 170 P.W.R. 1916.

(7) See CONTRACT ACT, No. 80, 32 Ind. Cas. 511.

(8) Work done by defendant for plaintiff—No proof of agreement as to payment of commission—Award of reasonable. See CONTRACT ACT, No. 79, 30 Ind. Cas. 223.

(9) See LAND ACQUISITION ACT (1894), No. 13, 31 Ind. Cas. 259.

(10) Mortgage—Award of, for breach of penal clause—Amount awarded a charge on mortgaged property. See LIMITATION, No. 4, 30 Ind. Cas. 323.

(11) Specific performance—Misrepresentation as to extent of property—Principle—Court of equity. See VENDOR AND PURCHASER, No. 7, 32 Ind. Cas. 47.

Compensation for Improvement.

Ejection—Tenant's right to compensation for buildings or for time to remove them after expiry of term—Equitable estoppel. See LANDLORD AND TENANT, No. 29, 9 But. L.T. 101.

Compensation for Tenants' Improvements (Malabar) Act.

See MAD. ACT I OF 1900.

Complaint.

Under Copyright Act—Discharge of accused—Power of High Court to direct further enquiry. See LETTERS PATENT (MADRAS), No. 6, 30 Ind. Cas. 721.

Compoundable Offence.

Criminal case compoundable with leave of Court only—Agreement to compound such case if opposed to public policy—Offence not so compoundable alleged but no summons issued—Effect. See AGREEMENT, No. 1, 20 C.W.N. 946.

Compound Interest.

(1) *Interest on interest—Interest on default becoming principal.*

Compound Interest—(Concluded).

Compound interest is not interest on interest, it is interest on a sum or sums which were interest but which, on default or liquidation, immediately becomes principal. **Sham Sundar v. Harbans Singh**, 30 Ind. Cas. 517.

JOHNSTONE and SHAH DIN, JJ.

(2) Provision regarding payment of interest on default—Relief against penal clause—Assessment of compensation—Conduct of parties. See **CONTRACT ACT**, No. 93, 30 Ind. Cas. 323.

Compromise.

(1) *Registration—Compromise—Not embodied in decree.*

Where a compromise was not embodied in the decree but merely remained amongst the records of the Court and it was an agreement for the exchange of lands and the parties contemplated that it would be carried into effect by a decree of the Court but was not so done, the agreement remains to be effected by a document of transfer of the property and does not require registration. **Palavalasa Appala-swamy v. Sri Dantaluri Narayana Ganapathiraju**, (1916) M.W.N. 276=34 Ind. Cas. 446.

BAKEWELL and NAPIER, JJ.

(2) *Compromise decree how far operates as res judicata—Compromise decree relating to properties outside the scope of the suit—Effect—Registration whether necessary.*

So far as it relates to the properties within the scope of the suit a compromise decree is *res judicata*, but so far as it relates to properties outside the scope of the suit, such a decree, if the terms of the compromise are embodied within the decree, is judicial evidence of an agreement to transfer an interest in the property. It is not necessary in such a case to register the compromise petition. **Bhiseswar Ram v. Mahadeo Pahan**, 1 Pat. L.J. 208=36 Ind. Cas. 290.

MULLICK, J.

References:—22 M. 508=26 I.A. 101; 1 C.L.J. 406; 7 C.L.J. 496, F.

(3) *Compromise decree, effect of.*

When a case is settled by compromise, the decision is as binding as if it had been decided after hearing evidence and it is not permissible to go behind that decision and enquire whether the decision might have been different if evidence had been adduced. **Bhisheshwar Dass v. Saghirunnissa**, 31 Ind. Cas. 902.

BAILLIE, S.M.

(4) *Partition suit—Compromise pending an appeal—Compromise about money payable by one of the parties—Compromise signed by that party—Absence of consent by another party immaterial.*

Where pending an appeal in a partition suit a compromise was concluded which did not modify the decree of the Court below as regards the properties divided but made certain provisions with reference to an amount of money payable by one of the parties, it is binding on the parties though it is not signed by another

Compromise—(Continued).

party. **Achama Naidu v. Krishnaswami Naidu**, 34 Ind. Cas. 518.

ABDUR RAHIM and SPENCER, JJ.

Reference:—24 M. 326, D.

(5) *Compromise decree—Terms of the Razinama reproduced in the decree—Specific provision in decree that the terms so far as they relate to the suit only are executable—Executability of decree as regards terms outside the scope of suit.* **Subbavarayana Aiyar v. Maya Thevan**, 2 L.W. 608=30 Ind. Cas. 263. See Final Part, 1915, Col. 518.

(6) *Compromise decree, penal clause in, if can be relieved against.* **Ramayanam Jogamma v. Enamandra Ramalakshmi**, 2 L.W. 635=30 Ind. Cas. 248. See Final Part, 1915, Col. 519.

(7) *Compromise by limited owners—Scope and effect—District Judge to act on the opinion of the majority of the Full Bench.* **Elamarty Bangarayudu v. Mangipoody Perayya Sastry**, (1915) M.W.N. 810=2 L.W. 1025=30 Ind. Cas. 927. See Final Part, 1915, Col. 519.

(8) See **BEN. ACT VIII of 1885 (TENANCY)**, No. 64, 35 Ind. Cas. 445.

(9) *Application by judgment-debtor to record satisfaction of decree—Enquiry into questions of fact—One of the judgment-debtors a minor—Validity of compromise—Court's duty—Compromise after decree—Applicability of O. XXXII, r. 7, Civ. Pro. Code.* See **CIV. PRO. CODE (1908)**, No. 429, 31 M.L.J. 207.

(10) *Compromise by next friend or guardian when binding on minor—Leave of Court.* See **CIV. PRO. CODE (1908)**, No. 585, 35 Ind. Cas. 675.

(11) *Consent decree under O. XXIII, r. 3, Civ. Pro. Code, when may be passed—Compromise not recorded—Effect—Appeal.* See **CIV. PRO. CODE (1908)**, No. 569, 43 C. 85.

(12) *Ex parte decree—Payment of decree amount on—Order setting aside said decree after disposal of appeal by other judgment-debtors.* See **CIV. PRO. CODE (1908)**, No. 384, 30 Ind. Cas. 247.

(13) *Order recording petition of—Jurisdiction of Court to decide whether suit has been settled out of Court when one party denies the settlement—Absence of authority of persons negotiating compromise.* See **CIV. PRO. CODE (1908)**, No. 565, 36 Ind. Cas. 375=21 C.W.N. 366.

(14) *Plaintiff's compromising with only some of the defendants—Dismissal of suit for non-prosecution—Court if bound to pass a decree embodying the terms of compromise under O. XXIII, r. 3, Civ. Pro. Code—Appeal if lies when no decree passed—Revision if lies.* See **CIV. PRO. CODE (1908)**, No. 254, 20 C.W.N. 752.

(15) *Prior suit for partition—Minor parties—Reference to arbitration—Decree in accordance with award—Appeal from decree—Compromise in appeal—Leave of Court not obtained either to arbitration or to consent-decree—Effect—Minor's right of suit to avoid the decree—Prior partition suit re-opened with reference to all parties.* See **CIV. PRO. CODE (1908)**, No. 587, 30 M.L.J. 465.

Compromise—(Concluded).

(16) Party compromising suit not estopped from urging setting aside sale in entirety, when. See *ESTOPPEL*, No. 6, 31 Ind. Cas. 858.

(17) Mutation proceedings, registration of petitions of, filed in. See *FAMILY ARRANGEMENT*, No. 1, 19 O.O. 75.

(18) Compromise by father as next reversioner—Whether binding on son. See *HINDU LAW (REVERSIONERS)*, No. 1, 19 M.L.J. 1.

(19) Compromise by widow when binding on reversioners. See *HINDU LAW (WIDOW)*, No. 8, 31 M.L.J. 87.

(20) Compromise entered into with a Hindu widow—Not binding on reversioners—Effect. See *HINDU LAW (WIDOW)*, No. 9, 14 A.L.J. 881.

(21) Of suit with reversioner's consent—Compromise having effect of alienation—Right of reversioner to question compromise. See *HINDU LAW (WIDOW)* No. 25, 30 Ind. Cas. 927.

(22) Views of parties as to compromise if absolute. See *MAHOMEDAN LAW (GUARDIANSHIP)*, No. 3, 3 L.W. 379.

(23) Pleador's acts how far binding on clients—Pleador's authority to compromise—*Vakalatnamah* containing such authority whether sufficient—Form IV, Sind Courts Civil Circulars—O. III, r. 1, Civ. Pro. Code. See *PLEADER AND CLIENT*, No. 5, 9 S.L.R. 218.

(24) Suits for partition by younger sons compromised, presumption from. See *PRIMOGENITURE*, No. 1, 1 Pat. L.J. 509.

(25) Application for probate—Petition of compromise between propounder and objector dividing testator's property—Probate case decided on such compromise without proof of will, if legal. See *PROBATE*, No. 3, 20 C.W.N. 986.

(26) When binding on reversioners. See *PROBATE*, No. 1, 23 C.L.J. 82.

(27) Settlement of dispute in mutation proceedings—Petition to Revenue Court—Admissibility in evidence without registration. See *REGISTRATION ACT (1908)*, No. 22, 14 A.L.J. 449.

(28) Nature and validity of compromise decrees. See *RELIGIOUS ENDOWMENTS*, No. 1, 30 M.L.J. 274.

Compromise Decree.

(1) Penalty in—Power of execution Court to interfere. See *CONTRACT ACT*, No. 94, 32 Ind. Cas. 796.

(2) Right of party to, to prove that his consent was obtained by misrepresentation and fraud—Necessity for suit to set aside decree. See *EVIDENCE ACT*, No. 25, 30 Ind. Cas. 639.

(3) See *EXECUTION OF DECREE*, No. 34, 32 Ind. Cas. 693.

(4) See *HINDU LAW (GIFT)*, No. 3, 33 Ind. Cas. 521.

Compulsion.

Money paid under compulsion of legal process—Suit to recover the money if lies—*Bona*

Compulsion—(Concluded).

fides of party receiving payment—Effect. See *CIV. PRO. CODE (1908)*, No. 460, 20 C.W.N. 188.

Compulsory Registration.

Deed of gift—Requirements of—Donor's death after execution—At the donee's instance—Gift, if complete and valid. See *TRANSFER OF PROPERTY ACT*, No. 147, 31 M.L.J. 690.

Computation of Time.

(1) See *LIMITATION ACT (1908)*, No. 38, 35 Ind. Cas. 868.

(2) See *TRANSFER OF PROPERTY ACT*, No. 58, 33 Ind. Cas. 761.

Concurrent Findings.

Of fact of Courts below, dismissal of appeal for. See *BEN. ACT VIII OF 1885 (TENANCY)*, No. 67, 20 C.W.N. 1352.

Conditional Decree.

(1) *Execution of—Civ. Pro. Code, O. XXI, r. 22—Notice to debtor—Objections to execution.*

Even where O. XXI, r. 22 of the Code of Civil Procedure does not apply, the Court should issue a notice on the judgment-debtor and hear his objection, if any, before it grants execution of a conditional decree on the *ex parte* statement of the decree-holder that the contingency contemplated has happened. *Syam Mandal v. Sati Nath Banerjee*, 24 C.L.J. 523.

MOOKERJEE and CUMING, JJ.

(2) Execution of—Costs—Procedure. See *EXECUTION OF DECREE*, No. 25, 31 Ind. Cas. 564.

(3) Court's power to pass. See *SALE*, No. 13, 34 Ind. Cas. 106.

Conduct.

Evidence of, as to whether a mortgage was really a *Kobala*. See *EVIDENCE ACT*, No. 60, 35 Ind. Cas. 102.

Confiscation.

(1) *Declaration of war between England and Germany—Cargo shipped by British subjects before declaration—Enemy ship—Destined to German port—Property in goods shipped—Confiscation. Re Cargo ex S.S. Rappenfels*, 42 C. 334=30 Ind. Cas. 174. See Final Part, 1915, Col. 523.

(2) Joint family—Grant of confiscated property to one member—Effect—Right of succession. See *HINDU LAW (IMPARTIBLE ESTATES)*, No. 1, 14 A.L.J. 913.

(3) Of proprietary rights in Oudh—Effect. See *HINDU LAW (WIDOW)*, No. 7, 19 O.O. 1.

Consent.

(1) Of children to proposed marriage—Parent's promise to marry their children if enforceable. See *BUDDHIST LAW—MARRIAGE*, No. 2, 9 Bur. L.T. 77.

(2) Of parties, effect of. See *JURISDICTION OF CIVIL AND REVENUE COURTS*, No. 6, 30 Ind. Cas. 209.

Consent Decree—(Concluded).

(1) Suit for redemption of mortgage—Relief sought being setting aside of a, between the parties and a prior sale-deed as fraudulent, See BOM. ACT XVII OF 1879 (DEKHAN AGRICULTURIST'S RELIEF), No. 2, 18 Bom. L.R. 708.

(2) See CIV. PRO. CODE (1908), No. 154, 35 Ind. Cas. 850.

(3) Consent decrees under O. XXIII, r. 3, Civ. Pro. Code, when may be passed—Compromise not recorded—Effect—Appeal. See CIV. PRO. CODE (1908), No. 569, 43 C. 85.

(4) Power of Court to vary or set aside same. See CIV. PRO. CODE (1908), No. 284, 36 Ind. Cas. 339.

(5) Contract—Time as of the essence of contract—Construction. See CONTRACT, No. 14, 18 Bom. L.R. 803.

(6) *Res judicata*—Gross negligence of guardian—Confession of judgment by guardian. See GUARDIAN AND WARD, No. 1, 117 P.L.R. 1916.

(7) Nature and validity of compromise decrees. See RELIGIOUS ENDOWMENTS, No. 1, 30 M.L.J. 274.

Consequential Relief.

(1) Suit against order on claim petition—Plaintiff's right to declaration and—Sale of property before order on the claim petition—Limitation. See CIV. PRO. CODE (1908), No. 486, (1916) 2 M.W.N. 207.

(2) Declaratory suit for removal of a Mahant in possession and declaration that plaintiff has the right to nominate a successor for possession. See DECLARATORY DECREE, No. 1, 95 P.R. 1916.

(3) See SPECIFIC RELIEF ACT, No. 27, 115 P.L.R. 1916.

Consideration.

(1) *Advancement*—*Meher*—*Conveyance of property in satisfaction of meher*—*Consideration not necessary*—*Suit for possession*—*Limitation Act* (IX of 1908), Arts. 142, 144.

In 1898, the plaintiff's husband sold to her two houses by a registered document for Rs. 1,700 (*babashahi*) in satisfaction of her *meher* (*dowry*). In one of the houses conveyed, the plaintiff's husband continued to reside as before till his death which took place in 1911. On his death, the defendants having taken forcible possession of the house, the plaintiff sued to recover possession. The lower Courts rejected the claim first on the ground, that the document was not supported by consideration and, secondly, that the claim was barred by limitation. On appeal:

Held, that the document being a document of advancement needed no consideration to support it.

(2) That the suit was within time, for the residence by the husband from 1898 to 1911 was permissive and on behalf of the plaintiff, *Ibrahim v. Isa Rasul*, 18 Bom. L.R. 810—41 B. 5—36 Ind. Cas. 715.

BRAMAN and HEATON, JJ.

Consideration—(Concluded).

(2) *Bond, renewal of*—*Release of original debtor*—*Acceptance of new debtor*—*Contract Act*, S. 2 (d). *Moheo Chandra Guha v. Rajani, Kanta Dutt*, 22 C.L.J. 235—31 Ind. Cas. 29. See Final Part 1915. Col. 524.

(3) Mortgage of land in favour of agriculturist who undertakes to pay debt due from an agriculturist to a non-agriculturist—Transfer of Property Act, S. 58. See PUN. ACT XIII OF 1900 (ALIENATION OF LAND), No. 1, 114 P.W.R. 1916.

(4) Finding that a certain amount of the money was returned after registration is a question of fact. See APPEAL—SECOND APPEAL, No. 6, 115 P.W.R. 1916.

(5) Objections to execution sale—Compromise—Consideration. See CONTRACT, No. 9, 3 L.W. 435.

(6) See CONTRACT ACT, No. 3, 32 Ind. Cas. 416.

(7) Guarantee—Absence of—Effect. See CONTRACT ACT, No. 1, 33 Ind. Cas. 732.

(8) Promissory note—Endorsement—Presumption of—Oral evidence to prove consideration for endorsement. See EVIDENCE ACT, No. 62, 32 Ind. Cas. 233.

(9) Recital in pro-note as to—Proof of consideration of a different kind. See EVIDENCE ACT, No. 70, (1916) M.W.N. 474.

(10) Promissory note—Presumption as to consideration. See HINDU LAW—ALIENATION, No. 24, 34 Ind. Cas. 617.

(11) Pardanashin woman executing sale-deed, liability of—Denial of receipt of, by executant of deed—Onus of proof. See LIMITATION ACT (1908), No. 192-a, 33 Ind. Cas. 746.

(12) See MORTGAGE—GENERAL, No. 49, 35 Ind. Cas. 56.

(13) See MORTGAGE—GENERAL, No. 52, 35 Ind. Cas. 455.

(14) Promissory note by a young boy just emerged from minority with large expectations—Burden of proof re-passing of. See NEGOTIABLE INSTRUMENTS ACT, No. 23, 31 Ind. Cas. 739.

(15) Consideration simultaneous with the passing of the pro-note—If action on debt would lie. See PARTNERSHIP, No. 5, (1916) 2 M.W. N. 14.

(16) Second suit to recover mortgage-money—Failure of—Suit for money had and received—Limitation. See RES JUDICATA, No. 17, 18 Bom. L.R. 779.

(17) Non-payment of—Delivery of deed—Effect. See SALE, No. 18, 34 Ind. Cas. 106.

(18) Registration of sale-deed—No taint of fraud, not paid—Title passing notwithstanding—Stranger alleging fraud—Burden of proof. See SALE, No. 12, 34 Ind. Cas. 125.

(19) Suit for cancellation of sale-deed when no, passed—Point to be considered. See SPECIFIC RELIEF ACT, No. 24, 31 Ind. Cas. 77.

Consideration—(Concluded).

(20) Loan—Execution of promissory note—Suit on original consideration—When maintainable. See STAMP ACT (1899), No. 3, 9 S. L. R. 150.

Consolidation.

Of suits when may be allowed. See CIV. PRO. CODE (1909), No. 323, 20 C.W.N. 475.

Construction.

- 1.—OF ACTS.
- 2.—OF CONTRACT.
- 3.—OF DECREE.
- 4.—OF DEEDS.
- 5.—OF DOCUMENTS.
- 6.—OF GRANT.
- 7.—OF STATUTES.
- 8.—OF WILL.
- 9.—OF WORDS.

—1.—Of Acts.

(1) Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentences. *Aiyasamier v. Venkatachela Mudali*, 31 M.L.J. 513=(1916) 2 M. W. N. 296=20 M.L.T. 391=4 L.W. 507.

ABDUR RAHIM, O.C.J., SESHAGIRI AIYAR and PHILLIPS, JJ.

(2) *High Court—Original side—Right of audience enjoyed by practitioners for long time cannot be taken away except by express words or by necessary implication.*

An act passed several years after the right of audience of certain legal practitioners on the original side has been enjoyed, cannot be construed as taking away that right in the absence of provision in plain terms or by necessary implication. *Namberumal Chetty v. Narasimhachari*, 31 M.L.J. 698=(1916) 2 M.W.N. 529.

COUTTS-TROTTER, J.

(3) *Act to be done at particular meeting convened in particular way, when valid—Notice of Agenda—Proceedings of meeting when valid.*

If a particular act must, by statute, be done at a particular kind of meeting, convened in a particular way, no meeting can do that act which is not a meeting of that particular kind or has not been convened in that particular way. The members of the body must have notice of what it is proposed to do at the meeting, or its proceedings will be invalid. Ordinarily, it will be sufficient if they have notice of the substance of what is proposed, unless the statute in terms enacts that the notice must not only give the substance of what is proposed but must call it by its statutory name. *In re G.A. Natesan*, 31 M.L.J. 634=40 M. 125.

COUTTS-TROTTER and KUMARASWAMI SASTRI, JJ.

References:—(1916) 2 Ch. 57; (1867) L.R. 2 Ch. 191; (1877) 3 C.P.D. 282, R.

Construction—(Continued).**—1.—Of Acts—(Continued).**

(4) *Waste Lands Act, 1863—Conditions of application of provisions, strict proof of.*

The Waste Lands Act, 1863, is drastic in its character, and makes a great invasion on private rights, and consequently those pleading it must bring the matter strictly within its provisions. *The Secretary of State for India in Council v. Maharaja Radha Kishore Manjya Bahadur*, 14 A.L.J. 1205=18 Bom. L.R. 1027=20 M.L.T. 549=(1917) M.W.N. 25=21 C.W.N. 291=5 L.W. 570.(P.C.).

LORD DUNEDIN, LORD MOULTON, SIR JOHN EDGE and MR. AMEER ALI.

(5) *Indian Contract Act, 1872—To be held to be exhaustive on matters when it varies from English Law.*

Though the Indian Contract Act, 1872, purports to deal only with "certain parts of the law relating to contracts," it would appear that, where it does treat with a subject in a way at variance with the law of England, it should be regarded as exhaustive, and binding on the Courts in India. *Ballabhdas v. Palkaji*, 12 N. L.R. 177.

BATTEN and STANYON, A.J.Cs.

(6) See ABATEMENT OF APPEAL, No. 1, (1916) 2 M.W.N. 280.

(7) Where a Statute expressly or by implication leaves the determination of certain matters to the Body Corporate created by it, the latter has no power to delegate its authority on matters within its competence to a third person. See ACT VIII OF 1904 (UNIVERSITIES), No. 1, 31 M.L.J. 634.

(8) Indian Act based on English Law—Applicability of English decisions in interpreting the Indian Act. See ACT III OF 1909 (PRESIDENCY TOWNS INSOLVENCY), No. 17, 39 M. 250.

(8-a) See BEN. ACT III OF 1884 (MUNICIPAL), No. 3, 35 Ind. Cas. 782.

(9) Heading of chapter if may be looked at for construing sections. See BEN. ACT VIII OF 1885 (TENANCY), No. 63, 20 C.W.N. 1097.

(10) Statute not declaratory but amending—Retrospective operation. See BEN. ACT VIII OF 1885 (TENANCY), No. 3, 20 C.W.N. 258.

(11) See BEN. ACT V OF 1911 (CALCUTTA IMPROVEMENT), No. 1, 24 C.L.J. 246.

(12) Statute interpretation of—Ordinary meaning—Consistent with the Act—Proper course—Intention of Legislature, immaterial. See BOM. ACT III OF 1901 (DISTRICT MUNICIPAL), No. 3, 9 S.L.R. 126.

(13) Construction of statutes—Grammatical meaning—Object of legislature. See C.P. ACT IX OF 1883 (TENANCY), No. 1, 12 N.L.R. 51.

(14) Estates Land Act explicit—Principles of general law, if applicable. See MAD. ACT I OF 1908 (ESTATES LAND), No. 20, 4 L.W. 168.

(15) Two possible constructions—Which to be preferred. See MAD. ACT I OF 1908 (ESTATES LAND), No. 8, 3 L.W. 592.

Construction—(Continued).**—1.—Of Acts—(Concluded).**

(16) Contracting out of statutory rights—Freedom of contract—Statute, interpretation of. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 24, 34 Ind. Cas. 441.

(17) Civ. Pro. Code, 1908, O. XXI, r. 57 whether retrospective. See ATTACHMENT, No. 1, 31 Ind. Cas. 911.

(17-a) See CIV. PRO. CODE (1908), No. 397, 31 Ind. Cas. 869.

(18) Reference to marginal notes to sections in Acts. See COMPANIES ACT (1882), No. 9, 4 P.W.R. 1916.

(19) Interpretation at the time of enactment—Mandatory enactments if and when directory. See CONTRACT, No. 2, 23 C.L.J. 26.

(20) Interpretation of contract. See CONTRACT ACT, No. 106, 20 C.W.N. 1192.

(21) Penal section to be strictly construed. See CRIM. PRO. CODE, No. 6, 4 L.W. 613.

(22) Provisions in bar of suit—Strict interpretation. See CUSTOMS (PUNJAB—ALIENATION), No. 6, 48 P.R. 1916.

(23) Preamble, proper use of. See EASEMENTS, No. 1, 20 C.W.N. 1158.

(24) Limitation of ordinary incidents of litigation to be express. See LIMITATION ACT (1908), No. 269, 31 M.L.J. 324.

(25) Interpretation of fiscal enactments. See SUCCESSION CERTIFICATE ACT, No. 11, 20 C.W.N. 1125.

(26) Limitation Act—Strict construction. See TRANSFER OF PROPERTY ACT, No. 57, 9 Bur. I. T. 45.

—2.—Of Contract.

Question of—Question of law for the Courts. See INJUNCTION, No. 1, 20 C.W.N. 457.

—3.—Of Decree.

(1) See CIV. PRO. CODE (1908), No. 722, 35 Ind. Cas. 761.

(2) By executing Court—Absence of patent ambiguity—Alteration of decree under guise of interpretation. See CIV. PRO. CODE (1908), No. 116, 36 Ind. Cas. 500.

(3) Contract—Time as of the essence of contract—Construction—Consent-decree. See CONTRACT, No. 14, 18 Bom. L.R. 805.

(4) Execution—Ambiguous decree—Court's power of construction. See EXECUTION OF DECREE, No. 32, 33 Ind. Cas. 561.

(5) Reference to the pleadings and the record in construing the decree. See EXECUTION OF DECREE, No. 28, 34 Ind. Cas. 344.

(6) Sale of widow's right, title and interest in her husband's properties—Test to determine the interest sold—Decree for mesne profits. See HINDU LAW (WIDOW), No. 33, 32 Ind. Cas. 587.

(7) Settlement decree, construction of. See JURISDICTION OF CIVIL COURTS, No. 5, 19 O.C. 339.

Construction—(Continued).**—3.—Of Decree—(Concluded).**

(8) With reference to plea of *res judicata*. See RES JUDICATA, No. 12, (1916) 2 M.W.N. 133.

(9) See SPECIFIC RELIEF ACT, No. 51, 35 Ind. Cas. 106.

—4.—Of Deeds.

(1) *Document—Construction—Mortgage or charge—Covenant to pay whether can be implied.*

Where a document had been executed by the stake-holders and subscribers to a *chit* containing the usual provision that the prize-winner should execute a security bond before he gets the prize money :

Held on a construction of the document that it amounted to a mortgage and not merely charge. The mere fact that there was no express covenant to pay, when one must necessarily be implied, will not affect the construction of the document. **Subramania Iyer v. Papchanatha Iyer**, (1916) 2 M.W.N. 263.

OLDFIELD and SADASIYA AIYAR, JJ.

Reference :—23 M.L.J. 131, D.

(2) *Mortgage by conditional sale or sale with covenant to purchase—Test.*

In the case of a dispute as to whether a document is a mortgage by conditional sale, or a sale with a covenant for re-purchase, the test is the intention of the parties to be gathered from the language of the documents themselves, viewed in the light of the surrounding circumstances (a).

It is a rule of law dictated by common sense "that *prima facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance, and becomes a mortgage merely because the vendor stipulates that he shall have a right to re purchase (b). (Per Lord Cranworth). **Jhanda Singh v. Sheikh Wahib-ud-din**, 31 M. L.J. 750=20 M.L.T. 529=21 C.W.N. 66=14 A.L.J. 1189=(1916) 2 M.W.N. 570=38 A. 570=19 Bom. L.R. 1=5 L.W. 189=36 Ind. Cas. 38.

LORD CHANCELLOR, LORD ATKINSON and SIR JOHN EDGE.

References :—(a) 17 I. A. 98, F.; 27 I. A. 58, D. (b) (1858) 2 D. G. & J. 97 (105); (1888) L.R. 13 A. C. 554 (568); 17 I. A. 98, F.; 27 I. A. 58, D.

(3) *Mortgage—Construction of covenant—Clause as to payment upon mortgages receiving less than the stipulated amount of profits—Sum payable on redemption.*

A mortgage-deed provided that the mortgagor would be entitled to redeem on payment of the principal amount of the mortgage, and that the mortgagor would have nothing to do with the profits of the mortgaged property nor would the mortgagee get any interest so long as the mortgagee remained in possession. It then provided that should there be a deficiency of

Construction—(Continued).**—4.—Of Deeds—(Continued).**

profits, then the mortgagor would pay the deficient amount with interest at 2 per cent. per mensem, from his own pocket. In a suit for redemption, *held*, that the mortgagor was entitled to redeem on payment of the principal amount only of the mortgage, there being no covenant that the deficiency of the profits was to be added to the principal at the time of redemption. **Ali Ahmad v. Kalka Prasad**, 14 A.L.J. 986.

RICHARDS, C.J. and RAFIQ, J.

(4) Deed, construction of—Deed between owner of soil and capitalist—Transfer of land, effect of—Partnership.

In this case one J entered into an agreement with B and T the terms of which were recorded in a document. The important clauses of that document were as follows:—"I, J gave in writing that there is a *karia* which takes its supply from Dhoro Naro. In all the rights and interests of the lands within the limits of this *karia*, and in this *karia*, I take B and T as partners with myself having one-third share. From this day, in this *karia* and in all the rights and interests of the land one-third share is and shall remain in force and there are two shares of mine and will remain as such. We become and shall remain bound and responsible with each other according to the following terms." Then followed the conditions under which money was to be advanced, whatever money was required for cultivation without interest; if they failed to pay as required they were to be liable for interest at a certain fixed rate. J was to make all the arrangements for the cultivation and to sell the produce at a certain rate. All advances were to be paid out of the sale-proceeds and the net profit was to be divided in certain proportion. J was to be allowed to retain the whole produce out of the Kharif crop and six jirebs out of the Rabi crop. It was also declared that the partnership would continue to remain for ever from generation to generation and would be agreed to by the heirs and executors of J.

Held on a construction of the above document (1) That the said doc! did not create a transfer of one-third share of the land and water-course to B and T but that it created a partnership between the parties by which the whole land was transferred to the partnership as a partnership asset and treated as partnership property, the owner of the soil having agreed to provide the land and B and T having agreed to provide the required capital.

(2) That the above said partnership was terminable at will and that on the termination of such partnership, the relief of B and T was by a suit for partnership accounts and not for partition and possession of one-third share in the land.

(3) That on the termination of such partnership, B and T could not remain under a liability to finance the partnership which no longer existed, and that in taking accounts of such partnership their liability to find money

Construction—(Continued).**—5.—Of Deeds—(Continued).**

every year for cultivation must be assessed and debited against them on taking accounts. **Billawal v. Giammal**, 10 S.L.R. 58=35 Ind. Cas. 652.

PRATT, J.C. and CROUCH, A.J.C.

(5) Construction of document—Sale of land—Vendor and purchaser—Intention to transfer the whole of the share of the vendor in a village—Inadvertent omission of certain plots in the list attached—Omission immaterial—False demonstration—Pleader, authority of—Withdrawal of a plea—Withdrawal binding on the party.

Where on the true construction of a sale-deed it appears that the intention was to transfer shares, the vendor's intention being to transfer the whole of the share in a certain village, if in the list attached to the sale-deed certain numbers were omitted by mistake, that cannot make any difference on the effect of the sale-deed and the transferee will get title to the entire share intended to be conveyed and the maxim '*falsa demonstratio non nocet*' applies to the case.

A pleader has full authority to withdraw any plea which had been raised in the case and the party cannot be heard to contend that the pleader had no authority to do so and such plea is not thereafter open to the party in the appeal. **Surajpal Singh v. Debi Bakhsh Singh**, 34 Ind. Cas. 390.

LINDSAY, J.C.

(6) Sale followed by agreement for re-purchase—Construction—Onus.

A sale followed by an agreement for re-purchase of the land for a certain sum within a certain time may be construed as a species of mortgage. He who asserts that the transaction is mortgage must prove it. **Maung Kya Hla v. Maung Ko Kyaw**, 35 Ind. Cas. 336=10 Bur. L.T. 4.

PARLETT, J.

Reference:—12 A. 387 (P.C.), R.

(7) Construction of document—Transaction whether sale or mortgage—Surrounding circumstances.

The mere fact of the conditions on which the mortgage can be redeemed being onerous, would not be sufficient to justify the Court in coming to the conclusion that the transaction which purported to be a mortgage was a sale. The surrounding circumstances have to be looked to. **Muhammad Quasim v. Sheo Sing Swami Jangam**, 32 Ind. Cas. 192.

BANERJEE and PIGGOTT, J.J.

(8) Construction of document—Wajib-ul-ars—'Farar' meaning of.

Where a *wajib-ul-ars* contains the following clause "where an owner of the grove '*gaon se farar ho jatahai*' his grove becomes '*nasul*,'" the word '*farar*' cannot apply to a man who leaves a village openly in order to take up his residence in an adjoining village. The word means an absconder. There must be something

Construction—(Continued).**—5.—Of Deeds—(Continued).**

clandestine or irregular about the departure. A man cannot be called 'farar' simply because he has abandoned his cultivatory holding (a). *Gauri Shankar Singh v. Bhagwan Din*, 32 Ind. Cas. 337.

STUART, A.J.C.

Reference:—(a) 2 O.C. 231 (285), R.

(9) See ABWAB, No. 1, 36 Ind. Cas. 404.

(10) Condition repugnant to grant, effect of, on construction. See ACT XV OF 1882 (PRE-SIDENCY SMALL CAUSE COURTS), No. 1, 4 L. W. 339.

(10-a) See BEN. ACT VIII OF 1885 (TENANCY), No. 3-a, 32 Ind. Cas. 717.

(11) See U.P. ACT II OF 1901 (AGRA TENANCY), No. 42, 31 Ind. Cas. 898.

(12) Whether a document is deed of mortgage or sale—Whether it is ground for second appeal. See APPEAL (SECOND APPEAL), No. 6, 115 P.W.R. 1916.

(13) See CIV. PRO. CODE (1908), No. 233, 31 Ind. Cas. 209.

(14) See CIV. PRO. CODE (1909), No. 722, 35 Ind. Cas. 761.

(15) Of power of attorney. See CONTRACT ACT, No. 143, 36 Ind. Cas. 968.

(16) Terms in partnership contract in writing not clear—Construction—Parol evidence—Evidence Act, S. 93. See CONTRACT ACT, No. 36, 31 Ind. Cas. 632.

(17) See EVIDENCE ACT, No. 81, 36 Ind. Cas. 597.

(18) See EVIDENCE ACT, No. 8, U.B.R. (1916), 2nd Cr., p. 110.

(19) Mutual mistake in description of land in registered mortgage-deed, oral evidence to prove—Construction of document. See EVIDENCE ACT, No. 73, 31 Ind. Cas. 671.

(20) Negotiable instruments, construction of—Practice. See EVIDENCE ACT, No. 57, 4 L. W. 339.

(21) See GRANT, No. 4, 31 Ind. Cas. 565.

(22) See HINDU LAW (JOINT FAMILY), No. 19, 31 Ind. Cas. 35.

(23) Gift by widow—Gift with power of alienation—Construction of document—Intentions of parties. See HINDU LAW (WIDOW), No. 28, 34 Ind. Cas. 596.

(24) See LEASE, No. 12, 33 Ind. Cas. 264.

(25) With regard to provisions as to forfeiture. See LEASE, No. 7, 39 M. 1049.

(26) Of gift. See MALABAR LAW (GIFT), No. 1, 32 Ind. Cas. 107.

(27) See MORTGAGE (GENERAL), No. 48, 34 Ind. Cas. 899.

(28) Of power of attorney. See POWER OF ATTORNEY, No. 4, 36 Ind. Cas. 968.

(29) Power of attorney—Construction of. See POWER OF ATTORNEY, No. 3, 39 M. 918.

Construction—(Continued).**—5.—Of Deeds—(Concluded).**

(30) See POWER OF ATTORNEY, No. 2, 18 Bom. L.R. 821.

(31) See REGISTRATION ACT (1908), No. 15, 98 P.R. 1916.

(32) Provision in mortgage-deed restraining mortgagee's right to sue—Independent clauses regulating the right—Construction of document. See RIGHT OF SUIT, No. 3, 30 Ind. Cas. 323.

(33) Sale-deed—Construction of—Mortgage by conditional sale—Sale with agreement to reconvey—Distinction between—Intention of parties. See SALE, No. 11, 31 M.L.J. 375.

(34) Document intending to operate on vendor's death, construction of—Will. See SPECIFIC RELIEF ACT, No. 24, 31 Ind. Cas. 77.

(35) See SUCCESSION CERTIFICATE ACT (1889), No. 1, 31 Ind. Cas. 446.

(36) See TRANSFER OF PROPERTY ACT, No. 82, 31 M.L.J. 347.

(37) As to forfeiture. See TRANSFER OF PROPERTY ACT, No. 143, 31 Ind. Cas. 454.

(38) See WAJIB-UL-ARZ, No. 1, 36 Ind. Cas. 66.

(39) See WILL, No. 15, 114 P.R. 1916.

—5.—Of Documents.

(1) Construction of documents—Intention—Surrounding circumstances, whether can be looked to—All the clauses to be given effect to—Construction nullifying a clause to be avoided—Debt—Assignment—Debtor's assent communicated to the assignee—No notice of any claim or charge in his own right—Debtor, whether can subsequently plead any such claim or charge—Liability on what grounded—Transfer of Property Act, S. 132—Actionable claim—Transfer prima facie subject to equities—Transferee bound to ascertain their extent and prove that the transfer is free from an existing right—The term "without prejudice," what it imports, when used in a private document. *Yenkata Subblah Chetty v. Subba Naidu*, 2 L.W. 977 = (1915) M.W.N. 832 = 18 M.L.T. 533 = 31 Ind. Cas. 152. See Final Part, 1915, Col. 528.

(2) Construction of covenants—Agreements must, if possible, be interpreted so as to make them operative. See BEN. ACT VII OF 1885 (TENANCY), No. 38, 20 C.W.N. 948.

(3) Document—Question involving construction of—When question of law—Second appeal. See APPEAL (SECOND APPEAL), No. 5, 68 P.R. 1916.

—5.—Of Grant.

(1) See U. P. ACT II OF 1901 (AGRA TENANCY), No. 42, 31 Ind. Cas. 898.

(2) See CROWN GRANTS, No. 1, 31 M.L.J. 483.

(3) Rules as to—Grant of land bounded by a stream—Rights of grantee. See GRANT, No. 2, 14 A.L.J. 684.

Construction—(Continued).**—7.—Of Statutes.**

See CONSTRUCTION OF ACTS.

—8.—Of Will.

- (1) *Bequest of property in which the testator has reversionary interest—Will by Hindu widow—Affirmation by reversioner.*

Where a testator bequeathed his entire property, moveable and immovable of which he was then in possession and that of which he might obtain possession thereafter to his nephew. Held that the will covered the entire property which the testator held at the time of his death, including the property in which the testator had a reversionary interest on the date of the bequest and which he afterwards inherited, although in his lifetime he did not take any steps to acquire possession.

A Court is bound to give effect to every word of the will without change or rejection, provided an effect can be given to it not inconsistent with the general intent of the whole will taken together, but if that cannot be done, the general intent has to be pursued, though it may involve the rejection or transposition of a particular superfluous or misplaced word(a).

A will by a Hindu widow is absolutely void (b) and no affirmation by a reversioner, unless it amounts to a renunciation by him of his reversionary interest, can validate it. **Dhamsa Bakhsh Singh v. Jagmohan Singh**, 32 Ind. Cas. 209.

KANHAIYA LAL, A.J.C.

References :—(a) 13 R.R. 142=3 V. & B. 79 =35 E.R. 409, R. (b) 5 Bom. L.R. 314; 17 B. 690, F.

(2) See HINDU LAW (WILL), No. 7, 32 Ind. Cas. 569.

(3) See SPECIFIC RELIEF ACT, No. 1, 35 Ind. Cas. 792.

(4) Document intending to operate on vendor's death, construction of—Will. See SPECIFIC RELIEF ACT, No. 24, 31 Ind. Cas. 77.

(5) See WILL, No. 18, 32 Ind. Cas. 267.

—9.—Of Words.

(1) "Abkari." See MAD. ACT I OF 1886 (ABKARI), No. 1, 34 Ind. Cas. 927.

(2) "Affected." See BEN. ACT V OF 1911 (CALCUTTA IMPROVEMENT), No. 1, 24 C.L.J. 246.

(3) "After notice to the other parties." See CIV. PRO. CODE (1908), No. 65, 150 P.W.R. 1916.

(4) "Aggrieved person." See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 61, 36 Ind. Cas. 771.

(5) "Alien enemy." See ALIEN ENEMY, No. 3, 9 Bur. L.T. 176.

Construction—(Continued).**—9.—Of Words—(Continued).**

(6) "Application." See CIV. PRO. CODE (1908), No. 709, 31 M.L.J. 509.

(7) "Assign." See REGISTRATION ACT (1908), No. 33, 20 C.W.N. 1345.

(8) "Attempt to enforce a forged instrument." See LIMITATION ACT (1909), No. 165, 32 Ind. Cas. 99.

(9) "Aulad." See HINDU LAW (WILL), No. 3, 97 P.L.R. 1916.

(10) "Aulad." See WAJIB-UL ARZ, No. 1, 36 Ind. Cas. 66.

(11) "Bond." See STAMP ACT (1899), No. 4, 9 Bur. L.T. 111.

(12) Settlement 'by the founder' and 'along with the founder' meaning. See PUNJAB ACT XVI OF 1887 (TENANCY), No. 8, 3 P.R. 1916 (Rev.).

(13) 'Cash.' See WILL, No. 6, 23 O.L.J. 241.

(14) "Cause of action." See CIV. PRO. CODE (1908), No. 61, 31 M.L.J. 816.

(15) "Claim." See BUR. ACT II OF 1876 (LOWER BURMA LAND REVENUE), No. 4, 35 Ind. Cas. 277.

(16) "Claim." See CIV. PRO. CODE (1908), No. 5, 35 Ind. Cas. 65.

(17) "Coercion." See CONTRACT ACT, No. 12, 31 M.L.J. 264.

(18) "Coming into force of the Act." See MAD. ACT I OF 1903 (ESTATES LAND), No. 9, 20 M.L.T. 520.

(19) "Declare." See FAMILY ARRANGEMENT, No. 1, 19 O.C. 75.

(20) "Disputes." See BUR. ACT II OF 1876 (LOWER BURMA LAND REVENUE), No. 4, 35 Ind. Cas. 277.

(21) "Distress." See CRIM. PRO. CODE, No. 6, 4 L.W. 613.

(22) "Exact." See MAD. ACT I OF 1908 (ESTATES LAND), No. 36, 30 Ind. Cas. 166.

(23) "Family house." See BUDDHIST LAW (MAINTENANCE), No. 1, 8 L.B.R. 404.

(24) "Farer." See CONSTRUCTION OF DEED, No. 8, 32 Ind. Cas. 337.

(25) "Father." See GUARDIAN AND WARDS ACT, No. 10, 8 L.B.R. 415.

(26) "Favourable rate of rent." See OUDH ACT XXII OF 1886 (RENT), No. 32, 33 Ind. Cas. 204.

(27) "Ferry" and "Ferry-boat." See BEN. ACT III OF 1884 (MUNICIPAL), No. 3, 35 Ind. Cas. 782.

(28) "Fit." See REVISION, No. 3, 31 M.L.J. 827.

(29) "Goods." See CONTRACT ACT, No. 2, 24 C.L.J. 835.

(30) "Inoumbrance." See SALE FOR ARREARS OF REVENUE, No. 1, 48 C. 779.

(31) "Involved." See CIV. PRO. CODE (1908), No. 219, 19 O.C. 131.

Construction—(Continued).**—9.—Of Words—(Continued).**

(32) Meaning and effect of the expression "Istemrari mokarari" in leases—Lease when to be deemed perpetual and when not—Meaning of words in a document whether a question of fact or law. See LEASE, No. 3, 43 C. 332.

(33) "Jerayati." See MAD. ACT I OF 1908 (ESTATES LAND), No. 4, 31 Ind. Cas. 852.

(34) Meaning of "Jeth raiyat" and "mafi." See BEN. ACT VIII OF 1885 (TENANCY), No. 66, 20 C.W.N. 1207.

(35) "Jote." See BEN. ACT VIII OF 1885 (TENANCY), No. 4, 34 Ind. Cas. 92.

(36) "LAND." See U.P. ACT II OF 1901 (AGRA TENANCY), No. 39, 34 Ind. Cas. 155.

(37) "Land." See CUSTOM (GENERAL), No. 2, 31 Ind. Cas. 279.

(38) "Land." See LAND ACQUISITION ACT (1894), No. 3, 35 Ind. Cas. 97.

(39) "Land." See LANDLORD AND TENANT, No. 36, 33 Ind. Cas. 147.

(40) "Land-holder." See MAD. ACT VIII OF 1885 (RENT RECOVERY), No. 2, 4 L.W. 654.

(41) "Laws for the time being in force." See SPECIFIC RELIEF ACT, No. 46, 31 M.L.J. 634.

(42) "Lay out." See BEN. ACT V OF 1911 (CALCUTTA IMPROVEMENT), No. 1, 24 C.L.J. 246.

(43) "Legal character." See RIGHT OF SUIT, No. 1, 1 Pat. L.J. 381.

(44) "Letting value." See U.P. ACT II OF 1901 (AGRA TENANCY), No. 12, 31 Ind. Cas. 482.

(45) "Maintenance." See ACT IX OF 1887, (PROVINCIAL SMALL CAUSE COURTS) No. 32-a, 32, Ind. Cas. 547.

(46) Malik-o-qabiz. See WILL, No. 13, 38 A. 446.

(47) "Matters in issue." See CIV. PRO. CODE (1908), No. 16, 24 C.L.J. 514.

(48) "May" and "Shall." See CIV. PRO. CODE (1908), No. 397, 31 Ind. Cas. 869.

(49) "Money-rent." See RENT, No. 1, 24 C.L.J. 379.

(50) "Moveable property." See CRIM. PRO. CODE, No. 6, 4 L.W. 613.

(51) "Muafi Khairati." See U.P. ACT II OF 1901 (AGRA TENANCY), No. 42, 31 Ind. Cas. 898.

(52) "Order." See BEN. ACT VIII OF 1885 (TENANCY), No. 69, 34 Ind. Cas. 301.

(53) "Other personal injuries." See DAMAGES, SUIT FOR, No. 1, 20 M.L.T. 303.

(54) "Other personal injuries not causing death." See ABATEMENT OF APPEAL, No. 1, (1916) 2 M.W.N. 280.

(55) "Passing of the Act." See MAD. ACT I OF 1908 (ESTATES LAND), No. 9, 20 M.L.T. 520.

Construction—(Continued).**—9.—Of Words—(Continued).**

(56) "Payment." See CONTRIBUTION, No. 4, 19 O.C. 347.

(57) "Penalty." See CONTRACT ACT, No. 93, 30 Ind. Cas. 323.

(58) "Person aggrieved." See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 27, 20 M.L.T. 486.

(59) "Proprietor." See O.P. ACT XVIII OF 1881 (LAND REVENUE), No. 1, 12 N.L. R. 139.

(60) "Proprietor." See LEASE, No. 11, 33 Ind. Cas. 170.

(61) "Providing building sites." See BEN. ACT V OF 1911 (CALCUTTA IMPROVEMENT), No. 1, 24 C.L.J. 246.

(62) "Public street." See MAD. ACT III OF 1904 (CITY MUNICIPALITY), No. 1, 30 Ind. Cas. 683.

(63) "Public street." See PUN. ACT III OF 1911 (MUNICIPALITY), No. 2, 108 P. R. 1916.

(64) Meaning of "putra poutradi"—Custom of Chota Nagpur. See CUSTOM (GENERAL), No. 1, 20 C.W.N. 876.

(65) "Relating to execution." See BEN. ACT VI OF 1908 (CHOTA NAGPUR TENANCY), No. 5-d, 36 Ind. Cas. 829.

(66) "Relay out." See BEN. ACT V OF 1911 (CALCUTTA IMPROVEMENT), No. 1, 24 C.L.J. 246.

(67) "Rent." See MAD. ACT I OF 1908 (ESTATES LAND), No. 4, 31 Ind. Cas. 852.

(68) "Right of office." See RIGHT OF SUIT, No. 1, 1 Pat. L.J. 381.

(69) Male 'Santhathi' whether includes adopted son. See HINDU LAW (ADOPTION), No. 4, (1916) M.W.N. 306.

(70) "Sir land." See U.P. ACT III OF 1901 (LAND REVENUE), No. 1, 31 Ind. Cas. 855.

(71) "Son to grandson." See GRANT, No. 4, 31 Ind. Cas. 665.

(72) "Street." See BEN. ACT V OF 1911 (CALCUTTA IMPROVEMENT), No. 1, 24 C.L.J. 246.

(73) "Street." See PUN. ACT III OF 1911 (MUNICIPALITY), No. 2, 108 P.R. 1916.

(74) "Sub-lease." See LICENSE, No. 1, 14 A.L.J. 1035.

(75) "Suit." See BENAMI TRANSACTION, No. 5-a, 32 Ind. Cas. 365.

(76) "Suit for trying the title." See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), No. 5, 4 L.W. 402.

(77) "Tax, rate or assessment." See PAUPER APPEAL, No. 1, 9 Bur. L.T. 69.

(78) "Tenant." See U.P. ACT II OF 1901 (AGRA TENANCY), No. 7-d, 32 Ind. Cas. 379.

Construction—(Concluded).**—9.—Of Words—(Concluded).**

(79) "Terms of a contract", if includes date of contract. See CIV. PRO. CODE (1908), No. 405, 9 Bur. L.T. 250.

(80) "Transfer." See LICENSE, No. 1, 14 A.L.J. 1035.

(81) "Where the ground of such appeal and the review are based on the same grounds." See REVIEW, No. 4, 24 C.L.J. 517.

(82) "Whose interests are affected." See CIV. PRO. CODE (1908), No. 519, 10 S.L.R. 53.

(83) "Within a distance of two miles above or below the ferry"—Meaning. See BEN. ACT III OF 1884 (MUNICIPAL), No. 3, 35 Ind. Cas. 782.

Constructive Notice.

(1) Search in Registration office. See MORTGAGE (GENERAL), No. 29, 43 C. 1052.

Constructive Possession.

Any possession is legal possession as against a trespasser. See POSSESSION, No. 7, 8 L.B. R. 372.

Constructive *res-judicata*.

See CIV. PRO. CODE (1908), No. 34-a, 36 Ind. Cas. 650.

Contempt of Court.

Temporary injunction—Breach—Refusal to commit—Appeal—Subsequent dismissal of suit if affects Court's jurisdiction to pass orders on committal application previously presented—Attachment order if should proceed committal order. See CIV. PRO. CODE (1908), No. 680, 3 L.W. 430.

Contract.

See AGREEMENT.

See CONTRACT ACT, 1872.

See EVIDENCE ACT, 1872, Ss. 91, 92.

See HINDU LAW.

See MINOR

See RIGHT OF SUIT.

See SALE.

See SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER.

(1) *Anticipatory breach—Delivery by instalments—Damages—assessment of.*

In a case of an anticipatory breach of contract involving deliveries in several instalments in several months, the true measure of damages would be the sum-total of the differences between the market rates at the appointed times for delivery in each month and the contract price.

Per *Sanderson, C.J.*—Where a contract only limited delivery of goods by shipments during certain months and no specific instalments for delivery were mentioned:

Held, that the buyer was not bound to accept delivery of the whole lot of the goods either at

Contract—(Continued).

the beginning or at the end of the period limited in the contract.

Per *Woodroffe, J.*—Where a question is one of pure fact and there is evidence to support the finding of the Court of first instance, it is incumbent on the appellant to show that the finding is clearly erroneous for the appellate Court to reverse that finding.

Per *Mookerjee, J.*—Where a contract is for delivery of goods by shipments during several months, in the absence of an express agreement to that effect, an agreement to accept delivery by instalments may be inferred from the conduct of the parties and the circumstances of the case.

In the absence of any indication to the contrary, the instalments must be deemed to have been intended to be distributed rateably over the period appointed for the delivery of the whole quantity of the goods. *Billaalram Takuraldas v. E.A. Gubbay*, 20 C.W.N. 240 = 23 C.L.J. 62 = 43 C. 305 = 33 Ind. Cas. 1.

SANDERSON, C.J., WOODROFFE and MOOKERJEE, JJ.

(2) *Corporate body—Title to land, if passes by admission—Bengal Local Self-Government Act (III B.C. of 1885), S. 138 (d), rules framed under—Rules 93, 98—'Regulating the power,' if includes regulating the mode of transfer—Immoveable property vested in District Board, how to be transferred—Statute, construction of—Interpretation at the time of enactment—Rule 98 mandatory—Mandatory enactments, if and when directory—Suit, if liable to be dismissed—No title—Contract, when rescinded—Party, when can resile from the contract—Evidence—Corporation, if can retain money—Cross-objection—Appellant—Party affected—Civ. Pro. Code (1908), O. XLI, rr. 29 (3), 33—Limitation Act (1908), Sch. I, Art. 113.*

Title to land cannot pass by a mere admission when the statute requires a deed (a).

Rule 98 of the statutory rules made by the Lieutenant-Governor under S. 138 (d) of the Bengal Local Self-Government Act is to be read along with r. 93 and is mandatory and not directory. Hence no immoveable property vested in a District Board can be validly sold except with the previous approval of the Local Government and except by an instrument under the common seal signed by the Chairman and by two members of the Board.

The expression 'regulating the power' in S. 138 (d) of the Bengal Local Self-Government Act, when applied to a Rule made thereunder, is comprehensive enough to include not only rules which restrict the power of alienation to property of specified value and kind, but also rules which regulate the mode in which the alienation is to be effected. A power to regulate assumes the conservation of the thing which is to be made the subject of regulation.

Rules 93 and 98 made under S. 138 (d) are not *ultra vires*.

Contract—(Continued).

The Courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it, although such interpretation has not, by any means, a controlling effect upon the Courts and may be disregarded for cogent and persuasive reasons (b).

No universal rule for the construction of statutes can be laid down to determine whether a mandatory enactment shall be considered directory only, or obligatory with an implied nullification for disobedience; it is the duty of Courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed (c).

Where powers or rights are granted with a direction that certain regulations or formalities shall be complied with, it is neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred (d). On the other hand, where a public duty is imposed and the statute requires that it shall be performed in a certain manner or within a certain time or under other specified conditions, such prescriptions are intended to be directory only, when injustice or inconvenience to others, who have no control over those exercising the duty, would result, if such requirements were deemed essential and imperative. The test is, do the statutory prescriptions affect the performance of a duty or do they relate to a privilege or power?

When a public body or a company is established by statute or incorporated for special purposes only, and is altogether the creature of statute law, the prescriptions for its acts and contracts are imperative and essential to their validity.

Cases on the subject referred to.

A suit need not be dismissed, merely because the authority for its institution, such as a certificate under the Pensions Act, or S. 78 of the Land Registration Act, or S. 60 of the Bengal Tenancy Act, or S. 4 of the Succession Certificate Act, is not produced with the plaint. But it is otherwise, where the plaintiff had no title at all at the date of the institution of the suit.

Where there was an offer by the District Board to A to reconvey the land to him upon payment of Rs. 25 as actual expenses of acquisition, and the offer was accepted by him by a deposit of the amount, an enforceable contract was constituted. As the contract was for re-transfer of the land for Rs. 25, neither r. 102 nor r. 103, which applies respectively to contracts in excess of sums of Rs. 50, and Rs. 500, had any application.

The strict rule of the ancient Common Law was that a corporation could only act under its seal and was not bound by written contracts not under seal. This rule, however, was relaxed in many cases at an early date, and where a corporation is acting within the scope

Contract—(Continued).

of the legitimate purposes of its institution, even parol contracts made by its authorised agents raise implied promises, for the enforcement of which an action may well lie, specially where there is no express statutory requirement of a contract under seal and the benefit of the contract has been enjoyed by the corporation (e).

The exception based upon the doctrine of part performance cannot be applied where the contract is, by statutes, positively required to be under seal.

One contract is rescinded by another between the same parties, when the latter is inconsistent with and renders impossible the performance of the former; but, if, though they differ in terms, their legal effect is the same, the second is merely a ratification of the first, and the two must be construed together; where the new contract is consistent with the continuance of the former one, it has no effect unless or until it is performed.

Cases on the point referred to.

Where parties enter into a contract which, if valid, would have the effect, by implication, of rescinding a former contract, and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect, by implication, of affecting their rights in respect to the former transaction.

Where one party, by acts and conduct, evinces an intention no longer to be bound by the contract, the other party will be justified in regarding himself as emancipated from continued liability under the contract.

A clear and precise evidence of a mutual intention to determine or abandon the contract is required by Court.

The demand of a return of the deposit is not by itself conclusive evidence of an intention to abandon the contract. But, where such demand is accompanied by other conduct consistent only with an intention to rescind, the vendee who has so acted cannot later on seek specific performance, for a non-existent contract cannot be specifically enforced.

A suit for specific performance of a contract is to be brought under Art. 113, Sch. I of the Limitation Act, within 3 years from the date when the performance is refused.

Where a corporation receives money or property under an agreement which turns out to be *ultra vires* or illegal, it is not entitled to retain the money. The obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation (f). The relief is granted, not upon the illegal contract, nor according to its terms, but on an implied contract of the corporation to return, or failing to do that, to make compensation for property or money which it has no right to retain; to maintain such an action is not to affirm but to disaffirm the illegal contract (g).

Contract—(Continued).

A respondent can urge cross-objection against another respondent, if he is a party affected. In this respect O. XLI, r. 22 (3) of the Code of Civil Procedure has materially altered the law. **Mathura Mohan Saha v. Ramkumar Saha**, 23 C.L.J. 26=20 C.W.N. 370=43 O. 790=35 Ind. Cas. 305.

MOOKERJEE and N.R. CHATTERJEE, JJ.

References:—(a) 4 C.L.J. 22=33 O. 967; 16 C.L.J. 436; 22 C.L.J. 380, *F.*; 12 C.W.N. 478, *D.* (b) 7 C.L.J. 563=35 C. 701 (713), *R.* (c) (1877) 2 P.D. 211; (1843) 6 M. & G. 872, *D.* (d) (1877) 2 C.P.D. 562, *R.* (e) (1903) 1 K.B. 772; (1913) 2 Ch. 407; (1878) 4 App. Cas. 156; (1813) 7 Cranch. 299, *R.* (f) (1910) 218 U.S. 27, *R.* (g) (1899) 139 U.S. 24, *R.*

(3) *Construction—Admissibility of extrinsic evidence—Rate of payment for work done under a contract—Over-all rate, effect of an.*

The rate of payment for work done under a written contract to execute it is determined by the terms of the contract, and consequently extrinsic evidence as to the rate of payment allowed for such work to another contractor or to same contractor under another contract is irrelevant and inadmissible.

Under the terms of the contract in this case, the schedule of rates of payment specified under one head a certain rate for carting permanent-way material and under another head the rate for carting explosives, and the note referred to in the schedule fixed conditions of carriage of cement and explosives. The question in dispute was as to the rate of payments for carting cement.

Held, that cement was permanent-way material and the rate of payment for carting cement was that specified in the schedule for carting the permanent-way material; that the note did not fix the rate of payment, and the conditions which attached to the carriage of cement were not the same as those which attached to the carriage of explosives; and that although both explosives and cement were to be carried under special instructions and the carriage of cement might consequently be more costly than other permanent-way materials, yet the rate of carting permanent-way materials was fixed as an over-all price, and the fact that one article might be more costly to handle than another did not affect the rate of payment under the terms of the contract. **Seth Jaswant Lal v. Secretary of State**, 19 M.L.T. 103= (1916) M.W.N. 201=3 L.W. 297=23 C.L.J. 177=18 Bom. L.R. 355=33 Ind. Cas. 924 (P.C.).

VISCOUNT HALDANE, LORD PARMOOR, LORD WRENCHURY, SIR JOHN EDGE and MR. AMEER ALI.

(4) *Presidency Small Cause Courts Act, Ss. 38 and 69—Application under S. 38—No order for revival or revival of suit—Reference to High Court before notice to the defendant, whether lies—Co-editor—Contract of service—Power of Managing Director to vary duties and hours of attendance*

Contract—(Continued).

—*Refusal to do duties assigned—Claim for salary—Contract Act, S. 54.*

A reference under S. 69 of the Presidency Small Cause Courts Act is competent though no formal order was passed granting a new trial or declaring that the suit has been revived before the notice was issued to the defendant on an application under S. 38 (a).

Held also, in the absence of any express contract as to the duties of the plaintiff as co-editor at the time of his appointment, the Managing Director of the Company publishing the newspaper was entitled as a matter of law to vary the plaintiff's duties and the hours of his attendance at the office from time to time, provided such variation was not unreasonable or inappropriate to his appointment as co-editor, and that the defendant-company was not bound to pay to the plaintiff his salary for the period during which he failed to perform the duties so required of him. **Ramaswami Aiyar v. The Madras Times**, 30 M.L.J. 207=19 M.L.T. 165=33 Ind. Cas. 929.

SADASIVA AIYAR and NAPIER, JJ.

References:—(a) 15 M. 179; 11 C. 298, *Diss.*

(5) *Privity of contract—Gift by grandfather—Deposit with a relative—Limitation Act, Art. 60—Distinction between a loan and a deposit—Presumption.*

Where the grandfather of one P intended to make a gift to her of Rs. 2,000 and, in fact, made the gift and asked the defendant who was a relative of his to hold the money for her and give it to her when she attained her majority or when she might demand it with interest at a certain rate, *held*, no question of privity of contract arose. There was a completed gift by the grandfather and the defendant agreed to hold the money in deposit for the donee and to pay it with interest to her at a particular rate. No question of privity of contract arises and the plaintiff can sue to recover the amount from the defendant. The transaction is clearly in the nature of a deposit of money in the hands of the defendant and Art. 60 of the Limitation Act applies.

Seshagiri Iyer, J.—There is only a thin difference between a loan and a deposit. Where money is to be paid on the happening of a certain specified event or on demand, the transaction should be regarded as a deposit payable on the happening of the event or on demand and not as a loan. If there is any doubt as to whether a transaction amounts to a loan or a deposit, the presumption is that it is a deposit and not a loan. **Narayanan Chettiar v. Yellayappa Chettiar**, (1916) M.W.N. 205=19 M.L.T. 237=34 Ind. Cas. 347.

ABDUR RAHIM and SESHAGIRI AIYAR, JJ.

(6) *Building contract—Money payable on final bill certified by Engineer—Owner liable to pay amount of the bill—Engineer liable for mistakes, if any, in the bill.*

The plaintiff entered into a contract with the defendants for building their house, one of the terms of the contract being that, when the plaintiff completed the work, the defendants

Contract—(Continued).

would get their Engineer to measure the same and pay immediately all the moneys due. When the plaintiff presented, on the completion of the work, his final bill certified by the defendants' Engineer, the defendants submitted the bill to another Engineer, and finding that the measurements included in the bill were excessive, consented to pay only for the re-measurements. The plaintiff having sued to recover the amount of the bill :—

Held, that the defendants were bound to pay under the bill, and if they discovered that their Engineer had made mistakes, they had their remedy against him.

Where the parties agree that a building contractor shall be paid according to the final certificate of the architect and that certificate is issued, the employer cannot impeach it except on the ground of fraud. If the architect is incompetent and makes mistakes in preparing the final bill, then the employer has his remedy against the architect, but the building contractor is bound to be paid. **All Mahomed Rahimtulla v. Pandurang Laxman**, 18 Bom. L.R. 166=33 Ind. Cas. 701.

MACLEOD, J.

(7) *Sale of goods—Calcutta Baled Jute Association's Contract—"Home guarantee" clause—Effect—Dispute between Calcutta buyer and Calcutta seller—Arbitration in London between Calcutta purchaser and London purchaser—Effect upon Calcutta seller.*

By a contract dated 2-3-1914, plaintiffs, a firm of Jute balers in Calcutta, sold 500 bales of Jute to the defendant firm for being exported to London.

The contract form used was that of the Calcutta Baled Jute Association and it contained a clause known as 'Home guarantee' to this effect "weight, condition and quality guaranteed by sellers at port of destination." Defendants sold the Jute to a London buyer who however refused to take delivery owing to its inferior quality. The matter was referred to arbitration in London in accordance with the terms of the London Jute Association's Contracts and an award was given against the defendants. Plaintiffs sued in Calcutta to recover the price of the 500 bales of Jute from the defendants.

The defendants contended that they were not liable on the ground that, under the bye-laws of the Calcutta Baled Jute Association which were incorporated in the contract, plaintiffs had guaranteed the : weight, condition and quality' of the goods at the port of destination ; that the goods had been invoiced back to the sellers in accordance with the award, and that plaintiffs and defendants were bound by the London award and to give effect to it by the plaintiffs taking back the Jute at a certain price.

Held, that the 'Home guarantee' did not say that a London award in a submission by the Calcutta purchaser and the London purchaser in accordance with the rules of the London

Contract—(Continued).

Association Contract would be binding in a dispute between the Calcutta seller and the Calcutta buyer ; and that, to make such an award binding upon a total stranger to the London submission, there should be a clear and unambiguous agreement to that effect, and such a term cannot be implied in this case.

Held also that, though it may be correctly contended that a contention about quality between the Calcutta seller and the Calcutta buyer may be validly referred to arbitration in London, the meaning of the "Home guarantee" clause cannot be extended by making an award between the Calcutta purchaser and the London purchaser binding upon the Calcutta seller. **Ram Dutt Ramkissen Dass v. E. D. Sassoon & Co.**, 43 O. 77=33 Ind. Cas. 938.

CHAUDHURI, J.

(8) *Construction of contract—Sale of goods—Contract of sale of goods—Orders for purchase limited to a certain maximum—Liberty to vendor to send or not to send the goods.*

On the 25th April 1914, the plaintiffs agreed to purchase Alizarine goods of the defendants at 7 as. 9 p. per pound. A shifting scale of commission was allowed upon the agreed rate, the discount varying according to the amount which should be purchased up to 300 drums in the course of a year. The above agreement was made subject to certain conditions, chief among which were : (1) when an order of plaintiffs reached the defendants the latter should send the goods, if ready in their godown ; (2) the goods should be credited according to the date of despatch and the defendants were at liberty to send or not to send every single article out of those comprised in the order. On the 29th April 1914, the defendants agreed to, and approved of, the above transaction. The plaintiffs ordered out 36 casks of Alizarine dye from the defendants, which were duly sent. In July and August 1914, they ordered out more casks but the defendants said at first that they had no goods in stock and wrote afterwards that they were unable to supply the goods owing to the war. In January 1915, the plaintiffs called upon the defendants to deliver to them the remaining 264 casks, and on their failure to do so, filed the present suit to recover Rs. 71,400, being the difference between the contract price and the market rate of the commodity. The trial Court dismissed the suit, on the ground that the writing of the 25th April 1914 created no valid and binding contract between the parties. The plaintiffs having appealed :—

Held, (1) that the omission, from the writing of the 25th April 1914, of the maximum which might be ordered, was no reason for not giving effect to its terms, provided any order had in fact been given ;

(2) that, as soon as an order was received by the defendants from the plaintiffs, there was a binding contract for the supply of goods mentioned in the order, though, until such an order was received, it would be open to the defendants to withdraw from the transaction by giving notice to the plaintiffs (a).

Contract—(Continued).

(3) that the condition which gave liberty to the defendants to send or not to send every single article out of those comprised in the order of the plaintiffs did not import a power in the defendants to refuse altogether to perform an order which they had received. **Gani Latif v. Manilal Mulji**, 18 Bom. L.R. 217=34 Ind. Cas. 520.

SCOTT, C.J. and HEATON, J.

References:—(a) (1862) 12 C.B.N.S. 748; (1872) L.R. 9 C.P. 16; 24 B. 97, F.

(9) S. 2 (d), *Contract Act—Objections to execution sale—Compromise—Consideration—Transfer of Property Act, S. 6—Executory contract to convey land—Assignment—Validity—Mere right to sue, what is—Transfer of Property Act, whether exhaustive of the topic of assignability—Hindu Law—Contract to convey land by one co-parcener—Specific performance, if and when can be decreed against a surviving co-parcener—Transfer of Property Act, S. 58—Executory contract to convey land—Right under, if can be mortgaged—Document recognising the ownership of a person other than mortgagor, if can be treated as mortgage—Hindu Law—Co-parcener's liability as regards executed and executory contracts, if different.*

Where the purchaser at an execution sale *bona fide* believes that the objections put forward by the judgment-debtor to the validity of the sale are sufficiently serious to necessitate his entering into a compromise with the judgment debtor and accordingly does so and there is no suggestion that the objections were put forward in bad faith, it cannot be said that there is no consideration for the compromise.

An executory contract for the conveyance of land is not a mere right to sue and is transferable. A right to sue is no doubt involved in it on breach of its stipulations but before breach there is also the right to conveyance.

The term 'mere right to sue' is only applicable to cases where there has been a complete breach sounding in damages and where the specific enforcement of the contract cannot be obtained.

The Transfer of Property Act, 1882, does not contain an exhaustive enumeration of what is assignable by the Law of British India and an assignment is not invalid merely because it is not covered by the provisions of that Act. All contracts can be assigned which are capable of specific performance.

An executory contract to convey land by one Hindu co-parcener does not die with the promisor, but can be enforced against a surviving co-parcener of the deceased promisor, if it is shown to be beneficial or necessary.

A mere right to specific performance under an executory contract to convey land cannot be the subject of mortgage.

The cardinal feature of an Indian mortgage being that the mortgagor and no one else is the owner of the property mortgaged, a document

Contract—(Continued).

which by its express terms validates and confirms the ownership of a person other than the suggested mortgagor cannot be treated as a mortgage.

Per **Seshagiri Aiyar, J.**—The considerations which govern the liability of a Hindu co-parcener are the same whether the contract is executed or executory. The enforceability of a contract must be traced back to the date of the agreement and not to the date on which the decree is to be passed. There is nothing in the Hindu Law to warrant a departure from this rule.

S. 27 of the Specific Relief Act embodies a general principle applicable to every one in this country. **Venkateswara Aiyar v. Raman Nambudri**, 8 L.W. 435=19 M.L.T. 329=33 Ind. Cas. 696.

COUTTS-TROTTER and SESHAGIRI AIYAR, JJ.

(10) *Promise to charge at waggon rate—Charge at maund rate not justified.*

Where a Railway Company entered into a contract to charge freight on certain goods at maund rate at the despatching station, it was not justified in charging freight at waggon rate at the station of destination, the charge so made not coming within the words "re-measurement, re-weighment, re-classification and re-calculation" found in the condition in the consignment note. **Alla-ud-din v. The G.I.P. Railway Company**, 14 A.L.J. 494=34 Ind. Cas. 104.

BANERJI, J.

Reference:—29 A. 228, F.

(11) *Construction—Principle on which a stipulation or understanding is to be implied in a written contract.*

The law recognises the fact that men assume that the words of the contract will be understood in their trade meanings, and that the terms of their agreements will be governed by the well-recognised usages of the callings to which they relate, and it necessarily looks to these usages to ascertain the real thought of the contract. It finds that merchants do not write all the terms of their contracts, but rely upon the knowledge and good faith of one another as to matters so well-known that special reference to them would be burdensome and unnecessary, and that they accordingly agree upon many of the terms of their contracts by mere silence; what these terms are, must be shown by parol evidence. **Lakurka Coal Company, Limited v. Jannadas Bhagwandass**, 23 O.L.J. 514=33 Ind. Cas. 838.

SANDERSON, C.J., WOODROFFE and MOOKERJEE, JJ.

(12) *Deposit—Sale of immoveable property—Earnest money—Time when essence of the contract—Failure to complete within stipulated time—Effect—Right to damages—Deposit, nature of—When forfeited.*

Where it is alleged that time is of the essence of the contract, it is meant that the particular

Contract—(Continued).

time mentioned for completion is the predominant constituent element of the contract without which it would not be what it is, and such that, if the time be allowed to pass without the contract being completed, it is fair and reasonable to consider that the promisor has definitely and finally refused, and rendered it impossible, to carry out the contract.

In cases of the sale of immoveable property, time is not of the essence of contract, unless it be quite clear that the parties specially agreed that it should be so (a).

Where time is really of the essence of the contract, failure to complete by specified time gives right to the promisees to immediately rescind. But where it is not of the essence of the contract, he has a right to damages only. But in any case the contract must be performed within a reasonable time.

A deposit is paid as a guarantee for the performance of the contract, and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit. But in order to enable the vendor so to act, there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract (b). *Doulatram Valabdas v. Ali Bhai Ibrahimji*, 9 S.L.R. 137 = 33 Ind. Cas. 668.

CROUCH, A.J.C.

References:—(a) 15 Bom. L.R. 405 (412), R. (b) 27 Ch. D. 89, R.

(13) *Contract to settle property in consideration of donee coming and living with donor—Promise—Acceptance by word and conduct—Consideration—Part performance—Contract if may be repudiated—Locus penitentiae—Contract, if requires writing—Specific performance—Civ. Pro. Code of 1882, S. 544—Civ. Pro. Code of 1908, O. XLI, r. 33—Suit in ejectment—Court in allowing a defendant's appeal against decree of ejectment, if may decree it in favour of non-appealing defendants—Appeal by plaintiff by leave of High Court to His Majesty in Council—Defendant not made respondent added and allowed to file cross objection by Privy Council.*

P, a childless widow, was greatly attached to her grand-niece, the plaintiff, and valued her companionship, and, on her marriage, was anxious that she and her husband, who was a man of independent means, should continue to live with her, and to this end offered to settle property on her. Plaintiff and her husband being thus induced to come and reside with her, remained with her from 1886 to 1893, between which dates P settles some small properties on plaintiff. In 1893 she wished to settle property of a more substantial value, and with this object in view purchased a property worth Rs. 40,000, but in her own name. The plaintiff's husband, not being satisfied with this

Contract—(Continued).

arrangement, left P's house and went to reside on his own property. P, thereupon, in order to persuade plaintiff to stay with her, wrote to her husband, pressing him to return, and she also gave plaintiff herself her assurance in writing that the property in question was purchased for plaintiff, that there were incumbrances on the property which were to be discharged, that P would retain the property so long as she was alive, and afterwards convey it to the plaintiff. The plaintiff as well as her husband agreed to this arrangement and, until P's death in 1899, plaintiff and her husband lived with P.

Held—that the letter was a promise quite definite as to its subject-matter, the person who was to be its owner (the plaintiff) and with regard to the time she was to enter into possession, and the same was accepted, and P obtained the consideration she desired, inasmuch as in compliance with the stipulation made by her, the plaintiff and her husband went on living with her.

That there was thus a concluded contract from which P could not rescind and which was specifically enforceable, the law of India not requiring such a bargain to be in writing. (a)

That the dying declaration of P that the property in question had been given away to plaintiff and that possession of the same should be delivered to her after her death, did not constitute a nuncupative will but a re-affirmation and confirmation of the previously concluded contract.

Upon appeal to the High Court by one of the defendants, N, against a decree in ejectment passed in favour of the plaintiff, another defendant, S, who had been made a respondent in the appeal, prayed that the Court, which proceeded to decree the appeal, should make a decree in favour of all the defendants. The prayer was overruled and the decree was in respect of the appealing defendant's unascertained share only. The plaintiff having then obtained leave of the High Court to appeal to His Majesty in Council, S who was not made a respondent in the appeal moved His Majesty in Council to be added as such and for leave to file cross-objections. This was allowed subject to all objections at the hearing. At the hearing it was urged that the cross-objections could not be entertained as (1) no leave had been obtained from the High Court; (2) S's application to His Majesty in Council was time-barred; (3) under S. 544 of the Civ. Pro. Code of 1882 which applied when the appeal was lodged in the High Court (though it was not disposed of until O. XLI, r. 33 of Act V of 1908 had come into force), S was not entitled to the relief he asked for. These objections were overruled by the Privy Council. *Sri Rajah Malraju Lakshmi Venkayamma Rao Bahadur v. Sri Rajah Venkata Narasimha Appa Rao Bahadur*, 20 O.W.N. 1054 = 31 M.L.J. 58 = 14 A.L.J. 797 = (1916) 2 M.W.N. 23 = 34 Ind.

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Cas. 921, (P.C.) = 24 O.L.J. 279 = 39 M. 509 = 18 Bcm. L.R. 651 = 4 L.W. 58 = 20 M.L.T. 137.

LORD SHAW, LORD SUMNER, SIR JOHN EDGE, MR. AMER ALI and SIR LAWRENCE JENKINS.

References:—(a) 4 H.L.C. 1039 (1854); 8 App. Cas. 467; 42 I.A. 1 = 19 C.W.N. 250, R.

(14) *Time as of the essence of contract—Construction—Consent-decree.*

Under a consent-decree the plaintiff's house was to be exchanged for one of the defendant's houses after the plaintiff had constructed on his premises a well and a sink; those additions were to be made and the exchange effected by the end of June 1912. The plaintiff failed to carry out the additions within the stipulated time; but two years later he applied for execution. The defendant resisted on the ground that time being of the essence of the contract, so much of the consent-decree was voidable at his option, owing to the plaintiff's failure:

Held, negating the defendant's contention, that time was not of the essence of the contract, for at the time the consent-decree was made the defendant did not regard it as of vital importance that the additions which were to be made to the plaintiff's house before the exchange could be effected should be completed before the 30th June 1912. **Bhagwant v. Appaji**, 18 Bom. L.R. 803 = 36 Ind. Cas. 598. BEAMAN and HEATON, JJ.

(15) *C.I.F.C.I. contract—Bill of Exchange presented with shipping documents—Acceptance of the bill—Outbreak of war—Goods shipped on enemy ship—Arrest of the ship as prize—Non-payment of bill at maturity—Goods delivered later at destination—Liability to pay amount of bill with interest—Bill presented without shipping documents—Acceptance after outbreak of war—Acceptance not supported by consideration—Non-liability to pay the bill.*

The defendants ordered through the plaintiffs aluminium circles, in shipments of twelve boxes each to be delivered at Madras on C.I.F.C.I. terms. The first consignment was shipped on board *SS. Barenfels* on the 16th July 1914 and the second on *SS. Kybfels* on the 25th idem, from a German port. The plaintiffs drew against the defendants for the first shipment, the bill of exchange was presented to the defendants along with the shipping documents and was accepted by the defendants on the 31st July 1914. On the 9th October 1914, the plaintiffs drew a bill of exchange as regards the second shipment; it was presented to the defendants who accepted it on the 10th November 1914. Both bills were not honoured on due dates of payment. Owing to the outbreak of war, *SS. Barenfels* was seized as a prize; but she was allowed to finish her voyage, when she delivered the defendant's shipment at Madras on the 8th June 1915. The defendants accepted the cargo and paid the amount of the first bill. The plaintiffs sued to recover from the defendants interest on the amount of the first bill from its

Contract—(Continued).

maturity to the date of payment and for the amount due on the second bill with interest:

Held, (1) that, as regards the first bill, the defendants obtained all that they were entitled to obtain under the C.I.F. contract when the bill was presented to them for acceptance, that is to say, good shipping documents; that, as they accepted them, the risk thereafter was entirely their own and they were not entitled to refuse payment on maturity; and that having refused payment on maturity they were liable for overdue interest after that date;

(2) that, as regards the second bill, inasmuch as the bill of lading had become a void contract before it was tendered to the defendants on the 10th November 1914, there was at the time a failure of consideration for the acceptance of the bill of exchange, and the defendants were, therefore, not bound to pay at maturity.

In the ordinary course of business, a seller on C.I.F. terms is entitled to be prepaid by his buyer on presentation to the latter of valid and legal shipping documents.

Contracts entered into between subjects of countries, which were at peace when the contracts were made, are not necessarily abrogated by the breaking out of hostilities between those countries. Unless the contracts are of a very special kind, the effect of war is not to avoid them totally but merely to suspend the remedies of one or other of the parties to them. Such contracts would doubtless remain in abeyance during the continuance of hostilities but upon their ceasing no good reason can be shown why the rights still enforceable should not be duly enforced, the Governments of the parties to such contracts having now re-established all peaceful and normal relations.

Hence, where a contract requires continuous performance of mutual duties by the parties to it and such duties cannot be so mutually performed during the continuance of a war, and further suspension of such mutual rights and obligations for an indefinite period go much beyond merely placing the contract in abeyance, the contract becomes, on the outbreak of war, void, inasmuch as taking it up upon cessation of hostilities would be something more than renewing it, would, in fact, be substituting for it an entirely new contract. A like rule would doubtless be applied to the case of partnership between subjects of belligerent states.

All contracts of affreightment are put an end to by the outbreak of hostilities between the Governments of the shipper and the shipmaster. **Marshall & Co. v. Naginchand**, 18 Bom. L.R. 915.

BEAMAN, J.

(16) *Quere.*—Whether the words "terms of a contract" in S. 91 of the Evidence Act include the date of a contract. **Ma Hia Dun v. Maung Shwe Ya**, 9 Bur. L.T. 250.

U KIN, J.

(17) *Effect of war on contract previously concluded—Contract for sale of goods—Seizure*

Contract—(Continued).*and release of goods by the Crown, effect of—Damages for breach of contract.*

Executory contracts concluded before the outbreak of war even with an alien enemy are merely suspended during the war as regards the right to performance and right of action, and are avoided or dissolved only in certain circumstances, among them, if their performance necessitates intercourse with the enemy during the war (a).

A agreed to sell goods to B to be shipped in June, July and August 1914 in equal proportions. The first shipment was duly delivered. The second shipment was on its way seized by the Ceylon Government but was subsequently released and arrived late. B was willing to take delivery on paying the price and usual lading charges, but owing to disputes between the parties as to payment of extra charges caused by the seizure of the ship by the Ceylon Government, A refused to deliver B the documents of title to enable him to obtain delivery, and eventually sold the goods to third parties.

Held, that though a promise is excused by a supervening impossibility caused by act of law, a temporary interruption of the voyage followed by a release of the goods does not avoid the contract, and that A having broken the contract which subsisted in spite of the seizure was liable to pay damages to B (b).

As a general rule unconditional contracts are not dissolved by their performance becoming impossible owing to war. *Sett v. Madhoram Hurdecass*, 33 Ind. Cas. 540.

CHAUDHURI, J.

References:—(a) (1857) 7 El. & B. 763, *F.*
(b) 10 East 530 at p. 534, *R.*

(18) *Novation—Acceptance by other party of novation in qualified manner—Right of such other party to claim benefit of the offer.*

Where the modification of an existing contract proposed by one party was accepted by another party in a qualified manner there could be no legal novation of the existing contract.

During the continuance of a mortgage the mortgagees agreed to have the mortgage deed substituted by another on more favourable terms to the mortgagor, but he never fulfilled that agreement. The mortgagor failed to sue the mortgagees for specific performance of the agreement within the period of limitation prescribed therefor. In a suit brought by the mortgagees to recover the money due under the terms of the mortgage the mortgagor pleaded that the conditions of the original mortgage had been altered by the agreement of the mortgagees which varied the original terms. *Held*, that the mortgagor could not plead the agreement by way of defence to the suit brought against him. *Babu Narendra Bahadur v. The Oudh Commercial Bank, Limited*, 30 Ind. Cas. 823.

STUART, A.J.C.

(19) *Primary and secondary obligations—Duty of Court to carry out secondary contract.*

The doctrine that the Court will carry out all contracts between parties is confined to the

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carrying out of the primary contract and does not extend to a secondary or subsidiary contract to come into operation, if the primary contract is broken. The Courts both in England and in India do not feel bound to carry out such a secondary contract apart from its justice and reasonableness. *Babu Narendra Bahadur v. The Oudh Commercial Bank, Ltd.*, 30 Ind. Cas. 823.

STUART, A.J.C.

(20) *Shipping contract—Carriage by sea—Shipper and shipowner, their rights and liabilities—Omission to call at appointed port—Breach of contract—Damages, suit for.*

It is well settled that engagements to ship goods and to keep space for goods must be punctually performed and a shipper is bound to have his cargoes ready to ship when the ship calls. But a shipper may dispense with the ship's calling at the port, if he is not ready with his cargo for shipment.

Where the defendants bound themselves under a contract to ship the plaintiff's cargo at Cuddalore during the months of July and August by the defendant's steamer, and the defendant's steamer arrived at Madras on the 7th August 1914, ~~on~~ route for Cuddalore but the plaintiff was not in a position to ship any cargo and in answer to the repeated enquiries made by the defendant's agent the plaintiff intimated to him his inability to ship any cargo and promised to let him know after consulting his buyers if he was in a position to ship and the steamer after waiting at Madras till the 21st August proceeded to Calcutta.

Held, that under the circumstances, the plaintiff shipper had dispensed with the defendant's steamer calling at Cuddalore, there was no breach of contract on the part of the defendants in not having shipped the cargo and that therefore the plaintiff's suit for damages against the defendant company was not maintainable. *Govinda Pillay v. Messrs Beat & Co.*, 34 Ind. Cas. 843.

WALLIS, C.J. and PHILLIPS, J.

References:—5 El. & Bl. 714 = 119 E.R. 647, *R.*

(21) *Hire—Omission to return article after specified date—Remedy for breach of contract—Suit for damages.*

Where notwithstanding a demand made in that behalf, boats hired for a specified period were not returned, there could not be a claim on the hire but a suit for damages for wrongful conversion of the boats would be the proper remedy. *Maung Ba Gyaw v. Heng Sang & Co.*, 36 Ind. Cas. 276.

PARLETT, J.

(22) *Contract on o. i. t. terms—Effecting insurance for war risks—Purchaser not bound to pay for such insurance—Shipment of sugar from enemy's port—Government proclamation prohibiting trade in enemy's sugar—Contract impossible of performance—Bill of lading, what is a.* *Nissim Isaac Bekhor v. Haji Sultanali Shustary*, 17 Bom. L.R. 949 = 28 Ind. Cas. 493 = 40 B. 11. See Final Part, 1915, Col. 534.

Contract—(Continued).

(23) *Public policy contract opposed to, as being indistinguishable from slavery—Halwahi bond—Agreement to perform manual labour in consideration of the loan to be paid off at given time, penal interest in default.* *Ramsarup Bhagat v. Banshi Mandar*, 19 C.W.N. 1118 = 42 O. 742 = 30 Ind. Cas. 955. See Final Part, 1915, Col. 535.

(24) *Sale—Conditions written—No condition for damages in case of re-sale—Right to damages.* *Municipal Board of Allahabad v. Tikandar-jang*, 19 A.L.J. 1079 = 38 A. 52 = 30 Ind. Cas. 584. See Final Part, 1915, Col. 536.

(25) *Bond, suit on—Limitation Act (1908), Sch. I, Art. 116—Contract in writing registered—Bond not signed by both the parties—Penalty—Excessive interest—What amounts to—Contract, harsh and unconscionable—Burden of proof—Contract, reasonable, substitution of—Damages.* *Bonwang Raja Challa-phroo v. Banga Behari*, 22 O.L.J. 311 = 20 C.W.N. 408 = 31 Ind. Cas. 394. See Final Part, 1915, Col. 537.

(26) *Part, performances, equitable doctrine of, if may be invoked by stranger to contract—Relinquishment of share in tenure without registered deed but for consideration by purchaser out of possession to person in possession—Remand order, scope of.* *Khagendra Nath Chatterjee v. Sonaton Guha*, 30 C.W.N. 149 = 31 Ind. Cas. 987. See Final Part, 1915, Col. 537.

(27) *Contracting out of statutory rights—Freedom of, Statute, interpretation of.* See U.P. ACT II OF 1901 (AGRA TENANCY), No. 24, 34 Ind. Cas. 441.

(28) *Liability of broker as principal—Custom and usage of Calcutta Gunny market—Evidence of custom—Admissibility.* See *BROKER*, No. 2, 20 C.W.N. 365.

(29) *Specific performance of—Transaction benami—Oral evidence whether admissible to show if transaction was benami.* See *EVIDENCE ACT*, No. 56, 18 Bom. L.R. 134.

(30) *Question of construction of a—Question for Courts—Question of law.* See *INJUNCTION*, No. 1, 20 C.W.N. 457.

(31) *Contract for sale—Rights of contracting purchaser as against subsequent transferee with notice.* See *KANOM*, No. 1, (1916) 2 M.W.N. 31.

(32) *Rights of parties to a contract by what law to be judged.* See *LEASE*, No. 3, 43 C. 392.

(33) See *RIGHT OF SUIT*, No. 1, 1 Pat. L.J. 381.

(34) *Uncertainty—Public policy—Agreement by a Gayawal to pay part of his earnings from certain ceremonies to an Acharjya—Maintainability of a suit on the agreement.* See *RIGHT OF SUIT*, No. 2, 1 Pat. L.J. 589.

(35) *Contract for sale of land—Subsequent variation of—Contingent contract—Grant of letters of administration—District Judge not*

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consenting to alienation—Right to specific performance or damages. See *SPECIFIC PERFORMANCE*, No. 4, 23 O.L.J. 606.

(36) *Contract to lease—Plea of inadmissibility for want of registration—Validity—Admission of genuineness in pleadings—Effect—Suit for specific performance—Maintainability—Evidence of negotiations and oral contract prior to written contract—Admissibility.* See *SPECIFIC PERFORMANCE*, No. 5, 20 M.L.T. 44.

(37) *Illegal contract—Conveyance executed by accused in consideration of complainant withdrawing prosecution for non-compoundable offence—Suit to set aside such sale-deed if lies—Parties in part delicto if entitled to declaratory relief.* See *SPECIFIC RELIEF ACT*, No. 23, 20 C.W.N. 760.

(38) *Sale of goods, not bearing eight anna stamp and containing arbitration clause, not invalid.* See *STAMP*, No. 2, 10 S.L.R. 14.

Contract Act (IX of 1872).

(1) *Ss. 2, 10, 127—Guarantee—Absence of consideration—Effect.*

A so-called guarantee for which there was no consideration is unenforceable. *Ram Gopal v. Agha Saheb Jan Khan*, 33 Ind. Cas. 732. CHAMBER, J.C.

(2) *Ss. 2, 76, and 178—"Goods" meaning of—"Goods," whether includes certificates of shares—Fraud, allegations of—Specific charge and strict proof, necessity of.*

Documents which are certificates of shares are neither "goods nor documents of title to goods" within the meaning of S. 178 of the Indian Contract Act (a).

Per Sanderson, C.J.—It is obvious from the phraseology of the section that the word "goods" was intended to refer to "goods" in the ordinary meaning of the word.

When the plaintiff sets up a charge of fraud against the defendant it is necessary for him to state in the plaint clearly and specifically what the fraud consists of, the nature of the fraud, and the particulars thereof which he says has been committed, and when he has pleaded that, it should be shown by strict proof that such fraud has been committed. *Lalit v. Mukerjee*, 24 O.L.J. 335.

SANDERSON, C.J., WOODROFFE and MUKERJEE, JJ.

References:—(a) 12 Bom. L.R. 870, *Not F.*

(3) *S. 2 (d)—Consideration—Decree against Zemindari—Promise to pay by one in the line of succession—Forbearance of creditor.*

Where a person who has obtained a decree against a Zemindari abstains for sometime from taking further proceedings against the Zemindari on the promise made by a person in the line of succession to charge his interest in the Zemindari when he should succeed to it with the decree amount, the forbearance on the part of the creditor to take further proceedings is sufficient consideration for the promise to pay

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the debt. **Lakshmanan Chettiar v. Bom-machi Nalaker**, 32 Ind. Cas. 416.

WALLIS, C.J. and **SESHAGIRI IYER, J.**

References :—18 M. 287; 30 M. 255—17 M. L.J. 201—2 M.L.T. 167, R.; 2 H. & N. 517—27 L.J. Ex. 120, F.

(4) S. 2 (d)—Objections to execution—Sale—Compromise—Consideration. See **CONTRACT**, No. 9, 8 L.W. 436.

(5) Ss. 2, (d), 37, Ill. (a), and 40, Ill. (a)—*Consideration—Past services—Suit by a beneficiary, not a party to contract—Transfer of Property Act*, Ss. 101, 124 and 126, **Kasturamma v. Venkatasurayya**, 2 L.W. 920—18 M.L.T. 353—29 M.L.J. 538—(1915) M.W. N. 947—30 Ind. Cas. 878. See **Final Part**, 1915, Col. 541.

(5-a) Ss. 2 (21), 68. See **BEN. ACT VI OF 1876 (CHOTA NAGPUR ENCUMBERED ESTATES)**, No. 1, 32 Ind. Cas. 937.

(6) S. 10—Minor if may be estopped from repudiating contract. See **EVIDENCE ACT**, No. 98, 20 C.W.N. 418.

(7) S. 10. See No. 1, *supra*.

(8) S. 11—Minor—Contract for sale—Purchaser, a minor—Sale by de facto guardian, when valid.

If there is only an agreement on the part of a minor to buy and on the part of a major to sell and nothing more, and the former afterwards refuses to perform his part of the contract, the latter would not be able to hold him liable under the contract because a minor is not, under the Indian Contract Act, competent to make a contract which is defined as being an agreement enforceable by law. But where in addition to the agreement the minor has paid the price and has obtained a transfer of the property, the transfer cannot be held to be void, especially as it is the act of the seller who is at the time competent not only to contract but also to make a transfer of his property to any one he likes (a).

A sale of the property of a minor by a de facto guardian is valid, if it is made for the benefit of the minor or because of his necessity. **Maung Aung Nyun v. Maung Gyi**, 32 Ind. Cas. 638.

MAUNG KIN, J.

References :—(a) 30 C. 539—5 Bom. L.R. 421—7 C.W.N. 441—30 I.A. 114 (P.C.), B.

(9) S. 11—Agreement to sell by minor—Void. See **MINOR**, No. 7, 33 Ind. Cas. 132.

(10) S. 11—Sale-deed in minor's favour—See **TRANSFER OF PROPERTY ACT**, No. 25, 31 Ind. Cas. 792.

(11) Ss. 15, 16 and 19—*Coercion—Prejudice—Suicide, threat to commit—Release deed by wife and son in consequence—Deed if caused by coercion—Voidability—Prejudice to one's life, whether sufficient to bring a threat within the term 'coercion.'*

Where one S used a threat of suicide to his wife and son and they in consequence executed a release deed in respect of their reversionary

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right in certain immovable properties in favour of the brothers of S.

Held, per **Sadasiva Aiyar, J. (Moore, J., diss.)** that, as the document was intended to be and was actually 'caused' by the threat, it was voidable as having been brought about by coercion, that it was immaterial to whose prejudice the threat was made, that prejudices to the life of S was sufficient to bring it within the definition of coercion, and that the document was further invalidated by the fact that it was brought about by undue influence, inasmuch as it was executed at a time when the executants were distressed in mind owing to the strength of the threat and when their mental capacity was temporarily affected by reason of such mental distress.

Quare.—Whether prejudice or injury to sentiments, feelings, or supposed spiritual welfare is also contemplated in the definition of 'coercion' in the Contract Act?

The line between coercion and undue influence is sometimes thin and it is possible to conceive of cases where the act might fall under both heads.

Per **Moore, J.**—That the words, 'to the prejudice of any person' occurring in S. 15, Contract Act, must be read with both branches of the section, that prejudice to the life of S was insufficient in law to bring the threat within the definition of 'coercion' or 'undue influence,' and that consequently the document was valid' **Chikkam Ammiraju v. Chikkam Sesamma**, 3 L.W. 490—(1916) M.W.N. 368—34 Ind. Cas. 578.

SADASIVA AIYAR and MOORE, JJ.

(12) Ss. 15, 23, 72—*Stifling criminal prosecution—Money paid in consideration therefor—Suit for recovery thereof—Money really due—Maintainability of suit—"Coercion," meaning of—The doctrine of in pari delicto, etc.—Non-applicability.*

Where the plaintiff was induced to pay money to the defendants in order that a criminal prosecution instituted by the defendants against the plaintiff for an offence which was not compoundable should not be proceeded with. *Held* that the parties should not be considered in *pari delicto* and that the money may be recovered back (a).

Where a hundi was given with a view to stifle the prosecution, the Courts cannot give a decree on the hundi (b).

Where one party used his position as prosecutor to secure monies which, but for the arrest, he would not have got, the principle of the parties being in *pari delicto* cannot apply. In a suit to recover money so paid the defendant should not be estopped from proving that the money which he seeks to retain was really due to him (c).

The term 'coercion' used in S. 72, Contract Act, is not synonymous with the definition of the term in S. 15 of the Act (d). **Muthuveerarappa Chetti alias Nellayappa Chetti v.**

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Ramaswami Chetti, 31 M.L.J. 264—34 Ind. Cas. 401.

WALLIS, C. J. and BESHAGIRI AIYAR, J.

References:—(a) 2 Doug. 696 (n)=99 E.R. 441; 8 East 378=103 E.R. 988; 1 M. and G. 747, *Relied on*. (b) 40 C. 113; 37 M. 385 and (1892) 1 Ch. 173, R. (c) 38 B. 709; 9 Barn. and C. 901=109 E.R. 335; (1903) A.C. 49, R. (d) 40 C. 598 (P.C.) 42 C. 286; 6 H. and N. 778; (1848) 2 Ex. Rep. 395; 10 Q.B.D. 572; (1876) 4 Ch. D. 150; 13 M. and D. 427=153 E.R. 178, R.

(13) S. 16. See No. 11, *supra* and No. 99, *infra*.

(14) S. 18 (2)—*Misrepresentation—Ability to discover truth—Hotel keeper—Landlord and tenant—Right to sue for rent—Breach of contract—Distraint.*

The defendant wrote to the plaintiff, proprietress of a hotel, enquiring if certain accommodation for his family was available and asked if the accommodation required could be had in the same block as the dining hall. The plaintiff sent plan of a cottage in the close proximity of the hotel and stated that the accommodation was not available in the main buildings. The defendant made no further reference to any desire to get rooms in the main buildings and stated that he would be glad to take the accommodation offered by the plaintiff from the beginning of April next for the season and repeated the terms agreed to, viz., Rs. 300 per mensem including board. On the 12th April the defendant's wife took possession of the flat but left it on the 16th of April, the main and the only relevant reason assigned being the distance of the flat from the main buildings which was found to be 182 yards.

The plaintiff sued for recovery of rent for a period of 4 months calculating rent at Rs. 180 per month.

The Munsif dismissed the suit on the ground that defendant had been induced to enter into the contract by reason of misrepresentation falling under sub-S. 2 of S. 18 of the Contract Act.

The Divisional Judge agreed with the Munsif that there had been such misrepresentation, but he further found that the contract was not voidable because the defendant had the means of discovering the truth with ordinary diligence. He disagreed with the finding of the Munsif that the relation between the parties was that of landlord and tenant and held that the plaintiff was only entitled to sue for damages for breach of the contract. He granted the plaintiff a decree for Rs. 100 as damages.

Held, (1) that the defendant had the means of discovering the truth with ordinary diligence; (2) that there was nothing to show that the defendant attached importance to proximity to main buildings and there was no good reason to suppose that the plaintiff ought to have anticipated that the defendant would be specially particular regarding the question of distance; (3) that as between the parties the position of the plaintiff was not that of an inn-keeper but

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of a boarding house-keeper who receives his boarders by special arrangement and makes such bargain as he chooses as to the price to be paid by him; and that the status of landlord and tenant existed between the parties.

In the absence of a plea that the amount which the plaintiff had charged on account of rent of the premises only was disproportionate, the Chief Court granted a decree for full amount of the claim.

If the agreement for the payment is that a lump sum be paid in respect of board and lodging there is no right of distress for the recovery of such payment, but if the boarder is entitled to the exclusive occupation of a room or part of a room and an agreed rent is payable in respect of his occupation such rent may be distrained for. **A.L. Donca, Proprietress of "Spring Field Hotel," Dalhousie v. A.H.S. Teed, 113 P.L.R. 1916=139 P.W.R. 1916=36 Ind. Cas. 34.**

LESLIE JONES, J.

References:—(1806) 2 N.R. 224; (1868) L.R. 3 C.P. 694; (1882) 52 D.J.Q.B. 58, R.; L.R. 7 Q.B. 90; 3 Bcn. 244, D.

(15) S. 19. See No. 11, *supra*.

(16) Ss 20, 65—*Mistake as to an essential matter of fact—Avoidance of contract—A person executing mortgage in the owner's name—Deed of transfer by mortgagee to a third partly signed by the same person—Transferee suing to recover money on discovering that the owner did not sign the transfer—Failure of consideration.*

Representing himself to be M mortgaged M's property; and also joined in a transfer of the mortgage executed by the mortgagee (defendant) to the plaintiff. When the plaintiff discovered that both the mortgage and the transfer were executed by a forger, he sued the defendant for return of the purchase money as on a total failure of consideration. The trial Court applied the maxim *caveat emptor* and dismissed the suit. The plaintiff having appealed:

Held, that the defendant was bound, under S. 65 of the Contract Act, to repay the money, for both parties being under the belief that the real owner was putting his signature to the deed of transfer, committed a mistake as to an essential matter of fact which avoided the contract under S. 20, Contract Act. **Ismail Allarakhia v. Dattatraya R. Gandhi, 18 Bom. L.R. 201=40 B. 638=34 Ind. Cas. 515.**

SCOTT, C.J. and HEATON, J.

(17) S. 23—*Contract—Illegal contract—Badni—Wagering transaction.*

Where the parties to a contract of sale of goods intended, not the actual transfer of goods, but mere adjustment of prices according to the fluctuating market rates:—

Held, that the contract being illegal was not enforceable at law and the suit was not maintainable. **Firm of Lal Chand-Gela Ram v. Nathu Ram, 74 P.L.R. 1916=36 Ind. Cas. 48.**
SHADI LAL, J.

Contract Act (IX of 1872)—(Continued).

- (18) S. 23—*Pleader advancing money to client—Public policy, contract opposed to—Actionable claim, purchase of.*

Lending money to a person after he has obtained a decree of redemption on the security of the property to be redeemed is not the purchase of an actionable claim. The advancing of money by a pleader to his client, a part of which is meant for the prosecution of the suit in which the pleader is engaged, is a violation of the restrictions placed by law upon dealings between pleaders and their clients and must be deemed to be against public policy and so void under S. 23 of the Contract Act. *Saheb-un-nissa (Mussammat) v. Abdul Gaffar*, 19 O.C. 60—34 Ind. Cas. 360.

LINDSAY, J.C.

- (19) S. 23—*Agreement opposed to public policy—Assignment of mortgage taken by patwari benami—Not void.*

An assignment of mortgagee-rights taken by a patwari in the name of his mother is not opposed to public policy and a suit on the basis thereof is maintainable (a). *Bhagwan Dal v. Murari Lal*, 14 A.L.J. 962—39 A. 51—36 Ind. Cas. 259 (F.B.).

RICHARDS, C.J., RAFIQ and WALSH, JJ.

References :—(a) 22 A. 220; 27 A. 73, overruled.

- (20) S. 23—*Acquisition of property by Kanungo—Not opposed to public policy.*

There is no rule prohibiting a Kanungo from acquiring property and such acquisition of property is not opposed to public policy. *Kamala Devi v. Gur Dial*, 14 A.L.J. 969—39 A. 58—36 Ind. Cas. 319.

RICHARDS, C.J., RAFIQ and WALSH, JJ.

(21) S. 23—*Void contract—Unlawful consideration—Agreement to share profits and loss under a contract w/ih Forest Department—Agreement, though opposed to terms of license issued by Forest Department, not void.* *Nazar-ali Sayad Imam v. Babamliya Durevatimsha*, 17 Bom. L.R. 701—40 B. 64—30 Ind. Cas. 913, See Final Part, 1915, Col. 548.

(22) S. 23. See MADRAS ACT I OF 1886 (ABKARI), No. 1, 34 Ind. Cas. 927.

(23) S. 23—*Lease—Stipulation contrary to proviso to S. 12, Agra Tenancy Act II of 1901—Not unlawful—Validity.* See U.P. ACT II OF 1901 (AGRA TENANCY), No. 3, 34 Ind. Cas. 148.

(24) S. 23—*Criminal case compoundable with leave of Court only—Agreement to compound such case if opposed to public policy—Offence not so compoundable alleged but no summons issued—Effect.* See AGREEMENT, No. 1, 20 C.W.N. 946.

(25) S. 23—*Covenant not to raise plea of limitation—Validity.* See LIMITATION ACT (1908), No. 84, 4 L.W. 48.

(26) S. 23. See No. 12, *supra*.

(27) Ss. 23 and 27—*Illegal consideration rendering contract void—Restraint of trade illegal and void.*

Contract Act (IX of 1872)—(Continued).

Where defendant-appellant entered into an agreement with the plaintiff-respondent that the latter should not set up and carry on a stevedoring business in Rangoon and 3 other places or in any way interfere with the former's business of stevedoring in those places and agreed to pay her regularly every month during the life of the plaintiff-respondent the sum of Rs. 350.

Held by the Full Bench that the whole agreement is void as the plaintiff-respondent's undertaking is in restraint of trading and is of no binding effect and it would be contrary to all sound principles to allow a plaintiff to recover because she had carried out an unlawful promise. *In re G Harry Krishna Pillay v. M. Adilatchmi Ammal*, 9 Bur. L.T. 28—8 L.B.R. 389—33 Ind. Cas. 238 (F.B.).

FOX, C.J., ROBINSON and PARLETT, JJ.

- (28) Ss. 23, 27—*Kabuliat—Construction—Grant of right to defendant to carry on trade in a district—Not in restraint of trade nor against public policy—Suit for rent—Limitation—Arts. 110, 116. Limitation Act (1908).*

Defendant executed a registered kabuliat in favour of plaintiff agreeing to pay an annual rental for carrying on a trade in hides within a particular district. The lessor did not bind himself against giving a similar lease to any one else.

In a suit for rent, defendant contended that the kabuliat tended to create a monopoly and was therefore against public policy. *Held*, that nothing in it offended public policy, and the contract was not void under S. 23 or S. 27, Contract Act (a).

Held also that, the lease being a registered lease, the suit was governed by Art. 116, and not Art. 110, Limitation Act (1908) (b). *K. L. Mackenzie v. Maharajah Sir Rameswar Singh Bahadur*, 1 Pat. L.J. 37—34 Ind. Cas. 754.

MULLICK and ROE, JJ.

References :—(a) 28 M. 520, D. (b) 19 C. 489, F.

(29) Ss. 23, 65—*Contract—Immoral—Opposed to public policy—Influencing of appointment to public offices—S. 65, applicability of.* *Ledu Goschman v. Hira Lal Bose*, 21 C.L.J. 537—19 C.W.N. 919—29 Ind. Cas. 625—43 C. 115. See Final Part, 1915, Col. 549.

(30) S. 24. See RES JUDICATA, No. 17, 18 Bom. L.R. 773.

(31) S. 25—*Gift—Revocation, power of, exercise of—Pleadings—Fraud should always be specifically pleaded.* *Lal Mahomed v. Mra Tha Aug*, 30 Ind. Cas. 20—8 Bur. L.T. 269—8 L.B.R. 185. See Final Part, 1915, Col. 550.

(32) S. 26—*Kabinnamah—Authority given by Mahomedan husband to wife to divorce on husband marrying a second wife if valid.* *Maharam Ali v. Ayasa Khatum*, 19 C.W.N. 1226—31 Ind. Cas. 562. See Final Part, 1915, Col. 550.

(33) S. 27. See Nos. 27, 28, *supra*.

Contract Act (IX of 1872)—(Continued).

(34) S. 28—Parties agreeing not to object to award—Effect. See AWARD, No. 9, 107 P.W. R. 1916.

(35) S. 29—Terms in partnership contract in writing not clear—Construction—Parole evidence—Evidence Act, s. 93—Agency—Pleadings—Plea not raised in first Court or in appeal memo.

It is obviously impossible for a Court of justice to give effect to a contract, the meaning of which it is unable to find out with reasonable clearness. So a condition in a partnership written contract which gives one party the right to specify the share of profits to be assigned to the other but which does not afford the slightest indication as to the proportion of losses which one party is to bear in the partnership is void for uncertainty.

A Court cannot undertake to supply defects or ambiguities according to its own notions of what is reasonable, for this would be not to enforce a contract made by the parties but to make a new contract for them (b).

When the terms of a document are ambiguous on the face of it parole evidence is inadmissible to prove the intention of the executant.

Where a partnership was apparently contemplated but the terms thereof could not be ascertained the relationship of principal and agent does not exist.

A plea not set up in the lower Court nor mentioned in the memorandum of appeal even, cannot be raised for the first time in the Chief Court at the time of the hearing. **Barkat Ram v. Anant Ram**, 31 Ind. Cas. 632.

SHADI LAL and LESLIE JONES, JJ.

References:—(a) 11 M. 200, F; 27 M. 332; 5 C. 932 (P.C.) D. (b) (1887) 36 Ch. D. 359, R.

(36) S. 30. See CIV. PRO. CODE (1908), No. 592, 9 Bur. L.T. 229.

(37) S. 32—Contract to sell land together with cultivating rights in sir—Sanction to sell without reservation of occupancy rights in sir refused—S. 45, C.P. Tenancy Act—Contingent contract—Rights to specific performances or damages—Ss. 14, 15, Specific Relief Act—Scope and applicability.

This was a suit to enforce specific performance of a contract to sell to the plaintiffs for Rs. 4,500 a 4-anna share in a village together with cultivating rights in sir. By the terms of the contract, the first defendant undertook to apply, under S. 45 of the C.P. Tenancy Act, for sanction to transfer his sir land without reservation of the right of occupancy. The contract also provided that the first defendant should pay Rs. 1,000 as damages, if he should refuse to sell the property after obtaining sanction. The first defendant applied for sanction, but sanction was refused, and thereupon he sold the property, without cultivating rights in sir to second defendant. The plaintiffs in this suit asked that the first defendant should be made to execute a sale-deed for the property including cultivating rights in sir, or in the alternative, to execute a sale-deed, reserving

Contract Act (IX of 1872)—(Continued).

cultivating rights in sir, for a smaller consideration of Rs. 3,500.

Held that, S. 32 of the Contract Act, the contract for the sale was contingent on the grant of sanction, and the contract cannot be specifically enforced at all since the sanction was refused, and there was no alternative contract to meet the event of its being refused.

Held also that, Ss. 14 and 15 of the Specific Relief Act have no application to the case. These two sections refer to cases where the inability to perform the whole contract was not contemplated by the contracting parties. Where, as here, the contracting parties knew of and contemplated the possibility of the whole contract being incapable of performance, for reasons beyond the control of either of the parties, the sections have no application. They apply to unforeseen contingencies, not to foreseen contingencies. **Shardaprasad v. Sikan-dar**, 12 N.L.R. 69 = 34 Ind. Cas. 461.

BATTEN, A.J.C.

References:—6 N.L.R. 185; S.A. No. 132 of 1905; (1861) 7 Jur. (N.S.) 1262; (1870) L.R. 5 Oh. 534, R.

(38) S. 37. See No. 5, *supra*.

(39) Ss. 37, 74—Repayment in kind by instalment—Default—Penalty. See EVIDENCE ACT, No. 59, 35 Ind. Cas. 111.

(39) S. 38—Sale of goods—Produce—Delivery to European Firm on purchaser's behalf—Proper course—Vendor's duty to render facilities as regards delivery—Drawing samples—Tender—Reasonable opportunity for analysis, etc.—Tender after drawing of samples—Effect—Acceptance.

Before a vendor of produce can give delivery on behalf of his purchaser to a European Firm, it is necessary for the purchaser either to make a contract for the sale of goods to the European Firm or otherwise to arrange that they shall take delivery on his behalf and to hand to the vendor a delivery order requesting the firm to accept the goods against such and such contract or on his behalf.

Generally, the vendor is under no obligation to see that the purchaser takes delivery within time all that he has to do is to offer delivery within time and to give all customary assistance to the purchaser in taking delivery. (*Vide* Contract Act, S. 38).

The drawings of samples and analysis are acts to be performed by the buyer in order to satisfy himself that the goods tendered for delivery are according to the contract. S. 38 (3) of the Contract Act requires that the buyer shall have this facility, and therefore tender must be made sometime before the date specified in the contract.

But where, on tender, goods are accepted subject to analysis, the buyers could only refuse to accept delivery on the ground that the goods were not of the contract quality. **Firm of Ruttonji Burjorji v. Firm of Motamal Bhag-Chand**, 9 S.L.R. 160 = 32 Ind. Cas. 720.

PRATT, J.C. and CROUGH, A.J.C.

Contract Act (IX of 1872)—(Continued).(40) S. 40. See No. 5, *supra*.(41) S. 43—*Suit for rent against some heirs of tenant—Accrual of cause of action—Absence of a promisor from British India.*

Under the terms of S. 43 of the Contract Act the landlord is entitled to get a decree for money against any one or more of the tenants. A Court for rent is the common *indebitatus* Court, viz., a Court to recover a debt. That clearly falls within the provisions of S. 43 and the promisee is entitled to require performance by any one or more of the promisors. The mere absence from India of one of the promisors in a suit in British India, where no plea in abatement or a similar plea is permitted, is not a fatal bar to the suit. There cannot be any objection to the maintainability of a suit against some of the heirs of a tenant to recover the rent that has accrued due after the death of the tenant. *Rai Bahador Lalit Mohan Sinha Roy v. Haran Chand Khamrui*, 36 Ind. Cas. 243.

FLETCHER and TEUNON, JJ.

References:—19 Ind. Cas. 989=17 C.W.N. 833, F.; 7 Ind. Cas. 840=12 O.L.J. 642=15 C.W.N. 191, D.

(42) S. 43—*Suit for recovering money upon a rugga—Express allegation in plaint that certain persons are responsible in their individual capacity, and not the firm in which they are partners with others—Individual liability found against—Plaintiff whether can change his ground afterwards—Mere acknowledgment of indebtedness without any promise to pay—Whether suit lies upon such acknowledgment.* *Ram Adin v. Munshi Ram*, 76 P.R. 1915=154 P.W.R. 1915=31 Ind. Cas. 209. See Final Part, 1915, Col. 553.

(43) S. 43—*Pleader when bound to refund his fees—Liability of deceased pleader's representatives.* See PLEADER AND CLIENT, No. 1, 20 P.W.R. 1916.

(44) S. 43. See RENT, No. 2, 24 C.L.J. 371.

(45) Ss. 43, 44—*Contract—Joint promisors—Suit against all on the joint promise—Dismissal of suit—Appeal—Death of one joint promisor—Non-joinder of his representatives in appeal—Effect—Claim not released against them—Appeal not maintainable—No right to obtain relief against shares of others.*

Where a suit against several joint promisors was dismissed on the ground that the *kabuliat* which was the basis of the suit was fictitious and where pending the appeal one of the defendants died and the appeal was given up against his heirs.

Held, that the plaintiff cannot rely on S. 44 of the Contract Act and that he cannot proceed against the others for the entire claim.

As in the case, the contract was found to be illusory and of no effect so far as the deceased defendant is concerned, this is not a case of giving release to one of several joint promisors.

Held that, S. 43 of the Contract Act cannot be invoked because the plaintiff did choose to

Contract Act (IX of 1872)—(Continued).

bring a suit against all joint contractors and the contest proceeded on the basis of a joint contract.

If the Court were to give a decree against the other defendants, it would work injustice upon them, in that supposing they were jointly liable they would not be entitled to claim contribution against the heirs of the deceased defendant who has, by the decision of a competent Court, been declared to be not liable.

Held further, that in the absence of the representatives of the deceased defendant, the plaintiff cannot sue for the shares of the defendants on record for their shares cannot be determined in the absence of those representatives. *Jogesh Chandra Chackrabutty v. Bama Sundari Debi*, 34 Ind. Cas. 138.

CHATTERJEE and BEACHCROFT, JJ.

(46) Ss. 43, 44—*Release of a joint judgment-debtor—Whether operates as a release of others—Amount paid by the released debtor—Whether the others can claim benefit thereof—English Law—Applicability in—Original side of High Court.* *Moolchand v. Alwar Chetty*, 17 M.L.T. 449=29 Ind. Cas. 303=39 M. 548. See Final Part, 1915, Col. 554.

(47) Ss. 43, 44, 126 to 145—*Joint promisors—Suit by creditor against—Decree against one joint promisor—Another joint promisor exonerated on the ground that suit barred against him—Payment by former—Right to seek contribution from latter.* *S. P. Abraham Servai v. Raphael Muthirian*, 16 M.L.T. 569=27 M.L.J. 746=27 Ind. Cas. 337=39 M. 288. See Final Part, 1914, Col. 457.

(48) S. 44. See Nos. 45, 46, 47, *supra*.

(49) S. 45—*Partnership—Representative of deceased partner—Right to sue for recovery of debts due to partnership.* *Oodayappa Chetty Firm v. Ramaswamy Chetty*, 24 Ind. Cas. 268=7 Bur. L.T. 361=8 L.B.R. 130. See Final Part, 1914, Col. 459.

(50) Ss. 45, 263. See SUCCESSION CERTIFICATE ACT, No. 6, 31 Ind. Cas. 904.

(51) S. 47—*Sale—Vendor's duty to tender goods at the time specified—Delivery of Railway receipt not sufficient—Bombay Cotton Trade Association Rules, 17.*

The plaintiff agreed to sell to the defendant 200 bales of cotton—March delivery—between the 15th and 25th. The contract was expressed to be governed by the Rules of the Bombay Cotton Trade Association; and provided that in no circumstances was the contract to be cancelled. One of the Rules of the Association required that the vendor was bound to tender a delivery order backed by the goods before 1 P.M. on the due date. In the event of his failure to do so, the buyer was entitled to (1) cancel the contract; (2) buy at seller's risk, or (3) close at the room-rate of the day. On the 19th March, the plaintiff gave to the defendant a railway receipt for 100 bales. The defendant applied to the railway authorities for the goods on the 25th; but as he failed to receive any, he returned the railway receipt to the plaintiff on

Contract Act (IX of 1872)—(Continued).

the 26th intimating to him, that, by reason of non-performance of the contract by the plaintiff, the same was cancelled. The plaintiff alleged that the terms of the contract excluded cancellation, and that, had the defendant informed him of the non-delivery of 100 bales on the due date, he had another 100 bales ready for delivery. The plaintiff, therefore, sued to recover the difference between the contract rate and the market rate on the due date:

Held, (1) that it was the plaintiff's duty to satisfy himself that the goods covered by the receipt had actually arrived before the due date, and if he failed to do so he would not be absolved from the obligation of tendering the delivery order backed by the goods;

(2) that the plaintiff having been in breach could not sue to recover damages on the contract. **Mukanchand Rajaram Balia v. Nihalchand Gurmukhral**, 18 Bom. L.R. 96=32 Ind. Cas. 944=40 B. 517.

BEAMAN, J.

(52) S. 54. See **CONTRACT**, No. 4, 30 M.L.J. 207.

(53) S. 55—Scope—Contract to sell land—Time when of the essence of the contract. *See **SALE**, No. 4, 30 M.L.J. 186.

(54) Ss. 55, 73—Contract, breach of—Time, essence of contract—Intention—Merchants' contract—Damages, suit for. **Bhudar Chandra Goswami v. C.R.S. Betta**, 22 C.L.J. 566=33 Ind. Cas. 317. See **Final Part**, 1915, Col. 555.

(55) S. 56—Contract with enemy—Trading with enemy—Hostile Foreigners Trading Order—Impossibility of performance—War avoids all contracts with enemies.

On the 18th February 1914, the defendants (a German joint-stock company incorporated at Hanover, having a branch in Bombay under the sole management of a German subject) agreed to purchase from the plaintiffs waste produced in the latter's mills for the year ending the 31st December 1914, and to take its delivery at least once monthly at rates specified. A deposit of Government Promissory notes of 3½ per cent of the nominal value of Rs. 2,200 was made by the defendants. On the 4th August 1914, war was declared between Great Britain and Germany. The plaintiffs wrote to the defendants on the 18th idem calling 'upon them to take delivery of waste under the contract. The defendants' manager replied on the 22nd saying that, owing to the present political position, they were not allowed to do business in India, and desired the plaintiffs to keep delivery of waste standing over until business was allowed to be resumed. On the 5th September 1914, the manager was interned as an alien enemy at Ahmednagar. The plaintiffs called upon the manager on the 11th November to take delivery of the waste; and again on 3rd December wrote to him to comply with notice of November on or before 8th December—a time, which was subsequently extended to the 16th idem. The manager relied in reply upon

Contract Act (IX of 1872)—(Continued).

S. 56 (2), Contract Act. The Hostile Foreigners Trading Order was issued on the 14th November 1914. The defendants applied to the Local Government for permission to carry on their local business; but permission was not granted till 8th February 1915. The plaintiffs sold the waste by auction and sued to recover damages occasioned to them on such sale; and claimed to retain the deposit towards such damages:

Held, dismissing the suit, (1) that, owing to circumstances arising from the outbreak of war, it had become impossible for the defendants to perform their part of the contract;

(2) that, even assuming that it only became impossible after the 14th November, the granting of further time up to the 16th December by the plaintiffs for taking delivery waived any breach committed before that date;

(3) that the defendants were entitled to a return of their deposit under S. 56, Contract Act.

On the outbreak of war all contracts with alien enemies become illegal. **The Textile Manufacturing Co., Ltd. v. Salomon Brothers**, 18 Bom. L.R. 105=40 B. 570=33 Ind. Cas. 353.

MACLEOD, J.

(56) S. 56—Term of contract impossible to perform—Period fixed for performance—Test of impossibility.

In a suit for damages for breach of contract, the main term of which was to supply 151 bales of cotton twist of a particular quality manufactured by the Raipur Mills within 75 days, the defendant set up that this item of the contract was impossible of performance. The District Judge held that the yarns mentioned in the contract were not available at Ahmedabad Raipur Mills at the time of the contract (Ex. A) and the contract was therefore impossible of performance.

Held, that the real test of impossibility is whether it was practically impossible for the defendant to get the quality of yarn contracted for within the time fixed in the contract. **Sooryaprakasalingam Garu v. Shaw Teikam-lal**, (1916) 2 M.W.N. 131=35 Ind. Cas. 625.

OLDFIELD and NAPIER, JJ.

(57) S. 56—Performance of contract becoming unlawful or impossible—Void contract. **Karl Ettlinger v. Chagandas & Co.**, 17 Bom. L.R. 1087=40 B. 301=33 Ind. Cas. 205. See **Final Part**, 1915, Col. 555.

(58) Ss. 59, 60—Appropriation of payments—Onus of proof—Hundis not paid at maturity—Interest on Hundis—Usage in Rawalpindi. **Khilalla Shah v. Hansari Mal Nathu Mal**, 24 P.R. 1915=29 Ind. Cas. 846=23 P.L.R. 1916. See **Final Part**, 1915, Col. 556.

(59) S. 60. See No. 58, *supra*.

(60) Ss. 60, 61—Appropriation—Payment in discharge of running account—No appropriation by debtor or creditor—Right of the Court to appropriate—Partnership debt, appropriation of.

Contract Act (XX of 1872)—(Continued).

Ss. 60 and 61 of the Contract Act provide a very simple Code of Procedure analogous in all particulars to the law of appropriation that prevails in England. If the debtor does not appropriate, and he has the first right, then the creditor may appropriate, and he may appropriate to any particular debt or to any particular portion of a running account. But if neither party appropriate, S. 61 is an enabling section, which entitles the Court to declare that such payments shall be appropriated, in discharge of the debts in order of time.

Where there is a running account and payments are made extending over the entire period of that account from its inception to its end, the Court should imply that the payments made shall be applied in discharge in the order of date in which the debts were contracted (a).

The general rule is, that the party who pays the money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party which receives the money. But there is a third rule, *viz.*, that where one of several partners dies and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and new firms in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt (b). *Bishun Perkaash Narain Singh v. Md. Siddique*, 1 Pat. L.J. 474—35 Ind. Cas. 375.

ATKINSON and JWALA PRASAD, JJ.

References:—(a) (1897) Ap. Cas. 546, F.
(b) 1 Q.B.D. 178, F.

(61) S. 61. See No. 60, *supra*.

(62) S. 62—*Absence of privity of contract—Direction to purchaser to pay vendor's debt—Right of creditor to enforce such undertaking.*

Where in a sale deed the vendor directed the vendee to pay off certain debts due by him to certain creditors, such creditors of the vendor can institute a suit against the vendee and recover the amount due to them, though they had no notice of the agreement between the vendor and vendee in respect of payment of their debts.

The right of a stranger to enforce an agreement in such cases is in the nature of a trust or quasi contract. The claim in such cases is not based on novation of contract or a substituted contract. The purchaser is treated as a trustee of the vendor's creditors for the money reserved in his hands for their benefit. *Dwarka Nath Ash v. Priya Nath Malki*, 36 Ind. Cas. 792.

MOOKERJEE and CUMING, JJ.

References:—20 Ind. Cas. 630=41 O. 137=17 O.W.N. 1143=18 O.L.J. 603; (1881) 1 B. & B. 893=30 L.J.Q.B. 265=8 Jur. (N.S.) 339=4 L.T. 468=9 W.R. 781=124 R.R. 610=

Contract Act (IX of 1872)—(Continued).

121 E.R. 762; 5 Ind. Cas. 565=11 O.L.J. 864=14 O.W.N. 470=37 O. 449; (1817) 3 Mar. 470=17 R.R. 136=Preface V, 36 E.R. 224, R.

(63) S. 62—*Balance of account signed by defendant—New rate of interest different from usual rate—New contract—Suit upon the new contract—Limitation—Arts 64, 85, Limitation Act (1908)—Punjab Loans Limitation Act. Makhani Lal v. Ganesh Lal*, 42 P.R. 1915=130 P.W.R. 1915=30 Ind. Cas. 84=49 P.L.R. 1916. See Final Part, 1915, Col 556.

(64) Ss. 62, 63—*Agreements to give time—Validity.* See LIMITATION ACT (1908), No. 55, 3 L.W. 98.

(65) S. 63. See No. 64, *supra*.

(66) S. 65—*Contract becoming void—Repayment of advantage under the contract—Payment of freight in advance—Voyage abandoned owing to Government orders—Refund of freight—Carriers Act (III of 1865)—Carriers by sea are not common carriers.*

The plaintiffs consigned, under a charter-party, 2,500 bales of cotton for Genoa on board a steamer belonging to the defendants, and paid Rs. 32,160 for freight. The steamer, however, did not leave the harbour and abandoned the voyage, as the Government prohibited the import of cotton into Genoa. Eventually, the steamer unloaded her cargo; but the defendants required the plaintiffs to deposit with them Rs. 12,000 to cover the expenses and loss incurred by the ship. The plaintiffs having paid the amount under protest, sued to recover the amounts of freight as well as deposit:

Held, (1) that the case was governed by S. 65, Contract Act, and the plaintiffs were entitled to recover the amount paid by them in advance for freight;

(2) that the defendants were entitled to reasonable expenses in unloading, etc., of the cargo.

Carriers by sea in India are not entitled to the benefits of Act III of 1865. *C. Boggiano & Co. v. The Arab Steamers, Ltd.*, 18 Bom.L.R. 126=40 B. 529=33 Ind. Cas. 536.

MACLEOD, J.

(67) S. 65—*Unenforceable contract of sale—Vendor being a lunatic—Rights of purchaser—Refund of money paid—Specific Relief Act, I of 1877, Ss 38, 41.*

A Court of equity cannot say that it is equitable to compel a person to pay any monies in respect of a transaction which as against that person the Legislature has declared to be void.

A contract of sale entered into by payment of consideration to a lunatic vendor is void and unenforceable and the purchaser is not entitled to the refund of the money paid either under S. 65 of the Contract Act or Ss. 38 and 41 of the Specific Relief Act, 1877. *Doulattuddin v. Dhan Ramchhuttia*, 32 Ind. Cas. 802.

D. CHATTERJEE and BEACHCROFT, JJ.

References:—(1903) 1 Ch.D. 1, F.; 30 C. 739 (P.C.)=5 Bom. L.R. 421=7 O.W.N. 441=30 I. A. 114 (P.C.).

Contract Act (IX of 1872)—(Continued).

(67-a) S. 65. See Nos. 16, 29, *supra*.

(68) Ss. 69, 247—Infants if may be adjudicated insolvents. See INFANTS, No. 1, 20 C.W.N. 1065.

(69) S. 69—*Contribution, suit for—Second appeal, if lies—Provincial Small Cause Courts Act, Sch. II, Art. 41—Personal liability—Liability imposed on property—'Person bound by law to pay'—'Interested in the payment of money'—Rent payable by the judgment debtor—Execution purchaser, if can recover—Execution purchaser, liability of, extent of.*

The plaintiff sued to recover from the defendants the whole amount paid by him to save the property, a portion of which was held by him as a tenant under defendant No. 1. There was an alternative case, *viz*, that, if the plaintiff was held liable to contribute, then, a decree for proportionate amounts might be passed against the defendants.

The primary Court held that the plaintiff was a co-sharer and liable to contribute, and on that footing gave a modified decree to the plaintiff. The plaintiff did not appeal against that decree. On second appeal by defendant No. 2:

Held, that, as the suit was one for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer, it was exempted from the cognizance of Small Cause Courts Act under Art. 41 of the second schedule of the Provincial Small Cause Courts Act, and second appeal lay to the High Court.

S. 69 of the Contract Act was intended to include the case not only of personal liability, but all liabilities to payments for which owners of lands were indirectly liable, those liabilities being imposed upon the lands held by them (a).

Plaintiff and defendant No. 1 were co-sharers of a taluk. The share of the defendant No. 1 was purchased by defendant No. 2 in execution of a mortgage decree. Prior to the purchase of the defendant No. 2, the landlord of the taluk had obtained a decree for arrears of rent of the taluk and after the purchase by defendant No. 2 put up the taluk to sale in execution of the rent decree, when the plaintiff deposited the entire amount due to the landlord and saved the taluk:

Held, that defendant No. 2 was a person "bound by law to pay" within the meaning of S. 69 of the Contract Act, although his liability was not a double liability like that of the plaintiff.

That the plaintiff was a person "interested in the payment of money" within the meaning of S. 69, as he was "bound by law to pay" by reason of the liability attaching to the land.

That defendant No. 2, in the absence of any thing to denote the contrary, purchased the land charged with the rent which was due in respect of it at the time of its purchase, and there being no privity between him and defendant No. 1, the judgment-debtor, he could not recover from the latter the money which he

Contract Act (IX of 1872)—(Continued).

was obliged to pay for the rent so due at the time of the purchase (b).

That defendant No. 2 was liable only to the extent of the share purchased by him *Chandradaya Sen v. Bhagaban Chandra Sen*, 28 C.L.J. 125=32 Ind. Cas. 200.

N. R. CHATTERJEE and NEWBOULD, JJ.
References:—(a) 4 C. 369, F. (b) 1 C.W.N. 458; 3 C.W.N. 384; 4 C.W.N. 590, D.

(70) S. 69—*Mortgages leasing property to mortgagors—Division among mortgagors—Failure by one mortgagor to pay his share of revenue—Payment by mortgages—Liabilities of other mortgagors.*

Property was mortgaged to the plaintiff who leased it to the mortgagors. The latter divided the property among themselves. One of the mortgagors B, having failed to pay his share of the revenue, the other mortgagor K paid it up and got possession. Subsequently under the terms of a compromise entered into in a suit for profits brought by the plaintiff against the defendants, possession passed to the mortgagors who paid up further arrears of revenue due by B and also the amount K had paid up and brought this suit for recovery of the whole amount against both B and K. *Held* that the plaintiff had no cause of action against B. *Prag Narain v. Prag Narain*, 14 A.L.J. 605=35 Ind. Cas. 198.

BANERJI and PIGGOTT, JJ

(71) S. 69—*Attachment of crop on portion of land included in patta for arrears—Legality. Lakshmi Amma v. Yenappa Ullara*, (1915) M.W.N. 643=33 Ind. Cas. 234. See Final Part, 1915, Col. 558.

(72) S. 69. See MALABAR LAW (MORTGAGE), No. 1, (1916) 2 M.W.N. 358.

(72-a) S. 69. See No. 124, *infra*.

(73) Ss. 69, 70—*Bengal Tenancy Act (VIII of 1855), Ss. 170, 171—Tenancy advertised for sale in execution of a rent decree—Deposit by a person claiming to be mortgagor from tenant—Mortgage impugned to be a forgery and the right to deposit contested by the tenant—Tenant benefiting by the deposit—Subsequent suit for the amount from the tenant—Mortgage found to be fictitious and forged—Money not 'lawfully paid' within the meaning of S. 70 of the Contract Act—No implied contract to re-pay—The mere enjoyment of the benefit from the deposit insufficient to support any obligation to repay.*

Defendant's holding having been advertised for sale in a rent decree plaintiff claiming to be a mortgagor thereof deposited the amount to avert the sale and defendant benefited by such payment. Defendant however impugned the right claimed by plaintiff and asserted the mortgage to be a mere forgery.

In a suit by plaintiff to recover from defendant the said amount the mortgage having been found to be a forgery, held the plaintiff had no legal right to recover the amount. He was not

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a person having any interest in the property within the meaning of S. 170 (3) of the Bengal Tenancy Act, the alleged interest being fictitious and non-existent and that plaintiff ought not to have been allowed to make the deposit.

Nor was plaintiff a person interested in the payment of the money within the meaning of S. 69 of the Contract Act. Interest means 'lawful interest' and not an interest from his own point of view in making the payment. The payment also was not 'lawful' within the meaning of S. 70 of the Contract Act.

The mere enjoyment of the benefit of the payment is not sufficient to support an implied contract to repay. The obligation to repay cannot be determined merely by nice considerations of what may be fair or proper according to the highest morality and specially having regard to the fact that defendant protested against plaintiff making the deposit it is impossible to say that there was any implied undertaking to repay. *Panchkori Ghosh v. Hari Das Jati*, 34 Ind. Cas. 341.

SANDERSON, C.J. and MOOKERJEE, J.

References:—2 C.L.J. 311; 2 I.A. 131 (P.C.), F.

(74) Ss. 69 and 70—*Contribution, suit for—Applicability—'Person interested,' meaning of—Transfer of Property Act, S. 55—Sale of equity of redemption—Implied covenant to indemnify vendor against non-payment of mortgage-money—Contribution suit—Parties—Practice—Several persons liable to contribute—Recovery, if can be had from one alone—Madras Revenue Recovery Act, II of 1864—Revenue, liability to pay personally, if extends to persons who are not registered holders—Statutory liability of the registered holder, whether personal—Civ. Pro. Code, 1908, Ss. 16 and 20—Defendant resident beyond local limits—No personal liability—Jurisdiction. Jagapathiraja Bahadur Garu v. Durgaraju Bahadur Garu, 2 L.W. 1046=29 M.L.J. 639=18 M.L.T. 464=39 M. 795=31 Ind. Cas. 255. See Final Part, 1915, Col. 560.*

(75) Ss. 69, 70. See CONTRIBUTION, No. 5, 34 Ind. Cas. 367.

(76) Ss. 69, 72—A's land attached as B's for arrears due by B—A paying under protest to avoid sale—Suit by A against landlord and B for recovering amount paid by him. See MAD. ACT I OF 1908 (ESTATES LAND), No. 34, 3 L.W. 517.

(77) S. 70—*Obligation of person enjoying the benefit of non-gratuitous act—Act must be done for another person—Subrogation—Stranger paying off a subsisting mortgage—Subrogation to mortgagee's position.*

During the pendency of proceedings for sale of mortgaged property in execution of a decree for sale upon the mortgage, defendant No. 2, who held a decree for money against the mortgagor, had the property sold in execution of his decree and purchased the property himself. When the property was thereafter put up to sale under the mortgage decree the mortgagor

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borrowed a sum of money from the plaintiff and paid off the mortgagee. The property was then sold by the mortgagor to the plaintiff for the sum borrowed as also for a further sum paid. The plaintiff having been ejected from the property by defendant No. 2 sued to recover the consideration money from the mortgagor; and as regards the money paid to the mortgagee, he claimed to stand in the shoes of the mortgagee and asked that the amount should be recovered by sale of the mortgaged property or from defendant No. 2 personally, under S. 70 of the Indian Contract Act, 1872:

Held, (1) that the plaintiff's claim to compensation under S. 70 of the Indian Contract Act was not established, inasmuch as the payment was made not only without the consent, but without the knowledge, of defendant No. 2, the object of the payment being to benefit the plaintiff himself:

(2) that the plaintiff who was a stranger paying off a subsisting mortgage was entitled to be subrogated to the position of the mortgagee; and was therefore, entitled to recover the sum paid to the mortgagee by sale of the mortgaged property. *Tangya Fala v. Trimbak Daga*, 18 Bom. L.R. 700=40 B. 646=35 Ind. Cas. 794.

BATCHELOR and SHAH, JJ.

(78) S. 70—*Institution of suit by several plaintiffs—Expenses borne by one of them—Liability of the other to pay contribution.*

Where two plaintiffs join in the institution of a suit and the suit is conducted by one plaintiff alone and the entire expenses of the suit are borne in the first instance by that plaintiff, a suit for contribution by him against the other plaintiff could succeed only on one or other of three grounds: first that there was an agreement between the two plaintiffs, that the expenses should be borne proportionately or secondly that the plaintiffs had joined in engaging counsel or vakil and that after the joint engagement of counsel or vakil the one plaintiff had paid the counsel or vakil on behalf of both; thirdly under the provisions of S. 70 of the Contract Act. *Musammatt, Umatol Soghra v. Musammatt Zohra*, 34 Ind. Cas. 54.

CHAPMAN and ATKINSON, JJ.

(79) S. 70—*Work done by defendant for plaintiff—No proof of agreement as to payment of commission—Award of reasonable compensation.*

The case of the plaintiff was that the defendant being in need of money and having occasion to raise a loan employed the plaintiff to negotiate the loan on a promise to pay him commission at a certain rate. The defendant denied that there was any such agreement for commission and stated that he had negotiated the loan himself. It was found on evidence that the alleged agreement was not proved, but that the plaintiff had one work for the defendant in connection with the raising of the loan. *Held*, that taking into consideration, S. 70 of the Contract Act, the plaintiff was entitled to a reasonable compensation for work done, although he failed to prove the terms of the

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agreement alleged by him in the plaint. **Jwala Prasad v. Bachcha Ram**, 30 Ind. Cas. 223.

LINDSAY, J.C.

- (80) S. 70—*Non-applicability to express contract—Contract to deliver goods to a third person—Right to compensation.*

S. 70 of the Contract Act applies only in the absence of an express contract at all. If in pursuance of an express contract between A and B, A delivers certain goods to C, C is not liable to A for the value of those goods. **Sadik Maistry v. Mahomed Auzam**, 32 Ind. Cas. 511.

PARLETT, J.

- (81) S. 70—*Applicability.* See CONTRIBUTION, No. 3, 1 Pat. L.J. 201.

- (82) S. 70. See Nos. 73, 74, 75, *supra*, and No. 128, *infra*.

- (83) S. 72. See Nos. 12, 76, *supra*.

- (84) S. 73—*Delay of buyer in taking delivery—Damage to goods—Liability of purchaser.*

Under S. 73 of the Contract Act the purchaser would be liable to make good any loss or damage caused to the goods as the direct and immediate consequence of his delay in taking delivery of such goods, though the property in goods has not passed to the purchaser. **Tarachand v. Louis Dreyfus & Co.**, 10 S.L.R. 14.

HAYWARD, A.J.C.

- (85) S. 73—*Breach of contract—Suit for damages—Measure of profits.*

In a suit for damages for breach of contract the plaintiff will be entitled to recover damages on the basis of a contract made by him with a third person only when the defendant knew of the said contract at the time of his entering into the contract with the plaintiff. In the absence of special circumstances the proper basis for assessment of damages is the difference between the contract price and the market price at the time of breach. **Byan Na v. Maung Cheik**, 36 Ind. Cas. 264.

PARLETT, J.

- (86) S. 73. See No. 54, *supra*.

- (87) Ss. 73 and 74—*Deposit not a penalty—Forfeiture of deposit—Right of defaulter to claim credit in mitigation of damages.*

A deposit made to secure performance of a contract is not a penalty, for, the right to recover it depends upon legal and not upon equitable consideration (a).

When the defendant commits a breach of contract he loses his right to recover back his deposit.

The plaintiffs would be entitled to keep it even if the breach involved them in no loss.

But if they are not satisfied with the deposit and seek to recover damages there is no authority which would justify them in recovering damages without giving credit for the deposit. Only damages beyond the deposit can be recovered. This is in accordance with S. 73 of

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the Contract Act (b). **Trikamji v. The Karachi Port Trust**, 10 S.L.R. 4 = 36 Ind. Cas. 96.

PRATT, J.C. and BOYD, A.J.C.

- References:—*(a) (1884) L.R. 27 Oh. D. 89; 19 A. 489; 21 B. 827; 29 M. 118, F.; 33 M. 375, R. (b) 36 C. 960; (1868) E.B. & E. 486 and L.J. 27 Q.B. 361; (1910) L.R. 1 Oh. 176, R.

- (88) Ss. 73, 107—*Contract to purchase shares—Failure of buyer to take on date of delivery—Subsequent sale by seller at higher than market price on date of delivery—Buyers liability—Measure of damages.* **A. K. A. S. Jamal v. Moolia Dawood Sons & Co.**, 20 C.W.N. 105 = (1916) M.W.N. 70 = 19 M.L.T. 80 = 30 M.L.J. 73 = 23 C.L.J. 137 = 14 A.L.J. 89 = 3 L.W. 181 = 9 Bur. L.T. 8 = 43 C. 493 = 18 Bom. L.R. 315 = 8 L.B.R. 343 = 31 Ind. Cas. 949 (P.C.) See Final Part, 1915, Col. 563.

- (89) S. 73, Ill. (c)—*Damages—Principle of assessment—Termination of contract.*

Where in a contract for sale of sugar no date was fixed for delivery but the plaintiffs gave notice that they would not take delivery beyond a certain date and delivery was not made within that time, held that the contract must be deemed to have subsisted up to the date fixed in the notice and damages should be calculated on the difference between the contract rate and rate prevailing on date of breach. **Gauri Datt Basdeo v. Nanik Ram Chauthmal**, 14 A.L.J. 597 = 35 Ind. Cas. 203.

BANERJI, J.

- (90) S. 74—*Penalty, if limited to money—Stipulation to convey immovable property in default, whether a penalty.*

The stipulation by way of penalty contemplated by S. 74 of the Indian Contract Act need not be a stipulation to pay a certain sum of money alone. It may be any other stipulation, to wit, an agreement to convey property.

A entered into an agreement to purchase certain immovable property from B for Rs. 10,000. A for completing the sale borrowed from C, Rs. 6,500 under an arrangement whereby A agrees to pay C, the said sum of Rs. 6,500 on a certain date. In default he agreed to execute a conveyance for Rs. 6,500 alone in favour of C of the immovable property which he purchased from B. In a suit by C against A for specific performance of the agreement to convey.

Held that the stipulation to convey the property in default of payment was a penalty and could be relieved against. **Raja Sethupathi v. Sellachami Tevar**, 4 L.W. 173 = (1916) 2 M.W.N. 247 = 34 Ind. Cas. 500.

ABDUR RAHIM and SRINIVASA AIYANGAR, JJ.

- (91) S. 74—*Deposit by purchaser—Stipulation as to forfeiture if purchaser makes default—Relief against forfeiture—Earnest money, nature and origin of—Costs.*

In every case governed by the Indian Contract Act, 1872, where a deposit is made by a purchaser with the vendor as part payment in advance of the purchase-money, subject to a

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stipulation that it shall be forfeited if the purchaser shall make default, S. 74 of that enactment applies, and gives the Court a discretion to deal with the question of forfeiture on equitable principles.

To come within the principles applicable to earnest-money, such a deposit must be something paid over at the time of entering upon the bargain, and those principles cannot rightly be applied to any future payment to be made under the contract.

Though the Indian Contract Act, 1872, purports to deal only with "certain parts of the law relating to contracts," it would appear that, where it does treat with a subject in a way at variance with the law of England, it should be regarded as exhaustive, and binding on the Courts in India.

There are deposits by way of earnest varying from a mere symbol of sincerity to as much as one-half of the purchase-money, and there are also conditions of forfeiture made applicable to all proportions of the price, from a mere fraction to all but a mere fraction thereof, in the varying circumstances of contracts which have come before the Courts in England. To meet the varying equities arising in these cases the Judges resort to artificial rules of construction for the purpose of deciding whether a sum, deposited and agreed to be forfeited in case of default by the party depositing, was only an earnest of the bargain or liquidated damages, or a penalty; the real object in each case being to administer equity and relieve parties from their oppressive contracts; and for this purpose a fictitious intention has sometimes been ascribed to the contracting parties by the employment of extremely artificial rules which have perplexed English lawyers themselves, and made it impossible to find any general rule equally applicable to all cases. It is natural to assume that the Indian Legislature sought to resolve this complex question into one simple rule, embodied in S. 74, Indian Contract Act, to the provisions of which S. 64 is, subject. (*Per Batten and Stanyon, A.J. Cs.*)

The nature and origin of earnest money explained (a).

The mere fact that the parties erroneously described as earnest-money the first instalment of purchase-money does not, make it really earnest-money.

Equitable method of dealing with costs in a case like this indicated. *Ballabhdas v. Palkaji*, 12 N.L.R. 177.

BATTEN and STANYON, A.J. Os.

References.—(a) (1884) L.R. 27 Ch. D. 89; (1887) L.R. 35 Ch. D. 384, *Confirmed*; (1888) L.R. 87 Ch. D. 96 and (1889) L.R. 14 Ap. Cas. 429; (1872 73) 8 Ch. App. 1021; (1882) L.R. 21 Ch. D. 243; 21 B. 327; 33 A. 166; 23 B. 56; 16 M. 474; 29 M. 118, R.; 18 M. 116, and the *dictum* of Sankaran Nair, J., in 33 M. 875, F.; 19 A. 489; and the *dictum* of Wallis, J., in 33 M. 875, *Not F.*

Contract Act (IX of 1872)—(Continued).**(92) S. 74—Interest—Penal rate.**

A stipulation that interest in a bond should run at higher rate, if payment is not made on the due date, from the date of bond, is penal and cannot be enforced, since such stipulation cannot have retrospective effect. It is entirely in the discretion of Court to award interest in such cases at such rate as it deems proper. *Sonal Singh v. Randhir Singh*, 35 Ind. Cas. 624.

SUNDAR LAL, J.

(93) S. 74—Provision regarding payment of interest on default—Compound interest—Relief against penal clause—Assessment of compensation—Conduct of parties.

The word "penalty", when used in relation to contracts, is a liability agreed to by parties to be imposed as a vindictive punishment on the party committing the breach of contract, and not merely as reasonable and even liberal compensation to the other side injured by the breach of the contract. It is a liability agreed to by the parties to be imposed as a punishment on the party committing the breach of the contract.

Until the amendment of S. 74 of the Contract Act, the doctrine laid down for the most part in Indian Courts was that an agreement to pay enhanced interest from date of default was not a penalty within the meaning of the unamended section and must be enforced. But the amendment of the section declared that, if the contract contained any other stipulation by way of a penalty the Court should award not the penalty stipulated for, but reasonable compensation not exceeding the amount of the penalty, and further explained that a stipulation for increased interest from the date of default may be a stipulation by way of penalty.

In the case of an agreement to pay compound interest at the same rate as the simple interest agreed on, the debtor fixes the price paid for the accommodation at a progressive rate and the element of punishment or penalty is absent. But where the parties agreed that, if the debtor does not keep his engagement to pay the interest by due date either at the non-progressive rate when the interest first falls due, or at the progressive rate on subsequent defaults, the element of punishment appears. A penalty then arises for non-compliance with the conditions (a).

A penal clause is not "invalidated by S. 74 of the Contract Act. The clause remains effective, but the amount awarded as compensation for its breach is left to the discretion of the Court up to the maximum fixed by the clause. In determining the amount of compensation the Court should examine the evidence showing the conduct of the parties subsequent to the execution of the deed embodying the contract (b).

A mortgage-deed contained *inter alia*.

(a) A primary obligation to pay certain amount in fifteen instalments with simple interest at 8 per cent. per annum payable six-monthly on balance due after payment of instalments due.

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(b) A secondary obligation to repay, in case of default of instalments, compound interest at 12 per cent. per annum with six-monthly rests on each instalment or part of an instalment not paid by due date.

(c) Another secondary obligation to repay, in case of default of interest due, compound interest at 12 per cent. per annum with six-monthly rests on the balance of interests not paid by due date. *Held*, that the stipulations, (b) and (c), are stipulations by way of penalty within the meaning of S. 74, Contract Act, as amended by Act VI of 1899 and had to be relieved against. *Babu Narendra Bahadur Singh v. The Oudh Commercial Bank, Limited*, 30 Ind. Cas. 323.

STUART, A J.C.

References:—(a) 34 C. 150=4 A.L.J. 109=11 C.W.N. 249=5 C.L.J. 106=17 M.L.J. 43=9 Bom. L.R. 304=2 M.L.T. 75=34 I.A. 9; 9 C. 689=13 C.L.R. 102; 12 M. 161; 17 B. 106; 5 Ind. Cas. 665=7 A.L.J. 394=32 A. 448; 18 Ind. Cas. 417=13 M.L.T. 20=24 M.L.J. 135=36 M. 229; 25 M. 343=11 M.L.J. 421; 9 Ind. Cas. 406; 13 Ind. Cas. 473, R. (b) 4 A.L.J. 109=11 C.W.N. 249=5 C.L.J. 106=17 M.L.J. 43=9 Bom. L.R. 304=2 M.L.T. 75=34 I.A. 9=34 C. 150; 3 Ind. Cas. 289=10 C. L.J. 203, R.

(94) S. 74—*Penalty in compromise decree—Power of executing Court to interfere.*

A Court executing a compromise decree is competent to go behind the terms of the decree.

Where a compromise decree provides that out of the amount claimed and costs a decree be passed for Rs. 400 after deducting Rs. 508 remitted by the plaintiff and that the defendant do pay the said amount in certain stipulated instalments and that in default of payment of any instalment, the whole amount shall become payable at once together with a sum remitted, there is no penalty whatever. The case is precisely an ordinary one of discount for prompt payment. But where in addition to this stipulation, which is one merely restoring the original principal if the conditions of remittance are not fulfilled, there is a further provision that interest shall be paid on the whole amount at 36 per cent. per annum, this provision strictly comes within the purview of S. 74 of the Contract Act. Having regard to the unconscionable nature of the original bargain the plaintiff is not entitled to any interest by way of compensation. *Jamil Fakir v. Ram Lal Ghose Chowdhury*, 32 Ind. Cas. 697.

HOLMWOOD and IMAM, JJ.

(95) S. 74—*Penalty—Stipulation for payment of interest and damages—Unconscionable bargain—Award of reasonable compensation.*

In any case the Court can grant relief in the exercise of its equitable jurisdiction if a contract is found to be unconscionable.

Where in a suit on a *kabuliat* the Court found that the stipulation to pay interest and

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damages at the rate mentioned in the *kabuliat* for non-payment of rent according to the kists was unconscionable, the Court declined to enforce the stipulation and awarded only a reasonable compensation for the failure to pay the rent. *Upendra Lal Gupta v. Ataula*, 36 Ind. Cas. 404.

CHATTERJEE and SHEEPSHANKS, JJ.

(96) S. 74—High rate of interest and damages in Mokurari lease, if penalty. See BEN. ACT VIII OF 1885 (TENANCY), No. 37, 21 C. W.N. 108.

(97) S. 74—Stipulation to pay interest on arrears of rent "at 75 per cent. with full damages," if by way of penalty—Mere high rate if sufficient to demand interference. See BEN. ACT VIII OF 1885 (TENANCY), No. 36, 21 C.W.N. 112.

(98) S. 74. See Nos. 38, 37, *supra*.

(99) Ss. 74 and 16—*Penalty—Interest at 75 per cent. in a mortgage by poor and ignorant men—Reasonable compensation—Evidence Act (I of 1872), S. 92—Verbal agreement modifying the terms of a mortgage—Release of one mortgagor, effect of.*

Where a mortgage-bond provided that each one of the mortgagors was liable for the whole amount of the mortgage, a subsequent verbal agreement providing that each individual mortgagor was to be liable only for his proportionate share of the amount being one materially varying the terms of the bond cannot be proved in evidence. S. 92 of the Evidence Act bars proof of such agreement.

A release of one of the mortgagors will not operate as a release of the other joint mortgagors though the mortgagees did not at the time of release expressly reserve his remedies against the other mortgagors.

A stipulation in a mortgage of immovable property by ignorant and poor mortgagors for payment of interest at 75 per cent. per annum, the loan being one which was intended as a merely temporary loan was held to be a penal provision though the case might not come under S. 16 of the Contract Act and 15 per cent. interest was allowed instead as a reasonable compensation. A provision for payment of one rate of interest only and not alternative rates in different contingencies may be a penal provision when in the circumstances of the case the rate is very high. *Krishna Charan Barman v. Sanat Kumar Das*, 34 Ind. Cas. 609.

SANDERSON, C.J. and MOOKERJEE, J.

References:—42 C. 652; 42 C. 690; 22 C.L.J. 311; 22 C.L.J. 352; 39 C. 284; 6 C.L.J. 46, R.

(100) S. 76. See No. 2, *supra*.

(101) S. 78—*Delivery order in sale of goods—Goods in existence and ascertained—Document of title.*

Where a delivery order was issued in respect of sale of goods in existence and ascertained the order is a document of title in respect of the goods sold and passes from hand to hand in the

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trade and is taken to represent the goods. *M.N. Kader Ebrahim Rowther v. S.S.A.S. Ghettty Firm*, 36 Ind. Cas. 593.

ORMOND, J.

Reference :—18 T.L.R. 224, R.

(102) Ss. 79, 81, 82, 83—*Usage of jute trade at Chandpur—Jute brought by fariachs and stored in Companies' godowns, burnt before weighing—Jute insured by Company—Incidence of loss—Title, passing of—Unascertained goods—Intention—English law,*

Plaintiffs who were *fariachs* used to purchase loose jute from dealers (*beparis*) and sell them to, amongst others, defendants' firm at Chandpur. The jute brought by the *fariachs* used to be stored in a godown called the "*fariachs*" godown, and according to the usage of trade at Chandpur, the sale was not complete until the jute had been examined, selected and weighed by the purchasing firm. The goods were, however, kept subject to the firm's lien for advances to the *fariach*, and it appeared that, once the goods were stored in the godown, the *fariachs* were not allowed to remove or sell them to other persons. Some jute which was stored by plaintiffs in defendants' godown, and was insured by the latter as belonging to the firm, caught fire before it had been tested, selected and weighed and was burnt :

Held, that title in the jute had not passed to the defendants, and the loss fell on the plaintiffs.

That the contract being one for the sale of unascertained goods, what remained to be done by the buyer to the goods appropriated to the contract by the seller was not merely for the purpose of ascertaining the price but was also for the purpose of placing the buyers in a position to say whether and to what extent they would for their part accept the goods offered to them.

That the fact that the seller could not remove or sell the goods from the godown did not show that the property in the jute had passed to the firm.

That the defendants, who had an interest in the goods, were justified in insuring them to protect that interest, and were entitled to receive the whole amount of the policies of insurance to indemnify themselves against their loss and were not bound to apply any portion of it to the plaintiffs' benefit.

When nothing remains to be done to the goods by the seller for the purpose of ascertaining the price, then *prima facie* the property in them passes although they have not been weighed by the buyer. It would be otherwise in England if the parties intended that property in the goods should not pass until the goods had been weighed.

The Indian Law is the same and the provisions of S. 81 do not exclude the question of intention which is laid down in the English cases as the determining factor. *Abdul Aziz Bepari v. Jogendra Krishna Ray*, 20 C.W.N. 1224—44 C. 98—36 Ind. Cas. 119.

N.B. CHATTERJEE and RICHARDSON, JJ.

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(103) S. 81. See No. 102, *supra*.

(104) S. 82. See No. 102, *supra*.

(105) S. 83. See No. 102, *supra*.

(106) Ss. 102, 103, 108, 178—*Transfer of Property Act, Ss. 4, 137—Railway receipt if "document of title" or "document showing title" or "instrument of title"—Right of vendor of stoppage in transitu if determines on assignment of railway receipt by way of pledge—Contract Act, interpretation of—Draughtsmanship.*

The Indian Contract Act is an amending as well as a consolidating Act, and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law.

There is no improbability in the Indian Legislature taking the lead of the English in a legal reform, the call for legislative action in India being so much more numerous.

Railway receipts issued to the consignors of goods are documents showing title to goods within Ss. 102 and 108 and documents of title to goods within S. 178 of the Indian Contract Act, and a second buyer in good faith and for consideration who obtains an assignment of such a receipt obtains thereby constructive delivery of the goods represented by the bill, so that the vendor's right of stoppage ceases under S. 102 upon such assignment.

The expression "instrument of title" in S. 103 means the same thing as "documents showing title" in Ss. 102 and 108 and "documents of title" in S. 178 of the Contract Act; the use of different expressions to convey the same sense showing merely that the draughtsman of the Act was not very careful in the use of language.

Where, therefore, a railway receipt is assigned by way of pledge to secure an advance made specifically upon it in good faith under S. 103 of the Contract Act, the vendor cannot, except on payment or tender to the pledgee of advance so made, stop the goods in transit. *Ramdas Vitthaladas Durbar v. S. Amerchand and Co.*, 20 C.W.N. 1182—(1916) 2 M.W.N. 110—18 Bom. L.R. 670—20 M.L.T. 194—31 M.L.J. 541—4 L.W. 342—14 A.L.J. 1045—24 C.L.J. 320—40 B. 630—35 Ind. Cas. 954 (P.C.).

LORD ATKINSON, LORD PARKER OF WADDINGTON, SIR JOHN EDGE and MR. AMERE ALI.

(107) S. 103. See No. 106, *supra*.

(108) S. 107—*Buyer failing to take delivery of goods and the seller exercising his power of re-sale—Damages, claim for, at market rate—Maintainability.*

In this case a buyer failed to take delivery of goods, and the seller re-sold the goods, in the exercise of a power conferred upon him. In such re-sale, the seller himself bought the goods *benami*. The seller sued defendant for re-sale damages. The defendant impugned the re-sale as being void. At the hearing the plaint was amended by the addition of an

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alternative claim for damages based on the market rate. Plaintiff was given a decree for this alternative claim.

Held, (i) that the plaintiff was entitled to renounce the re-sale and pursue his claim for damages based on the market rate.

(ii) A re-sale must be conducted openly and fairly. The inference to be drawn from the plaintiffs buying the shares benami is that they intended to conceal the fact that they had bought in the shares. The *onus* of showing that the defendant knew that the plaintiffs had bought the shares was therefore on the plaintiffs.

(iii) Where it is not alleged however that the shares were bought in at less than their market value, the question whether or not the defendant knew of the benami character of the sale is immaterial.

(iv) If the plaintiff's conduct had not been so improper with regard to the re-sale, the defendant would have been entitled to have damages assessed upon the basis of the market value.

(v) A plaintiff can sue for damages by way of re-sale and in the alternative for damages based upon the market rate on the due date (a).

(vi) The buyer could have held the seller to the re-sale; and if prejudiced by an improper re-sale could have claimed damages by way of set off, and to be placed in the same position as if the re-sale had been properly held and a proper price obtained (b). **Maung Gyl Maung v. Moosajee Ahmed & Co.**, 8 L.B.R. 367=9 Bur. L.T. 209=36 Ind. Cas. 252.

ORMOND and TWOMEY, JJ.

References:—(a) 24 C. 124; 24 C. 177; 39 C. 568, F. (b) 7 L.B.R. 252; (1840) 12 A. & E. 590; (1858) 27 L.J. Ex. 465; (1895) 2 Q.B.D. 253; 6 Taunt. 162; 24 C. 124; 24 C. 177; 39 C. 568, R.; 15 Beng. L.R. 276, D.

(109) S. 107. See No. 88, *supra*.

(110) S. 108. See No. 106, *supra* and No. 142, *infra*.

(111) Ss. 103, 178. See **HYPOTHECATION**, No. 1, 18 Bom. L.R. 587.

(112) *S. 118—Contract—Right of buyer on breach of warranty in respect of goods not ascertained—Goods not in accordance with contract—Goods, when to be rejected—Reasonable time—Burden of proof.*

A contract was made on the 23rd April 1914 for 125 bales of jute. It was guaranteed to yield after outting 70 per cent. good sacking warp, and the payment was to be made when the buyers (defendants), received the documents from the Railway Company, the vendor (plaintiff) was to receive 90 per cent. of the price and the balance 10 per cent., when the goods were actually delivered. The documents were received by the defendants from the Railway Company on the 23rd July and the goods were actually delivered to them on the 31st July. The goods were found to be inferior in quality. The defendants did not adduce sufficient evidence that they definitely rejected the goods

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before the 22nd August. In a suit for recovery of price of 125 bales of jute:

Held, that the goods not being in accordance with the contract, the defendants, if they chose, could have rejected them when tendered or kept them for a time reasonably sufficient for examining and trying them, and then refused to accept them.

That the burden lay upon the defendants to prove that they did in fact reject the goods, and as they failed to discharge such *onus*, they were liable for the price. **Klassendoyal Jitsaria v. Askaran Chowthmull**, 23 C.L.J. 415=34 Ind. Cas. 290.

SANDERSON, C.J., WOODROFFE and MOOKERJEE, JJ.

(113) *S. 118—Contract for sale of goods to be manufactured—Goods tendered inferior to sample—Reference to arbitration—Award directing acceptance of goods subject to allowance—Custom of trade permitting allowance—Custom cannot vary written contract—Delivery of goods manufactured by giving notice and debit entries.*

The defendants entered into seven contracts (marked A to G) with the plaintiffs for the sale and delivery of piece-goods of certain specified descriptions at a fixed price. The contracts were made subject to the condition that the defendants were not to give delivery of similar goods to other dealers during the period fixed for delivery under the contracts. The goods sold were under manufacture, the terms common to all the contracts being that the defendants' giving notice that the goods were ready was tantamount to delivery; that the plaintiffs were thenceforward to pay interest at the rate of nine per cent., and also to pay godown rent, insurance charges, etc.

Contract A was for the sale of 251 bales, of which some were delivered and paid for. Disputes then arose between the parties as to 84 bales on the ground that the goods were not according to the contract. The dispute was, under the terms of the contract, referred to arbitration. The arbitrators found that there was a difference in finish, quality, width, and in some cases of design and colour, and they decided that plaintiffs were entitled to an allowance of 0-4-0 per piece on 84 bales. Neither party accepted the award. The plaintiffs claimed that, owing to the difference in quality, they were absolved from accepting and paying for 84 bales.

Under contracts B, C and D, the defendants contracted to sell 658 bales out of which 159 bales were delivered. The plaintiffs objected to receive the remaining 499 bales on the ground that the defendants had broken the contracts by selling similar goods to others during the currency of the contracts.

Of the 305 bales contracted for under contracts E, F and G, 150 bales were duly delivered: the contracts were cancelled as to 42 bales; and 113 remained to be delivered.

The plaintiffs filed a suit to recover 113 bales of piece goods under contracts E, F and G and

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offered Rs. 7,286 as their price. The defendants counter claimed Rs. 20,280 being the price of the bales of which the plaintiffs failed to take delivery under all the contracts. They pleaded in defence a custom of the trade that the buyer had not the right to reject merely for difference in quality, etc., if the difference was not excessive or unreasonable and could be met by an allowance in the price :

Held, dismissing the plaintiffs' suit and allowing the defendants' counter-claim, (1) that, as the custom set up was inconsistent with the stipulation in the contract that a certain quality of goods should be delivered in return for payment of a certain fixed price, it could not be pleaded (a).

(2) That the parties having referred the question of the allowance to the arbitrators, they were bound by the award.

(3) That as regards contracts B, C and D. the defendants had committed no breach, and their debiting the goods to the buyer and sending them a delivery order for signature marked the period of delivery and rendered the plaintiffs liable for non-acceptance of the goods. *Ruttonsey Rewji v. The Bombay United Spinning and Manufacturing Co., Ltd.*, 18 Bom. L.R. 532.

SCOTT, C.J. and HEATON, J.

References :—(a) (1908) 2 K.B. 907, *F.*; (1904) 2 K.B. 152, *Not F.*

(114) S. 123—*Sale by auction—Puffers, employment of—Commission for sale, outrageously high—Sale whether voidable.*

Held, that, if at an auction sale, puffers are employed by the auctioneer, who charges an outrageously high commission for the sale, the transaction is voidable at the instance of the buyer under S. 123, Contract Act. *Sri Ram v. Ghabhu Lal*, 3 P.W.R. 1916=40 P.L.R. 1916=31 Ind. Cas. 689.

ONEVIS and LE-ROSSIGNOL, JJ.

(115) S. 126. See No. 47, *supra*.

(116) S. 127. See Nos. 1, 47, *supra*.

(117) S. 128. See No. 47, *supra*.

(118) S. 129. See No. 47, *supra*.

(119) S. 130—*Special contract of suretyship—Administration bond.*

S. 130 of the Contract Act does not apply to the special contract of suretyship which is entered into by a surety to an administration bond. The fact that letters of administration have not been issued does not affect the matter. *Maung Pa Oh v. Ma Pwa*, 36 Ind. Cas. 1000.

FOX, C.J. and TWOMEY, J.

Reference :—38 M. 161=14 M.L.J. 482, *F.*

(119-a) S. 130—*Death of decree-holder—Discharge of surety—Security—Contract Act, 1872, S. 130.* See CIV. PRO. CODE (1908), No. 644-a, 32 Ind. Cas. 807.

(120) Ss. 130 to 133. See No. 47, *supra*.

(121) Ss. 133, 139—*Surety—Liability, discharge of—Dealings, prejudicial—Guarantor, if can control appropriation—New account,*

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when to be opened—Departure from rule of appropriation—Agreement between principals with reference to contract guaranteed—Detention of money—Interest, liability to pay, after date of agreement. See *SURETY*, No. 1, 23 C. L.J. 266.

(122) S. 134—*Principal debtor and surety—Former a minor at the time of debt—Contract void—Liability of surety—Nature of surety's contract—Withdrawal of suit against principal debtor's legal representatives—Surety also pleading non-liability of principal—Effect.*

P stood surety for a debt due by N to S. N died. S sued N's legal representatives and P for the recovery of the debt. The defendants pleaded *inter alia* that N, at the time of the contract, was a minor, that the contract was void, that the debt was not binding on his legal representatives and that P had not stood surety for payment. The plaintiff withdrew his claim against the legal representatives and elected to proceed against P alone. It was found by the Courts below that N was a minor at the time of the contract, and that, as the plaintiff had by his conduct discharged the legal representatives of the principal debtor from liability, the surety was equally discharged under S. 134, Contract Act.

Held, by the Chief Court, that P, in the present circumstances, must be regarded as the principal debtor, and the fact that the plaintiff withdrew his claim against N's legal representatives cannot affect P's liability to pay whatever amount is found due to the plaintiff on the basis of the contract.

P, who subscribed to the written statement filed by N's legal representatives, must himself be taken to have urged the non-liability of the latter, and it was therefore with his implied assent that they were discharged from liability.

Where the original agreement is void as in the case of a minor's contract in India, the surety is liable as the principal debtor, for, in such a case, the contract of the so-called surety is not a collateral but a principal contract. *Sohan Lal v. Pura Singh*, 54 P.E. 1916=158 P.W.R. 1916=159 P.L.R. 1916=35 Ind. Cas. 537.

RATTIGAN, J.

(123) S. 134. See No. 47, *supra*.

(124) S. 135—*Surety's liability—Surety discharged by creditor's giving time to principal debtor.* *Maung Po Lu v. J.A. Begbie & Co.*, 8 Bur. L.T. 114=30 Ind. Cas. 637. See Final Part, 1915, Col. 569.

(125) Ss. 135 to 138. See No. 47, *supra*.

(126) S. 139. See Nos. 47, 121, *supra*.

(127) S. 140. See No. 47, *supra*.

(128) Ss. 140, 141, 142, 145, 69, 70—*Negotiable Instrument—Surety—Contract of guarantee—Drawer not party—Dishonour—Payment by surety—Suit on the Negotiable Instrument by surety—Right of the surety same as original creditor—Negotiable Instruments Act, Ss. 30, 74.*

Where a surety to a Negotiable Instrument

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who had become such without the concurrence of the drawer in the contract of guarantee, on being called upon by the holder in due course to pay on account of dishonour by the drawer, paid the amount and took the hundi from him.

Held, he acquired only the rights of an ordinary holder and could recover under S. 140, Contract Act, only subject to the limitations affecting the original creditor under Ss. 30 and 74 of the Negotiable Instruments Act, and not on the implied promise under S. 145, Contract Act. **Muthu Raman Chetty v. Chinna Yellayan Chetty**, 30 M.L.J. 369=19 M.L.T. 278=3 L.W. 393=(1916) M.W.N. 290=39 M. 965=33 Ind. Cas. 508.

ALYING and NAPIER, JJ.

(129) S. 141—Assignment of Jodi—Rights of assignee. See **MAD. ACT II OF 1864 (REVENUE RECOVERY)**, No. 1, 3 L.W. 273.

(130) S. 141. See Nos. 47, 128, *supra*.

(131) S. 142. See Nos. 47, 128, *supra*.

(132) S. 143. See No. 47, *supra*.

(133) S. 144. See No. 47, *supra*.

(134) S. 145. See Nos. 47, 128, *supra*.

(135) Ss. 151, 152 and 154—Deposit of money for safe custody—Deposit by depositée in bank where he had his own money—Failure of Bank—Liability to make good loss.

Plaintiff had deposited certain money with the defendant for safe custody. The defendant put this money into a bank in his own name. The bank having failed, plaintiff sued to recover the money from the defendant. There was no evidence to show that the defendant had any doubt as to the solvency of the bank at the time he made the deposit. His own money was in the same bank. *Held* that the defendant's conduct showed that he took exactly the same care of the plaintiff's money as he did of his own. It could not be said that the defendant used or intended to use the money for his own purposes. Therefore the plaintiff was not entitled to recover the amount from the defendant. **Mussamat Saraswati Kunwar v. Dr. Badri Prasad**, 36 Ind. Cas. 81.

RICHARDS, C.J. and RAFIQUE, J.

(136) S. 152. See No. 135, *supra*.

(137) S. 154. See No. 135, *supra*.

(138) S. 160—Bailment—Return of bailed goods—Liability for refusal to return on expiry of period—Conversion of goods—Measure of damages.

The bailee, or his legal representative after his death is bound to return the goods bailed on expiry of the term of the bailment, and would be liable for conversion of the goods from the time when he refuses to return them on a proper demand by the bailor. An executor so refusing to return would be personally liable for conversion.

In actions for damages for conversion of goods the measure of damages is the value of the goods at the time of conversion, and the bailor is not

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entitled to anything more by way of damages for wrongful use from the date of conversion to the date of the institution of the suit. **Ebrahim Ahmed Mehtar v. Samuel Balthazar**, 9 Bur. L.T. 224=34 Ind. Cas. 297.

FOX, C.J., and TWOMEY, J.

(139) Ss. 172 to 176—'Pledge' of goods—Nature of transaction—How effected—Necessity for endorsement in case of Government securities—Rights of pawnee.

A pawn is not an equitable mortgage. It is a security intermediate between a simple loan and a mortgage which wholly passes the property in the thing conveyed (a).

It is essential to the contract of pawn that the thing pledged should be actually or constructively delivered to the pawnee. The pawnee acquired a special property in the thing pledged and is entitled under S. 176 of the Contract Act either to bring a suit against the owner upon the debt or promise retaining the goods pledged as a collateral security or he may sell the things pledged upon giving reasonable notice of the sale (b). To effect a pledge of Government securities, it is necessary to endorse them, as mere delivery without endorsement gives no property in them for purposes of negotiation or sale. **Lala Joyti Prakash Nande v. Lala Muti Prakash Nande**, 33 Ind. Cas. 891.

CHAUDHURI and NEWBOULD, JJ.

References:—(a) (1876) 4 Ch. D. 605=46 L. J. Ch. 841; (1878) 8 Ch. D. 444=26 W.R. 504; (1885) 30 Ch. D. 396=55 L.J. Ch. 741=53 L. T. 746=34 W.R. 286; (1867) 3 Ex. 299=37 L. J. Ex. 174=18 L.T. 666=17 W.R. 19, R. (b) 22 C. 21 (23); 27 M. 528=13 M.L.J. 445; 19 C. 322=19 I.A. 322, R.

(140) Ss. 173 to 176. See No. 139, *supra*.

(141) S. 178. See Nos. 2, 106, 111, *supra*.

(142) S. 178 and Excep. 1 to S. 108—Scope—Commission agent for sale in possession of jewel—Pledge by him—Suit by owner to recover the jewel or its value from pledgee—Limitation—Rights of pledgee in good faith. See **LIMITATION ACT (1908)**, No. 126, 30 M.L. J. 587.

(143) Ss. 188 and 227—Principal and agent—Liability of principal to pay money borrowed by agent under power of attorney—Actions beyond scope of authority—Rights and liabilities of third persons dealing with agent.

The general rule is that an agent has no authority to borrow money on account of principal so as to render the latter responsible to the lender, unless he has been expressly authorised or it can be proved that the principal has previously sanctioned such a course of dealing on the part of the agent, or has subsequently adopted and ratified the loan.

Where an act is done by an agent holding a power of attorney the propriety of the act has to be judged with reference to the following rules relating to the construction of a power of attorney, viz., 1, the operative part of the deed

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is controlled by the recitals, 2, where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts, and 3, general words do not confer general powers, but are limited to the purpose for which the authority is given, and are construed as enlarging the special powers, when necessary and only when necessary for that purpose. *Bhagwanji v. Ganga*, 36 Ind. Cas. 968.

FAWCETT, A.J.C.

(144) Ss. 196, 216—Mortgage decrees obtained by principal—Execution sale—Purchase by agent on his own account—Rights of principal. See *EXECUTION SALE*, No. 2, 30 M.L.J. 497.

(145) S. 200—Notice to quit given by unauthorised person—Effect of ratification. See *EJECTMENT*, No. 3, 23 O.L.J. 453.

(146) S. 201—Bills sent to agent for collection and remittance to principal—Fiduciary position of agent—Agency when complete—Bankruptcy of agent—Claim for full amount—Maintainability. *Alliance Bank of Simla Ltd. v. Amritsar Bank in Liquidation*, 79 P.R. 1915 = 171 P.W.R. 1915 = 31 Ind. Cas. 215. See *Final Part*, 1915, Col. 570.

(147) S. 216. See No. 144, *supra*.

(148) S. 227. See No. 143, *supra*.

(149) Ss. 230, 236—Liability of broker as principal—Custom and usage of Calcutta Gunny market—Evidence of custom—Admissibility. See *BROKER*, No. 2, 20 C.W.N. 365.

(150) S. 236. See No. 149, *supra*.

(151) S. 241. See *MAHOMEDAN LAW—GUARDIANSHIP*, No. 4, (1916) 2 M.W.N. 341.

(152) S. 247. See No. 68, *supra*.

(153) S. 248—Joint Hindu family—Business started by father alone—Whether son can be adjudicated insolvent for father's debts. See *INSOLVENCY*, No. 3, 20 M.L.T. 565.

(154) Ss. 251 and 263—Partnership—Dissolution—One partner authorised to collect cut-standings and pay debts—Extent of authority—Whether includes power to acknowledge debts. *Muthuswami Nadan v. Sankarlingam Chetty*, 2 L.W. 823 = (1915) M.W.N. 722 = 18 M.L.T. 273 = 30 Ind. Cas. 675. See *Final Part*, 1915, Col. 572.

(155) S. 253, cl. 10—Joint Hindu family carrying on business in partnership—Contract by family if terminates with death of co-parcener—Rule of Hindu Law if to be considered. See *BROKERAGE CONTRACT*, No. 1, 20 C.W.N. 708.

(156) S. 254 (5), (6)—Suit for dissolution of partnership—Jurisdiction. See *PARTNERSHIP*, No. 3, 42 P.R. 1916.

(157) S. 263. See Nos. 50, 154, *supra*.

(158) S. 264—Partnership—Dissolution—Notice public or special—Persons dealing with the firm—Retirement of dormant partners. *Giovani Gorio v. Yallabhdas Kallianji*, 17 Bom. L.R. 762 = 30 Ind. Cas. 864. See *Final Part*, 1915, Col. 573.

Contribution.

(1) *Contribution, suit for—Judgment-debtors jointly liable—One judgment-debtor satisfying whole decree—Rule relating to joint tort-feasors not applicable.*

A brought a suit against B alleging that the latter had adopted his son who subsequently was entitled to the estate left by B's husband. B filed a counter-suit in which she claimed several lakhs of rupees from A and her other brothers as money payable to her by them as messengers of her estate. Both the suits were compromised, and the compromise was embodied in a decree. Under this it was arranged that the brothers would drop the allegation of the adoption by B of A's son and they agreed to pay her a certain sum of money collected by them. Plaintiffs brought the present suit for contribution against the Collector as representing one of their brothers and alleged that they had paid all the money to the decree-holder without the other brother and his sons contributing anything: *Held*, that the decree-holder being entitled to recover the whole decretal amount from any one of the judgment-debtors, *prima facie* he who paid the entire amount was entitled to contribution against the others, unless the latter pleaded and proved special circumstances which would render it inequitable that they should contribute to the satisfaction of the decree.

Quere:—Whether the rule in 8 T.R. 186 applies to India. *Nihal Singh v. The Collector of Bulandshahr*, 14 A.L.J. 275 = 38 A. 237 = 33 Ind. Cas. 165.

RICHARDS, C. J. and RAFIQ, J.

(2) *Contribution suit—Cause of action—Renewal of security by joint-debtor.*

Held, that the mere giving of renewed security as distinguished from cash payment by one of two debtors in discharge of a debt for which two persons are jointly liable, does not give him a cause of action for a contribution suit as against the other debtor. *Jagannath Kuar (Thakurain) v. Sheo Singh*, 19 O.C. 44 = 35 Ind. Cas. 499.

LINDSAY, J.C.

(3) *Suit by two plaintiffs jointly—Entire expenses borne by one plaintiff alone—Right to contribution as against co-plaintiff—S. 70, Contract Act—Applicability.*

Where two plaintiffs join in the institution of a suit and the suit is conducted by one plaintiff alone and the entire expenses of the suit are borne in the first instance by that plaintiff, a suit for contribution by him against the other plaintiff could succeed only upon one or other of three grounds: *first*, that there was an agreement between the two plaintiffs that the expenses should be borne proportionately, or *secondly*, that the plaintiffs had joined in engaging counsel or vakil and that, after the joint engagement of counsel or vakil, the one plaintiff had paid the counsel or vakil on behalf of both or, *thirdly*, under the provisions of S. 70 of the Contract Act, which lays down that, where a person lawfully does anything for another person not intending to do so

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gratuitously and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former. *Umatul Soghra v. Musammatt Bibi Zohra*, 1 Pat. L.J. 201. *

CHAPMAN and ATKINSON, JJ.

- (5) *Contribution against joint debtors—Satisfaction of money decree by execution of a deed of mortgage—Payment, meaning of—Right of contribution against joint debtor through creditor's claim against him dismissed as barred by limitation.*

Where the plaintiff, who was one of several joint executors of a simple deed on the basis of which a decree had been passed against him, satisfied the decree by executing a deed of usufructuary mortgage in favour of the decree-holder and brought a suit for contribution against the other joint executors of the deed, *held*, that the suit was maintainable.

The principle of 106 Eng. Rep., 286 relied in 19 O.C. 44, would not apply to a case such as this where the plaintiff has executed a deed of usufructuary mortgage and has assigned valuable property to the creditor in order that the profits may be enjoyed in lieu of interest and that the property may be held as security for the payment of the debt. *The ratio decidendi* in 106 Eng. Rep. 286, was that the plaintiff had satisfied the debt by giving his individual promise to pay and had parted with nothing and had done nothing more than undertake a fresh obligation.

Held further, that although the suit of the creditor against one of the executors was dismissed as barred by limitation, yet the plaintiff was entitled to claim contribution against his heirs in respect of the amount which he has paid over and above the amount that was due from him. *Muhammad Ramzan Ali Khan v. Muhammad Nasir Khan*, 19 O.C. 347=36 Ind. Cas. 774.

STUART, J.C.

- (6) *Contribution, suit for—Mortgage—Suit for foreclosure—Money paid to the mortgagee in the foreclosure suit—Suit for contribution against defendants on the ground that they held portions of the mortgaged property—Defendants not parties to the foreclosure suit—No liability to contribute—Indian Contract Act (IX of 1872), Ss. 69, 70.*

Plaintiff who had paid the mortgage amount in a foreclosure suit by the mortgagee brought this suit for contribution against the defendants alleging that they were benefited by such payment in respect of portions of the mortgaged property alleged to be with defendants. The defendants were not parties to the mortgagee's foreclosure suit. *Held* that the defendants were not bound by the decree in the foreclosure suit and were under no obligation to pay any money in order to satisfy that decretal debt and so the plaintiff cannot be heard to maintain that he has a right to contribution by reason of the fact that he has paid up any money which the defendants were under a legal obligation to pay. The case cannot possibly fall under the provisions of S. 69 of the Contract Act nor can it be

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brought within the purview of S. 70 for the payment by the plaintiff was made in his own interest and not on behalf of the defendants.

If the properties in the possession of the defendants were part of the mortgaged property, even then, they not having been parties to the foreclosure suit, their right to redeem still exists and they cannot be compelled by a suit for contribution to pay to plaintiff any portion of the money which he paid under the mortgage decree. *Suraj Din v. Wajid Ali*, 34 Ind. Cas. 367.

LINDSAY, J.C.

- (6) Decree—One judgment-debtor paying more than his share—His rights. See CIV. PRO. CODE (1908), No. 139, 34 Ind. Cas. 91.

(6-a) Expenses of litigation—Co-plaintiffs, See CONTRACT ACT, No. 78, 34 Ind. Cas. 54.

(7) Suit for—Second appeal if lies. See CONTRACT ACT, No. 69, 23 C.L.J. 125.

(8) Suit for contribution in respect of costs—Maintainability. See COSTS, No. 4, 18 O.C. 340.

(9) Jurisdiction—Suit for, of revenue. See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 9, 33 Ind. Cas. 721.

(10) Suit for—"Payment"—Starting point of limitation. See LIMITATION ACT (1908), No. 137, 36 Ind. Cas. 392.

(11) Liability of plaintiff and defendant under joint decree—Plaintiff paying and suing defendant for recovery of whole sum—Nature of defence open. See PLEADINGS, No. 5, (1916) 2 M.W.N. 214.

Contributory Negligence.

See DAMAGES, No. 1, 34 Ind. Cas. 273.

Contributory Suit.

Partnership—By one of the partners against another. See PARTNERSHIP, No. 7, 113 P.W. R. 1916.

Conversion.

Suit for damages—Measure of damages. See CONTRACT ACT, No. 138, 9 Bur. L.T. 224=34 Ind. Cas. 297.

Conversion of Goods.

Bailment—Return of bailed goods—Liability for refusal to return on expiry of period—Measure of damages. See CONTRACT ACT, No. 138, 9 Bur. L.T. 224=34 Ind. Cas. 297.

Converts.

Apostasy—Conversion of Hindu to Islam—Effect on co-parcenary—Separation—Suit for share of co-parcenary property—Limitation. See HINDU LAW (JOINT FAMILY), No. 2, 57 P.R. 1916.

Conveyance.

Joint holding—Surrender by one tenant—Deed stamped and registered as—Effect. See LANDLORD AND TENANT, No. 66, 32 Ind. Cas. 282.

Co-operative Bank.

Debt due to a Village Co-operative Bank by one of its members—Successors in-interest, liability of—Village Co-operative Bank, construction of bye-laws of. Village Co-operative Bank, Anguri Bagh Fyzabad v. Kali Din, 18 O.C. 157=31 Ind. Cas. 724. See Final Part, 1915, Col. 576.

Co-owner.

- (1) *Co-owners of the same property—Tenant of one surrendering rights to the other, effect of—Co-owner's right to possession—Whether resistible on the score of tenant's surrender—Landlord and Tenant—Tenant if bound to return possession to his landlord, where landlord is one of two co-owners.*

Where a tenant under one of two co-owners surrenders his rights to the other co-owner, the latter does not thereby become a tenant of the former co-owner liable to pay him rent.

Seemle.—The tenant so surrendering may still be bound to return possession to the co-owner from whom he got it.

One co-owner cannot resist the other co-owner's claim for possession even though he may have got his possession from the other's own tenant. *Kashungam Parambath Parkum Puthiarakkal Etappara Kunhi Kathia v. Kunnammakandiyal Ittanparamban Kunhi Sooppl, 4 L.W. 286.*

SPENCER and KRISHNAN, JJ.

Reference :—16 M.L.J. 351, R.

- (2) *Possession—Co-owner—Co-owner's possession when adverse.*

Possession is never considered adverse if it can be referred to a lawful title (a).

The possession of one of the owners of a property is in law the possession of his co-owner, and nothing short of ouster or something equivalent to ouster can put an end to that possession (b).

Where, however, the possession of both the co-owners of a property was terminated by a hostile third party, who claimed to hold the property adversely to both of them, and one of the co-owners subsequently came into possession of the property under a lease granted by the adverse possessor and continued to do so for more than 12 years :

Held, that the title of the other co-owner to the property was extinguished inasmuch as the possession of the property must be referred to the title which the co-owner acquired under the lease and not to his title as a co-owner of the property (c). *Blaeswar Gangooly v. Bhagabati Charan Banerjee, 24 C.L.J. 38=35 Ind. Cas. 26.*

MOOKERJEE and ROE, JJ.

References :—(a) (1855) 2 K. & J. 79=110 E.R. 107, R. (b) (1912) App. Cas. 280, R. (c) 21 C.L.J. 253, Rel.

- (3) *Parties to suit—Co-owner in sole actual possession, suit by, against trespassers—Specific Relief Act, S. 54—Injunction, suit for—'Real' and 'personal' action—English*

Co-owner—(Concluded).

Law, if applicable to India—Non-joinder of parties—Maintainability of suit—Practice.

A co-owner of immoveable property can maintain a suit for an injunction against intending trespassers without joining the other co-owners as parties, if he was in sole actual possession when the trespass was threatened and when the suit was brought (a).

Per *Sadasiva Aiyar, J.*—(1) An action for injunction is not a 'real' action.

(2) The distinctions between the rules of procedure in 'real' and 'personal' actions which are observed in the English Law should not be imported into India.

(3) The rule of English Law as to the several 'heirs' of a deceased owner taking as one 'heir' is not followed in either the Mahomedan or Hindu systems of law. *Selambayl v. Sangu Pandithan, 3 L.W. 542=35 Ind. Cas. 147.*

SADASIVA AIYAR and BAKEWELL, JJ.

References :—(a) 28 M.L.J. 598, F.; 1 A.L.J. 543, R.

(4) *Possession by—Presumption as to continuance of possession lawful in its inception. See ADVERSE POSSESSION, No. 8, 36 Ind. Cas. 100.*

(5) *Possession of, living jointly. See ADVERSE POSSESSION, No. 8-b, 36 Ind. Cas. 743.*

(6) *Purchase of undivided moiety—Lease executed in respect of other moiety—Defendant in occupation of whole house without paying rent—Suit for possession of plaintiff's moiety and arrears of rent—Limitation. See LIMITATION ACT (1908), No. 178, 39 M. 54.*

(7) *Nature of interest of—Definite shares and separate interest—No joint interest—Possession by one co-owner for benefit of all. See MAHOMEDAN LAW—INHERITANCE, No. 2, 36 Ind. Cas. 100.*

(8) *Redemption by one co-owner—Sale by redeeming co-owner of such property—Suit for redemption by another co-owner—Limitation. See MORTGAGE (REDEMPTION), No. 2, 14 A.L.J. 41.*

(9) *Co-owner's suit for share of profits. See PAUPER APPEAL, No. 1, 9 Bur. L.T. 69.*

Co-parcener.

(1) *Alienee from a—Possession of specific property alienated, suit for, incompetent. See HINDU LAW (ALIENATION), No. 19, 10 S.L.R. 34.*

(2) *Suit for partial partition by alienee from a co-parcener against subsequent alienee from the remaining, does not lie. See HINDU LAW—PARTITION, No. 6, (1916) 2 M.W.N. 156.*

Co-proprietor.

Account, suit for—Principal and agent—Proprietor appointed by a, as common manager for payment of debts on the estate, whether an agent of latter and, on his death, of his sons—Limitation. See ACCOUNTS, No. 4, 20 M.L.T. 430.

Copyright.

- (1) *Member of Board of Studies preparing a list of graduated selections from Persian authors for certain examinations—Approval by Board of Studies—Publishing the same selections—Infringement of copyright.*

A, a member of the Board of Studies of the Allahabad University, prepared at the request of the convener a list of graduated selections from standard Persian authors for the use of candidates for certain examinations of the University. In preparing these lists he spent considerable labour, learning and skill. The Board of Studies after due consideration adopted with slight modifications the selections shown in the list as the subject for those examinations in Persian and published the lists for the information of the public generally and of the candidates concerned specially. Subsequently to this, B, a firm of publishers, compiled books from the original authors according to these lists:—*Held* that A had no copyright in the lists, as by laying the result of his labours before the Board of Studies he placed the lists unreservedly at the disposal of the University authorities. **Muhammad Abdul Jalil v. Ram Dayal**, 14 A.L.J. 724 = 38 A. 484 = 34 Ind. Cas. 357.

PIGGOTT and LINDSAY, JJ.

- (2) *Complaint under, Act — Discharge of accused—Power of High Court to direct further enquiry. See LETTERS PATENT (MADRAS), No. 6, 30 Ind. Cas. 721.*

Copyright Act.

See ACT III OF 1914.

Corporation.

- (1) *Religious Endowments Act, S. 7, Committee appointed under.*

A committee appointed under S. 7 of the Religious Endowments Act is a corporation having a legal entity and is analogous in all respects to every other corporation (a).

If one member of the corporation is dead then the survivors can act until the new member may be appointed. **Syed Muhammad Hassan v. Kazi Nazar Muhammad**, 1 Pat. L.J. 437.

MULLICK and ATKINSON, JJ.

References.—(a) 39 C. 304 ; 22 M. 481, F.

- (2) *Suits by or against—Unincorporated societies or clubs. See CIV. PRO. CODE (1908), No. 304, 9 Bur. L.T. 247.*

(3) *Corporate body—Title to land if passes by admission—Corporation if can retain money or property received under illegal agreement. See CONTRACT, No. 2, 23 C.L.J. 26.*

(4) *Corporations and individuals—Difference in regard to burden of proof. See EVIDENCE ACT, No. 87, 1 Pat. L.J. 168.*

(5) *Or public body having statutory duty to perform—Power of Court to compel its performance. See MANDAMUS, No. 1, 31 M.L.J. 634.*

Co-sharers.

- (1) *Co-owner—Title, denial of—Joint possession—Ouster, what constitutes.*

Where the defendants, who appeared to be co-sharers of the plaintiffs as regards the land in dispute, had all along been denying the title of the plaintiffs, and setting up the interest of a third party, and asserted that they had been in possession of the land under that person:

Held, in a suit for recovery of possession of the land upon declaration of title, that the plaintiffs were entitled to a decree for joint possession (a).

Per Mookerjee, J.—*Prima facie*, co-owners are entitled to hold joint possession of joint property; consequently, if one co-sharer seeks to defeat the claim of another co-sharer to joint possession of joint property, special circumstances must be alleged and established so as to justify exclusive occupation of the joint property by one of the co-owners.

A co-sharer who has been ousted from joint property is entitled to recover joint possession (b).

To constitute ouster a physical eviction is not essential; if a co-owner is in possession on behalf of or under an adverse claimant under such circumstances as to evidence a claim of exclusive right and title and a denial of the right of the other co-owners, there is an ouster in law.

The acceptance by the defendants of a lease of the disputed land from an adverse claimant, and their entry upon the land in assertion of the title so derived from the adverse claimant, should be deemed to be an ouster of their co-sharers, the plaintiffs (c). **Jatindra Nath Ray v. Sahldannessa Khatun**, 24 C.L.J. 165 = 20 C.W.N. 1258 = 35 Ind. Cas. 36.

SANDERSON, C.J. and MOOKERJEE, J.

References.—(a) 18 C. 10 = 17 I.A. 110; 19 C. 253 = 19 I.A. 48; 1 C.L.J. 437 = 32 C. 837, D. (b) 32 C. 897; 21 O.L.J. 253, R. (c) 24 C.L.J. 38, *Rel. on.*

- (2) *Suit for profits against co-sharer who is not Lambardar—Co-sharer's liability to share, his collections not exceeding his own share, with other co-sharers.*

Held, that a co-sharer who is not the Lambardar of the village, being under no obligation towards the other co-sharers to collect the village rent, cannot be made to surrender any portion of the amount he has collected to another co-sharer if his collections do not exceed his own share of the profits. **Kalka Singh v. Rai Jwala Prasad**, 19 O.C. 326.

LINDSAY, J.C.

- (3) *Co-sharer in village—Cultivation of land in patti belonging to others—Adverse possession—If entitled to claim—Cultivating possession—No necessary implication of claim to proprietary right—Non-payment of revenue and non-collection of rent by claimant.*

A co-sharer in a village, cultivating land in a patti belonging to others, for which no rent was paid set up a claim to be proprietor by adverse possession. There was no evidence

Co-sharers—(Continued).

that the plaintiff had ever set up till the time of the plaint, any claim of proprietary right to the land during his period of occupation. Held that the mere cultivation of patti land was consistent with a claim to be a tenant or a proprietor or with the fact of his being a mere squatter; and that as the possession of the land by the plaintiff was not in any way proprietary possession, such as would be evidenced by collection of rent from former tenants or by payment of land-revenue, but only cultivating possession, he could not claim to hold as proprietor by reason of adverse possession after twelve years. **Bhagwan Din v. Shankar Prasad**, 33 Ind. Cas. 161.

HOLMS, S.M.

Reference:—Sel. Dec. No. 3 of 1910, R.

(4) *Separate possession by co-sharers—Result of previous arrangement—Suit for profits by co-sharer—Not maintainable.*

Where the separate possession of kamat lands in a patti by the co-sharers, is the result of a special arrangement arrived at many years ago, no co-sharer is entitled, on the allegation that he is in possession of a smaller area, to sue the other co-sharers, for the profits they receive from the land in their possession in excess of their share. **Baljnath Goenka v. Ajab Lal Jha**, 33 Ind. Cas. 371.

CHAMIER, C.J. and JWALA PRASAD, J.

References:—17 I.A. 110; 25 W.R. 313, R.

(5) *Nature of possession by co-owner—Possession abandoned by one co-owner—Exclusive possession.*

One co-owner is entitled to treat the possession of another co-owner as his own possession unless and until the other co-owner proves that by open assertion and exercise of hostile title he has acquired an indefeasible title to his property.

If there is an abandonment by a co-sharer, then that co-sharer cannot say that other co-sharer who has since abandonment been in actual and exclusive possession of his property did all this in his behalf. **Tomejudd v. Mulai Chowkidar**, 35 Ind. Cas. 72.

CHATTERJEE and NEWBOULD, JJ.

(6) See BEN. ACT VIII OF 1886 (TENANCY), No. 86, 35 Ind. Cas. 584.

(7) With separate account in Collectorate—Continuance as “co-owner”—Appointment of common manager. See BEN. ACT VIII OF 1886 (TENANCY), No. 44-b, 36 Ind. Cas. 448.

(8) See OUDH ACT XXII OF 1886 (RENT), No. 20, 14 A.L.J. 3 (Rev.).

(9) Ejectment—Right of co-sharer to apply for ejectment of tenant. See OUDH ACT XXII OF 1886 (RENT), No. 19, 34 Ind. Cas. 693.

(10) Nature of *sir*, when transferred by gift to one not a. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 6, 31 Ind. Cas. 906.

Co-sharers—(Continued).

(11) Becoming tenant—Assertion of occupancy rights—Estoppel. See U.P. ACT III OF 1901 (LAND REVENUE), No. a, 32 Ind. Cas. 387.

(12) Included members of joint family though their names be not entered in the *khwat*. See U.P. ACT IV OF 1913 (COURT OF WARDS), No. 1, 19 O. C. 306.

(13) Sale of share in undivided immoveable property—Simultaneous bid by—Right of pre-emption. See CIV. PRO. CODE (1908), No. 503, 36 Ind. Cas. 664.

(14) Suit by, against Lambardar for profits—Dismissal of suit for default—Subsequent suit for certain years including years covered by previous suit—Bar to suit. See CIV. PRO. CODE (1908), No. 377, 30 Ind. Cas. 568.

(15) See INHERITANCE, No. 1, 33 Ind. Cas. 330.

(16) Wrongful use of joint land by a sharer—Suit for injunction—Proof. See INJUNCTION, No. 2, 32 Ind. Cas. 690.

(17) Terms of *Kabulyat*—Right to bring suits jointly or separately—Suit by, landlord—Maintainability. See KABULIAT, No. 1, 33 Ind. Cas. 211.

(18) Landlords—Purchase of occupancy holding by one of them—Non-occupancy right—When preserved. See LANDLORD AND TENANT, No. 60, 34 Ind. Cas. 75.

(19) Lease taken from one of several—Right of latter to sue in ejectment. See LANDLORD AND TENANT, No. 59, 34 Ind. Cas. 71.

(20) Notice of ejectment by single, if proper. See LANDLORD AND TENANT, No. 41, 33 Ind. Cas. 215.

(21) Suit for possession by transferee from co-heir not in possession—Suit within 12 years from date of transfer. See LIMITATION, No. 7, 36 Ind. Cas. 100.

(22) Suit by some of the co-sharers of a ferry against the others for their share of profits—Limitation. See LIMITATION ACT (1908), No. 209, 1 Pat. L.J. 69.

(23) Recognition of transfer by one, landlord—Effect—Sub-division of holding. See OCCUPANCY HOLDING, No. 1, 32 Ind. Cas. 577.

(24) Custom—Property to be sold to, first—Informed of sale—Refusal to purchase—Effect of. See PRE-EMPTION, No. 17, 14 A.L.J. 1138.

(25) Decree for foreclosure, pre-emption in respect of—Decree for pre-emption obtained by one, without impleading others equally entitled, effect of—Transfer of property made by decree-holder during pendency of appeal. See PRE-EMPTION, No. 15, 19 O.C. 153.

(26) In the sub-division in which the share sold is situated—Co-sharer in a *shamilat patti* containing some land appertaining to that sub-division. See PRE-EMPTION, No. 20, 19 O.C. 394.

(27) Suit by person who became, after sale, maintainability of—Plaintiff cannot rely on

Co-sharers—(Concluded).

right acquired subsequent to the accrual of cause of action—Oudh Laws Act. See PRE-EMPTION, No. 14, 19 O.C. 110.

(28) Decision of Revenue Court that plaintiff as, not entitled to sue for ejectment—Suit as lambarder. See RES JUDICATA, No. 20, 35 Ind. Cas. 612.

(29) Patnidar agreeing to pay into the Collectorate the amount of revenue payable by the landlords on their account—Suit for apportionment by some of the landlords. See TRANSFER OF PROPERTY ACT, No. 30, 34 Ind. Cas. 409.

Costs.

(1) *Rules of practice—High Court Appellate Side Rules, r. 33. cl. (c)—Batch appeals—Vakil's fee.*

Where a District Judge, in disposing of a batch of Appeals in Summary Suits under the Madras Estates Land Act, fixed the Vakil's fee payable to the successful party in each of the appeals at one rupee, instead of the minimum fee of Rs. 20 prescribed by the rules, held that the direction as to costs could not be supported, as the Court had no power, if it gave costs in each case, to reduce the minimum fee as it did, and that the proper course to be allowed in cases in which a number of appeals had been heard together, involving the same point of law and not requiring separate argument, was to grant the usual costs in first three appeals of the batch and to make each party bear his costs in the other appeals. *Ganiraju v. Narasimha Apparayanlm*, 3 L. W. 249= (1916) M.W.N. 194=33 Ind. Cas. 128.

SESHAGIRI AIYAR and PHILLIPS, JJ.

Reference:—45 Ch. D. 606, 610, F.

(2) *Account, suit for, costs of suit pending reference for account.*

In a suit for accounts whether the defendant resisted plaintiffs' claim for an account, costs were awarded to the plaintiffs up to and including the hearing by the decree directing reference for an account. *J.I.J. Hyam v. Bengal Stone Co., Ltd.*, 20 C.W.N. 368=35 Ind. Cas. 89.

IMAM, J.

(3) *Costs—Taxation of costs—Bill of costs by Government Solicitor—Taxation to be in ordinary way.*

Where, in a suit on the Original Side of the High Court, to which the Secretary of State for India is a party, costs are awarded to him, the Government Solicitor is entitled to have his bill of costs taxed in the ordinary way against the losing party, notwithstanding the fact that the Government Solicitor is a salaried officer of Government. *P. Nusservanji & Co. v. SS. Wartenfels*, 18 Bom. L.R. 118=40 B. 588=39 Ind. Cas. 362.

MACLEOD, J.

(4) *Suit for contribution in respect of costs, maintainability of.*

Held, that a suit for contribution in respect of costs is not maintainable. *Jamshed Ali*

Costs—(Continued).

Khan v. Zabur-ul-Hasan Khan, 18 O.C. 340=33 Ind. Cas. 357.

STUART, A.J.C.

(5) Where the point on which the High Court in second appeal decided the case was not raised in the Courts below, each party was ordered to bear his own costs throughout. *Manjunatha Chetty v. Appaya alias Manuel Souza*, 31 M.L.J. 429=36 Ind. Cas. 988.

SESHAGIRI AIYAR and BAKEWELL, JJ.

(6) *Costs—Proceedings under the Land Acquisition Act—Mode of calculation.*

Costs in claims under Land Acquisition Act I of 1894 should be calculated as in ordinary suits (a). *Daya Nand Anglo-Vedic College Management and Trusts Society v. Secretary of State*, 126 P.R. 1916.

SCOTT SMITH and BROADWAY, JJ.

Reference:—(a) 31 M. 328, R.

(7) *Amendment of plaint of formal nature—Claim of defendant to increased costs.*

Where the amendment of a plaint was purely of a formal nature and the defendant was not prejudiced in any way by the amendment, and his costs were not increased thereby, he was not entitled to costs on the amendment. *Babu Narendra Bahadur v. The Oudh Commercial Bank Limited*, 30 Ind. Cas. 323.

STUART, A.J.C.

(5) *Opposition by vendee to pre-emptor's claim—Decision as to.*

Where a vendee resisted the claim of a pre-emptor on other grounds, besides the inadequacy of the offer, the pre-emptor would be entitled to his costs, though the vendee may get more than that offered to him. *Sham Sundar v. Harabans Singh*, 30 Ind. Cas. 517.

JOHNSTONE and SHAH DIN, JJ.

(9) *Costs—Appeal—Remand of case to lower Court—Direction that 'costs shall abide the result'—Discretion of lower Court—Not affected—'Costs to abide the result'—'Costs to abide and follow the result'—Distinction between the terms. Godavarthi Periah alias Ethirajah v. Godavarthi Lakshmidewamma*, 28 M.L.J. 441=(1915) M.W.N. 330=39 M. 476=29 Ind. Cas. 203. See Final Part, 1915, Col. 582.

(10) *Costs, discretion as to—Account, suit for, against manager—Costs against manager for default or dishonest conduct in accounting—S. 22, Presidency Small Cause Courts Act (XV of 1882). Sukumari Ghosh v. Gopi Mohan Goswami*, 19 C.W.N. 880=43 C. 190=31 Ind. Cas. 662. See Final Part, 1915, Col. 582.

(11) *Withdrawal of suit against some of the defendants after evidence closed—Discretion of the Court to award costs—Whether absolute—Two sets of costs—Power of the Court to award—Civ. Pro. Code, s. 35, O. XXIII, r. (1)—Civil Rules of Practice, rr. 278, 279 and 284. Indoor Subama Reddi v. Nelatur Sundararaja Iyengar*, 18 M.L.T. 460=(1915) M.W.N. 1021=31 Ind. Cas. 312. See Final Part, 1915, Col. 583.

Costs—(Continued).

(12) Granting of costs only discretionary—Order awarding costs if can be interfered with in second appeal. See **APPEAL (GENERAL)**, No. 1, 3 L.W. 109.

(13) Second appeal—Case remitted for rehearing on new case not raised in pleadings—Party at whose instance new issue raised in second appeal must pay costs. See **APPEAL (SECOND APPEAL)**, No. 3, 20 C.W.N. 1245.

(14) Discharge of attorney or solicitor—Lien for costs. See **ATTORNEY AND CLIENT**, No. 2, 20 C.W.N. 437.

(15) Attorney's costs—Charge on infant's property. See **ATTORNEY AND CLIENT**, No. 3, 20 C.W.N. 537.

(15-a) Appeal from conditional order setting aside decrees—Costs not imposed. See **CIV. PRO. CODE (1908)**, No. 390-a, 32 Ind. Cas. 984.

(16) If payable out of trust estate when no cause of action—Findings in the judgment immaterial to the decision, if appealable—S. 115, Civ. Pro. Code, revision under, of decrees for costs. See **CIV. PRO. CODE (1908)**, No. 177, 20 C.W.N. 1354.

(17) Pauper suit—Decree for less amount than claimed—Apportionment of Court-fees and costs. See **CIV. PRO. CODE (1908)**, No. 594, 14 A.L.J. 657.

(18) See **CIV. PRO. CODE (1908)**, No. 699, 156 P.L.R. 1916.

(19) See **CIV. PRO. CODE (1908)**, No. 660, 35 Ind. Cas. 239.

(20) See **CIV. PRO. CODE (1908)**, No. 5, 35 Ind. Cas. 65.

(21) Interest on—Judgment not allowing—Decree if can include. See **CIV. PRO. CODE (1908)**, No. 74, 35 Ind. Cas. 218.

(22) See **CONTRACT ACT**, No. 91, 12 N.L.R. 177.

(23) Institution of suit by several plaintiffs—Expenses borne by one of them—Liability of the other to pay contribution. See **CONTRACT ACT**, No. 78, 34 Ind. Cas. 54.

(24) Delay in bringing the suit—Costs—Adjournment granted on payment of costs—Effect of not paying costs. See **CUSTOMS (PUNJAB—ALIENATION)**, No. 10, 90 P.W.R. 1916.

(25) Cross-appeals decided by one judgment—Second appeal—Omission to file copy of decree in rival appeal—Effect—Costs. See **CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION)**, No. 13, 85 P.W.R. 1916.

(26) See **CUSTOMS (PUNJAB—SUCCESSION)**, No. 2, 100 P.R. 1916.

(27) See **DECLARATORY DECREE**, No. 1, 95 P.R. 1916.

(28) Conditional decrees, execution of—Procedure. See **EXECUTION OF DECREE**, No. 25, 31 Ind. Cas. 564.

(29) Decree for mesne profits and—Separate applications for execution of said reliefs—

Costs—(Concluded).

Continuation of proceedings. See **EXECUTION OF DECREE**, No. 21, 30 Ind. Cas. 13.

(30) Dilatory conduct in appeal to Privy Council. See **HINDU LAW (WIDOW)**, No. 14, 20 M.L.T. 335.

(31) Father's right of guardianship if can be taken away—Divorce suit—Appeal by wife—Adultery admitted—Costs of appeal. See **HUSBAND AND WIFE**, No. 1, 24 C.L.J. 226.

(32) Practice—Original Side—Fees paid to advocate who was instructed by vakil—Whether can be allowed as costs. See **LETTERS PATENT (MADRAS)**, No. 3, 30 M.L.J. 120.

(33) Mortgage—Parties—Person claiming title paramount impleaded—Objection raised first in second appeal. See **MORTGAGE (GENERAL)**, No. 53, 32 Ind. Cas. 358.

(34) Partition—Joint family property—Suit for partial partition, if maintainable—Plaintiff to be given option of amending the plaint, on part decreed. See **PARTITION**, No. 9, 156 P.W.R. 1916.

(35) Costs—Interference by appellate Court. See **SPECIFIC PERFORMANCE**, No. 4, 23 C.L.J. 606.

(36) Improvement by mortgagees—Intention to add, to mortgage-money. See **TRANSFER OF PROPERTY ACT**, No. 100, 30 Ind. Cas. 234.

(37) Mortgage suits—Award of, principles regarding. See **TRANSFER OF PROPERTY ACT**, No. 113, 34 Ind. Cas. 690.

(38) See **WILL**, No. 18, 32 Ind. Cas. 267.

Co-trustees.

Survival of trust to—Instrument of trust vesting management of temple in five trustees—Suit by four and death of one of them pending appeal—Effect. See **TRUST ACT**, No. 6, 32 Ind. Cas. 97.

Counsel.

(1) Conduct of counsel, in the matter of cross-examination of witnesses examined on commission, commented upon. **Bagar Mirza v. Mehdi Hasan**, 19 O.O. 246.

LINDSAY, J.C. and KENDALL, A.J.C.

Court.

(1) *Land Acquisition Act*, Ss. 18, 19—Collector exercising powers under—Subordinate Court.

The Land Acquisition Collector exercising his power under Ss. 18 and 19 of the Land Acquisition Act is not a Court and is certainly not a subordinate Court. **Beet and Company, Ltd. v. The Deputy Collector of Madras**, (1916) 2 M.W.N. 348 = 20 M.L.T. 388 = 4 L.W. 535 = 36 Ind. Cas. 621.

ABDUR RAHIM, O.C.J. and SESHAGIRI IYER, J.

(2) Court—Order properly made—Power to set aside. See **ACT III of 1907 (PROVINCIAL INSOLVENCY)**, No. 59, 9 S.L.R. 132.

(3) Special tribunal constituted under Act V of 1911 whether 'Court'—Power of Court to call

Court—(Concluded).

for records of other Courts. See BEN. ACT V OF 1911 (CALCUTTA IMPROVEMENT), No. 2, 20 C.W.N. 360.

(4) Duty of Court to guard against its order prejudicing party not before the Court. See CIV. PRO. CODE (1908), No. 460, 20 C.W.N. 188.

(5) Practice—Taking up big original suits after 5-30 P.M.—Prejudice—Interference in second appeal. See CIV. PRO. CODE (1908), No. 191, 3 L.W. 368.

(6) Court if should take notice of matters which come into existence after suit. See PRE-EMPTION, No. 9, 20 C.W.N. 1099.

Court-fees.

(1) *Memorandum of appeal—Decree creating charge over property for decretal amount—Appeal—Prayer for release of the property from the charge—Court-fee—Ad valorem fee payable.*

Where the appellants in a second appeal seek among other reliefs, to have their property released from the liability to pay the decretal amount which was made realizable out of their property.

Held that the memorandum of appeal should, as far as this relief is concerned, bear an *ad valorem* Court-fee and not merely a ten-rupee stamp. *Tharu Mal v. Chandu Ram*, 11 P. R. 1916=69 P.W.R. 1916=33 Ind. Cas. 138.

SHAH DIN and LE ROSSIGNOL, JJ.

References:—10 M. 187; 30 M. 96, R.

(2) *Court Fees Act (VII of 1870), S. 7 (iv) (f) —Administration suit, nature of—Valuation for jurisdiction.*

An administration suit by a creditor is an action for an account within the meaning of S. 7 (iv) (f) of the Court Fees Act. In such a suit, the plaintiff is entitled to place his own valuation on the relief claimed and the valuation for purposes of jurisdiction is identical with the valuation for purposes of Court-fees (a).

An administration suit is in essence for an account and application of the estate of the debtor for the satisfaction of the dues of all the creditors; the whole administration and settlement of the estate are assumed by the Court, the assets are marshalled, and the decree is made for the benefit of all the creditors other than the plaintiff, may come in under the decree and prove their debts and obtain satisfaction of their demands, equally with the plaintiff in the suit, and, under such circumstances, they are treated as parties to the suit. If they decline so to come in, they will be excluded from the benefit of the decree, and yet they will, from necessity, be considered as bound by the acts done under the authority of the Court. Creditors, who have obtained decrees on their claims, should not be formally joined as plaintiffs, unless, it was alleged and proved that their interests would be in serious jeopardy, if the plaintiff had the conduct of the proceedings (b).

But where one creditor sues on behalf of himself and the others for administration of

Court-fees—(Continued).

the estate of the debtor, the defendant may, at any time before judgment, have the action dismissed on payment of the plaintiff's debt and all the costs of the action (c). *Sast Bhushan Bose v. Maharaja Sir Menendra Chandra Nandy*, 24 C.L.J. 448=21 C.W.N. 310.

MUKERJEE and CUMING, JJ.

References:—(a) 39 B. 545=17 Bom. L. R. 574; 4 L.B.R. 279, R. (b) 34 B. 420=11 Bom. L.R. 1054, R. (c) (1838) 1 Beav. 316; (1840) 2 Beav. 2; (1844), 14 Sim. 353 R.

(3) *Suit for declaration that certain ex parte decrees is invalid—Court-fees.*

For fixing the Court-fee payable in a suit the Court has to look at the nature of the relief claimed and, for that purpose it must look at the allegations that are contained in the plaint.

To a suit for declaration that a certain *ex parte* decree declaring that certain alienations were invalid and not binding on the plaintiff a Court-fee of Rs. 10 only is payable. *Bagala Suudarl Dehl v. Prosanna Nath Mukerjee*, 35 Ind. Cas. 797.

FLETCHER and TEUNON, JJ.

Reference:—(a) 30 C. 788, F.

(4) *Redemption of mortgage—Appeal from decree of lower Court—Stamp-duty payable on memorandum of appeal.*

Where, in an appeal from a mortgage decree, the appellant seeks to establish that he is not liable to pay the money which has been adjudged by the lower Court to be due on the mortgage, he is liable to pay a Court-fee on the amount of the subject-matter in dispute in the appeal. *Mardan Singh v. Sheoraj Narain Singh*, 30 Ind. Cas. 322.

LINDSAY, J.C. and KANHAIYA, LAL, A.J.C.

References:—9 O.C. 153; 29 A. 471=A.W. N. (1907) 133=4 A.L.J. 375; 17 Ind. Cas. 442=12 M.L.T. 493, R.

(5) *Appeal—Payment on valuation by lower Court.* See APPEAL (GENERAL), No. 14, 30 Ind. Cas. 379.

(6) *In partition suit.* See BUDDHIST LAW (INHERITANCE), No. 4, 9 Bur. L.T. 97.

(7) See CIV. PRO. CODE (1908), No. 234-a, 36 Ind. Cas. 831.

(8) O. XXXIV, r. 6, Civ. Pro. Code—Decree under appeal—*Ad valorem* Court-fee. See CIV. PRO. CODE (1908), No. 611, 14 A.L.J. 328.

(9) *Deficiency of—Court's discretion under Ss. 148, 149, Civ. Pro. Code, if may be challenged in appeal.* See CIV. PRO. CODE (1908), No. 275, 24 C.L.J. 88.

(10) *Pauper suit—Decree for less amount than claimed—Apportionment of Court-fees and costs.* See CIV. PRO. CODE (1908), No. 594, 14 A.L.J. 657.

(11) *Suit instituted on insufficient, on last day of limitation—Balance made up after expiration of period of limitation—Suit not barred.* See LIMITATION, No. 2, 1 Pat. L.J. 420.

Court-fees—(Concluded).

(12) See PAUPER APPEAL, No. 1, 9 Bur. L. T. 69.

Court Fees Act.

(1) Appeal against preliminary decrees only although final decrees could be appealed against in time—Avoidance of payment of Court-fees—Effect. See CIV. PRO. CODE (1908), No. 185, 18 Bom. L.R. 76.

(2) S. 5—Levy of additional Court-fees after decision of case whether allowable. See INSURANCE, No. 2, 9 Bur. L.T. 43.

(3) S. 6 (iv) (c) & (v)—*Suit for declaration of invalidity of, certain transactions—Prayer for appointment of Receiver—Right of plaintiff to give his own valuation.*

In a suit by reversioner for a declaration that certain alienations were not binding on him and for the appointment of a Receiver, so far as the relief for declaration is concerned the plaintiff is entitled to value the reliefs sought by him and pay *ad valorem* duty on the value of the reliefs as fixed by him in his plaint (a).

As regards the prayer for a Receiver, *ad valorem* Court fee is payable, because the relief by way of appointment of Receiver is a consequential relief but the plaintiff is entitled to value the relief at his option. The relief need not be valued on the value of the property in respect of which the relief is sought. **Dodda Sannekappa v. Sakravva**, 36 Ind. Cas. 831.

SRINIVASA AYYANGAR, J.

References:—(a) 28 Ind. Cas. 79=38 M. 922=28 M.L.J. 118=(1915) M.W.N. 118=17 M. L.T. 154, F.

(4) S. 7 Cl. (iv)—*Suit for accounts—Preliminary decree—Appeal by defendant against the whole decree—Defendant whether bound by valuation in plaint.*

In a suit coming under cl. iv of S. 7 of the Court Fees Act, when the plaintiff has valued the relief prayed for and obtained a decree, in this instance a preliminary decree for an account, and the defendant appeals against the whole decree, he is bound by the valuation in the plaint. **Srinivasa Charlu v. Perindevam-ma**, 30 M.L.J. 402=39 M. 725 (F.B.)=33 Ind. Cas. 604.

WALLIS, C.J., SADASIVA AIYAR and SRINIVASA AYYANGAR, JJ.

References:—23 M. 490, Appr.; 15 B.L.R. 173; 13 C.W.N. 815, R.

(5) S. 7, cl. 4 (c)—*Act VII of 1887 (Suits Valuation), S. 8—Relief sought not valued in plaint—Court-fee—Civ. Pro. Code (1908), O. VII, r. 11, cl. (c).*

If the plaint in a suit under S. 7, cl. 4 (c) of the Court Fees Act, 1870, contains no valuation of the relief sought but states a valuation for purposes of jurisdiction the value for the computation of the Court-fees and the value for the purposes of jurisdiction are to be the same, unless the plaintiff with the leave of the Court amends the plaint. **Krishna Kumar Ray v. Chandra Kanta Mitra**, 31 Ind. Cas. 807.

RICHARDSON and IMAM, JJ.

Court Fees Act—(Continued).

(6) S. 7 (iv) (c)—Will—Death of testator—Subsequent suit for mere declaration that will is null and void—Maintainability—Prayer for cancellation essential—Court-fee payable. See SPECIFIC RELIEF ACT, No. 25, 87 P.R. 1916.

(6-a) S. 7, cl. (iv). See No. 33, *infra*.

(7) S. 7 (4), (c), Sch. II, Art. 17 (c)—*Suit for cancellation of document—Court-fee.*

Where a person states in his plaint that he believed he was signing a conveyance of certain property as a witness, that he subsequently found that he was represented in the document as the vendor and his signature was that of a vendor and not that of a witness and he prays for cancellation of the document, held, the prayer was for consequential relief and the plaint should be stamped *ad valorem* according to the value of the subject-matter. **Nga Ohit Wat v. Kwanan**, U.B.R. (1915), 4th Qr., p. 102=33 Ind. Cas. 624.

SAUNDERS, J.C.

References:—109 P.R. 1893, D.; 2 L.B.R. 266, R.

(8) S. 7—*Para iv, cls. (c) and (d)—Suit for declaration of title—Suit land being portion of land claimed by defendant—Defendant's claim under Miraspatta—Valuation of suit.*

Where in a suit for declaration of title and injunction the defendant set up title under a Miraspatta, which comprised the suit land and some other lands, the valuation of the suit for the purpose of jurisdiction should be on the market value of the land actually in suit and not the market value of the whole area comprised in the Miraspatta, though a decision in favour of the plaintiff would have the effect of setting aside the Miraspatta as a whole. **Sarat Chandra Basu v. Sreemati Swarnomoye Ghose**, 36 Ind. Cas. 615.

TEUNON and SMITHER, JJ.

References:—30 Ind. Cas. 111=42 C. 370=19 C.W.N. 895; 35 C. 202=12 C.W.N. 169=35 I.A. 22=1 C.L.J. 36=5 A.L.J. 10=17 M.L.J. 618=2 M.L.T. 506=10 Bur. L.R. 1=14 Bur. L.R. 41; 32 C. 734=9 C.W.N. 690; 11 C.W.N. 705=6 C.L.J. 427, R.

(9) S. 7 (iv) (f)—Administration suit, nature of—Valuation for jurisdiction. See COURT-FEES, No. 2, 24 C.L.J. 448.

(10) S. 7 (iv), Sch. I, Art. 1—Valuation of appeal. See CUSTOMS (PUNJAB—ALIENATION), No. 1, 16 P.W.R. 1916.

(11) S. 7 (v) (a) (b) (c) and (e)—*Meaning of 'garden'—Plot of land with coconut trees whether a 'garden'—Question of fact—Discretion of Court—Interference in revision while other remedy is open.* **Abdul Rahim Sahib v. Kullappa Gownden**, 18 M.L.T. 243=30 Ind. Cas. 845. See Final Part, 1915, Col. 591.

(12) S. 7, sub-S. v. (a), (b) and (d)—*Court-fees—Meaning of "separately assessed" and "definite share."*

In a suit to recover possession of specific plots of land which did not constitute any definite fraction of a distinct revenue-paying area

Court Fees Act—(Continued).

were not themselves separately assessed to revenue, it was held that the Court-fee should be paid on the market value of the land in suit, and not on the system of multiplying the Government revenue. **Godavarthi Mangamma v. Godavarthi Sundaramma**, 19 M.L.T. 266 = (1916) M.W.N. 325 = 33 Ind. Cas. 683.

COUTTS-TROTTER, J.

- (13) S. 7 (5), (10)—*Vendor and purchaser—Contract of sale—Suit for specific performance of contract.*

Where a suit is in substance and in form one for specific performance of a contract of sale, the Court-fees must be paid in accordance with S. 7, cl. 10 of the Court Fees Act. **Nehal Singh v. Sewa Ram**, 14 A.L.J. 434 = 38 A. 292 = 35 Ind. Cas. 275.

TUDBALL, J.

(14) *As amended by Act VI of 1905, S. 7, cl. 21 (cc)—Landlord and Tenant—Ejection, suit in—Jurisdiction, valuation for purposes of—Suits Valuation Act (VII of 1887), S. 8, whether applicable—Madras Civil Courts Act (III of 1873), S. 11, whether impliedly repealed by Act VI of 1905.* **Narayanaaswami Naidu v. Seshagiri Rao**, 2 L.W. 1031 = 18 M.L.T. 598 = 29 M.L.J. 572 = 31 Ind. Cas. 101 = 39 M. 873. See Final Part, 1915, Col. 588.

- (15) S. 12, Para ii, Sch. I, Art. I—*Plea of set-off—No payment of ad valorem duty—Power of Court to make order for payment of additional fee in such case.*

Where a written statement pleaded a set-off within the meaning of Art. I, Sch. I of the Court Fees Act and omitted to pay the requisite Court-fees, the Court can neither go into the question of set-off nor make an order for payment of additional Court-fees, as no fee at all had been paid. **Muthu Erulappa Pillai v. Yunuku Thathayya Maistry**, 36 Ind. Cas. 957.

FOX, C.J., and TWOMEY, J.

- (16) S. 13—*Case remanded on appeal as against some respondents—Refund of fee.*

S. 13 of the Court Fees Act refers to cases where a decree in favour of the respondents, (i.e., all the respondents where there are more than one) is set aside, and the case is sent back "for a second decision." The proviso refers to cases where the decision in favour of the respondents is set aside *qua* a portion only of the subject-matter of the suit, but in either case the decree appealed against must be set aside *qua* all the respondents.

Consequently where the decree of the lower Court was set aside as against some of the respondents, and left standing as against the others and the case was remanded in appeal for a second decision, held that the successful appellant was not entitled to a certificate mentioned in S. 13 of the Court Fees Act. *In the matter of Bhagwani*, 14 A.L.J. 671.

SUNDER LAL, J.

(17) S. 13—*Remand—Court-fee when to be refunded.* See CIV. PRO. CODE (1908), No. 655, 12 N.L.R. 126.

Court Fees Act—(Continued).

(18) S. 15—*Refund of Court-fee.* See CIV. PRO. CODE (1908), No. 289, 73 P.L.R. 1916.

- (19) S. 17—*Suit for ejectment and for damages for use and occupation—Suit after termination of tenancy—Claim whether for distinct subjects.*

A claim for possession and for damages for use and occupation after the tenancy has been terminated are not distinct subjects within the meaning of S. 17 of the Court Fees Act, because such claims should properly be included in one suit. But the claim for rent due is however a distinct subject, because a separate suit can be brought for that. It is a subject which arises out of a contract of tenancy, whereas the claim for possession and damages or mesne profits arises out of the tenancy having come to an end and the defendant wrongfully remaining in occupation. *In the matter of A. W. Jamal v. F. Cyril Brown*, 36 Ind. Cas. 883.

FOX, C.J., ORMOND and TWOMEY, JJ.

(20) S. 17—*Cash credit account—Guarantors to the extent of Rs. 25,000. In re Bank of Bengal v. R.M.M.L. Muthia Chetty*, 8 Bur. L. T. 217 = 8 L.B.R. 219 = 30 Ind. Cas. 705 (F.B.). See Final Part, 1915, Col. 592.

(21) S. 13-C—*Succession duty—"Full fee chargeable under this Act"—"Under this Act"—"Under the same Act"—Full fee paid—Estate not fully administered—Grant durante minore aetate—Second application for probate—Rate of fee, change of, in the interim—Duty, difference of, if to be paid—Appeal, if lies—Probate and Administration Act (V of 1881), S. 86.* **Swarnamayi Debi v. Secretary of State**, 22 C.L.J. 370 = 20 C.W.N. 472 = 30 Ind. Cas. 394 = 43 C. 625. See Final Part, 1915, Col. 593.

(22) Ss. 19-E, 19-G, 19-J—*Penalty—Suit for recovery, if maintainable—Civil Court, if can review revenue Court's decision—Revenue Court's order ultra vires.* **Nikunjarani Chaudharani v. Secretary of State**, 22 C.L.J. 375 = 20 C.W.N. 504 = 43 C. 230 = 31 Ind. Cas. 460. See Final Part, 1915, Col. 594.

(23) S. 19-G. See No. 22, *supra*.

(24) S. 19-J. See No. 22, *supra*.

(25) Sch. I, Art. 1. See Nos. 10, 15, *supra*.

(26) Sch. I, Art. 1, Sch. II, Art. 11—*Decree against a firm—Order refusing execution as against an alleged partner—Appeal—Court fee payable.*

Where a decree is obtained against a firm and execution is refused as against an alleged partner the Court-fee payable on appeal from the order refusing execution is regulated by Art. 1, Sch. I of the Court Fees Act. Art. 11, Sch. II of the Act, does not apply and the Court fee should be *ad valorem*. **Vallappa Chetty v. Rungaswamy Nalcker**, 8 L.B.R. 300 = 35 Ind. Cas. 429.

ORMOND and TWOMEY, JJ.

(27) Sch. I, Art. 11—*"Amount or value of the property"—Net value. In the goods of*

Court Fees Act—(Concluded).

G.A. Qulnngborough, 22 O. L. J. 160=20 C. W.N. 591=30 Ind. Cas. 958. See Final Part, 1915, Col. 595.

(28) Sch. I, Art. 12. See SUCCESSION CERTIFICATE ACT, No. 11, 20 C.W.N. 1125.

(29) Sch. II, Art. 11. See No. 26, *supra*.

(30) Sch. II, Art. 12—*Caveat, what is a—Probate proceeding—Persons upon whom citations issued, preferring objections—Objections if must be stamped as caveat.*

A petition by which a party upon whom citation has been issued opposes the grant of probate is not a caveat and need not be stamped as such.

A caveat, which is in the nature of a precautionary measure intended to assure that there shall be no proceeding in the matter of the estate of the deceased without notice to the person who files a caveat, is not necessary where persons interested in the estate of the deceased appear upon citation **Bhabatarini Debi v. Hari Charan Banerjee**, 20 C.W.N. 787=36 Ind. Cas. 38.

TRUNON and CHAUDHURI, JJ.

(31) Sch. II, Art. 17 (vi)—Prayer for setting aside award—Valuation—Court-fee. See AWARD, No. 9, 106 P.W.R. 1916.

(32) Sch. II, Art. 17. See No. 7, *supra*.

(33) Sch. II, Art. 17 (vi) and S. 7 (iv) (b)—Plaintiff in possession of property sought to be divided—Partition suit—Court-fee. See PARTITION, No. 2, 61 P.L.R. 1916.

Court of Wards.

(1) Power of Court of Wards to execute promissory note—Power to acknowledge debt—S. 19, Limitation Act (1908). See BEN. ACT IX OF 1879 (COURT OF WARDS), No. 4, 43 C. 211.

(2) Manager's power to remit interest on arrears of rent. See MAD. ACT I OF 1902 (COURT OF WARDS), 31 Ind. Cas. 468.

Court of Wards Act.

See BEN. ACT IX OF 1879.

See BOM. ACT I OF 1905.

See MAD. ACT I OF 1902.

See U.P. ACT III OF 1899.

See U.P. ACT IV OF 1912.

See PUN. ACT II OF 1903.

Courts Act.

See PUN. ACT III OF 1914.

Courts Amendment Act.

See PUN. ACT I OF 1912.

Courts (Chief) Act.

See PUN. ACT XXIII OF 1865.

Covenant for Title.

Lands situated in the mofussil—Exchange effected before the Transfer of Property Act—Warranty of title—Breach—Damages. See EXCHANGE, No. 1, 31 M.L.J. 380.

Covenant to Pay.

Mortgage or charge, whether can be implied. See CONSTRUCTION OF DEEDS, No. 1, (1916) 2 M.W.N. 263.

Creditor.

Probate proceeding—Right of, to come in such proceedings. See WILL, No. 16, 30 Ind. Cas. 538.

Crim. Pro. Code.

(1) S. 88—Absconding Hindu co-parcener—Joint family property—Attachment of a share—Validity and effect—Rights of Government and of after-born sons of absconder. See HINDU LAW (JOINT FAMILY), Nos. 4 and 3, 20 M.L.T. 58 and 60.

(2) S. 98. See PUN. ACT III OF 1914 (COURTS), No. 5, 109 P.W.R. 1916.

(3) S. 144—Order under, if bars prior suit for confirmation of possession. See CIV. PRO. CODE (1908), No. 149, 3 L.W. 233.

(4) S. 195—Application for sanction dismissed by Presidency Small Cause Court—Revisional powers of High Court. See SANCTION TO PROSECUTE, No. 1, 33 C. 597.

(4-a) S. 195. See No. 10, *infra*.

(5) S. 195, cls. (6) and (7) (c)—Order by District Munsiff as Small Cause Court—Subordination to District Judge.

Where an order was passed under S. 195, cl. 7 (c) Crim. Pro. Code, by a District Munsiff acting as a Small Cause Court, the District Judge has jurisdiction to interfere with the order. *In re Appavu Kavundan*, 36 Ind. Cas. 878.

SADASIVA AIYAR and NAPIER, JJ.

References:—12 Ind. Cas. 521=36 M. 198=10 M.L.T. 278=(1911) 2 M.W.N. 259=12 Cr.L.J. 545=21 M.L.J. 1074, F.; 13 Ind. Cas. 284=9 A.L.J. 124=13 Cr. L.J. 44=34 A. 197; 34 Ind. Cas. 320=17 Cr. L.J. 208, dissented from.

(6) S. 386—Moveable property, what is—"Distress," how affects the meaning of moveable property—Debt, if moveable property—Penal section to be strictly construed.

The word "distress" occurring in S. 386 of the Crim. Pro. Code is ordinarily used with reference to tangible moveable property which does not include mere debts or choses-in-action though it may include negotiable instruments, bonds or title deeds.

The provisions of S. 386, Crim. Pro. Code, being penal in character must be strictly construed and, therefore, the term 'moveable property' which is the subject of distress and sale signifies only tangible or corporeal moveable property. *The Secretary of State for India v. Sengammal*, 4 L.W. 613=(1917) M.W.N. 105=36 Ind. Cas. 833.

AYLING and SRINIVASA AIYANGAR, JJ.

(6-a) S. 439. See No. 11, *infra*.

(7) S. 476—Offence not mentioned in S. 195—Preliminary enquiry, necessity of—Indian Penal Code (Act XLV of 1860), S. 225-B.

Where it was reported to a Munsiff that the

Crim. Pro. Code—(Continued).

accused persons had endeavoured to rescue the judgment-debtor in a certain case tried by the Munsif from the custody of the execution peon and the Munsif purporting to act under S. 476, Crim. Pro. Code, made an order sending up the accused to the Magistrate for trial under S. 225-B, I.P.C.

Held—That the order made was bad for two reasons, viz., that the offence under S. 245-B is not one of the offences mentioned in S. 195, Crim. Pro. Code, and that the order was made without making any preliminary enquiry.

That there may be cases where no preliminary enquiry is necessary, for example, in a case where the Judge is trying the case and all the facts which are material to the charge have been brought to the notice of the Judge or have come out during the course of the hearing of the case and the Judge is already in possession of all the material facts on which it is necessary for him to form the judgment. But in a case like the present when the incident took place outside the Court and as to which the Judge himself could have no knowledge and as to which evidence must be called for, unless the Court holds such a preliminary enquiry as may be necessary to enable him to determine whether or not there is any case fit to be sent to the Magistrate, it has no jurisdiction to send the accused under S. 476, Crim. Pro. Code. **Tarak Das Moltra v. The King-Emperor**, 21 C.W.N. 125.

SANDERSON, C.J. and WALMSLEY, J.

- (8) S. 476—*Small Cause Court—Refusal to initiate criminal proceedings—Decree-holder's locus standi to question the order—Revision.*

Held, that a decree-holder has no *locus standi* to apply for revision of an order of the Judge of Small Cause Court, refusing to invoke the aid of Criminal Court in the matter of an alleged assault upon process servers of the Court made in the course of their executing the decree by attachment of the judgment-debtor's property. **Madam Feodore v. Miss A. Des Brosses**, 19 O.C. 91=36 Ind. Jas. 835.

STUART, J.C.

- (9) S. 476—*Whether controlled by S. 195, Crim. Pro. Code—Execution proceedings—Forgery suspected as regards promissory notes forming consideration for a sale deed on which a claim was based—Proceedings initiated under S. 476, Crim. Pro. Code, against the executant and witnesses of the promissory notes—Legality of the proceedings.* **Kalluru Ramalingam v. Thupili Subbaramayya**, 2 L.W. 1135=18 M. L.T. 488=16 Cr. L.J. 797=31 Ind. Cas. 653=40 M. 100. See Final Part, 1915, Col. 597.

- (10) Ss. 476, 195—*Ex parte decree—Transfer to another Court for execution—Arrest of defendant—Suit by latter to set aside an ex parte decree on the ground of fraud—Decree ex parte set aside—Application for sanction to prosecute—Refusal of sanction by original*

Crim. Pro. Code—(Concluded).

Court—Appeal—Sanction granted by appellate Court—Legality.

L having obtained an *ex parte* decree against B, caused the decree to be transferred to the Chapra District for execution, and in execution, B was actually arrested in the Chapra District. B instituted a suit to set aside the decrees on the ground that it was obtained by fraud and had the same set aside by decree in June 1914 obtained in his suit. B filed an application for sanction to prosecute L and others who helped him in various ways in his false suit. The Munsif dismissed the application, but on appeal the District Judge directed the prosecution of L and others.

Held that under S. 476, Crim. Pro. Code, the District Judge was authorised to direct the prosecution and to send the case for inquiry or trial to the nearest First Class Magistrate, because certain offences referred to under S. 195, Crim. Pro. Code, were brought to his notice in the course of a judicial proceeding (a). **Lachmi Singh v. Brijmohan Lal**, 1 Pat. L.J. 586.

CHAMBERLAIN, C.J. and SHARFUDDIN, J.

References :—(a) 1 Pat. L.J. 206, *Dist.*, and 1 Pat. L.J. 298, *Ref. to*.

- (11) Ss. 476, 439—*Civil Court taking action under S. 476, Crim. Pro. Code—Interference of High Court in revision under S. 439, Crim. Pro. Code—Legality—High Court's interference under S. 115, Civ. Pro. Code, when justifiable—Sanction to prosecute—Whether notice necessary.* See **SANCTION TO PROSECUTE**, No. 3, U.B.R. (1915), 3rd Qr., p. 83.

Criminal Proceedings.

- (1) *Small Cause Court—Refusal to initiate—Decree-holder's locus standi to question the order—Revision.* See **CRIM. PRO. CODE**, No. 8, 19 O.C. 91.

- (2) *Judgment in, when admissible.* See **LANDLORD AND TENANT**, No. 14, 23 C.L.J. 563.

Criminal Prosecution.

Stifling of—Money paid in consideration of—Money otherwise due—Suit for recovery of—Right of defendant to retain such money—When exists. See **CONTRACT ACT**, No. 12, 31 M.L.J. 264.

Cross-decrees.

Set-off when permissible. See **CIV. PRO. CODE** (1908), No. 442, 14 A.L.J. 776.

Cross-examination.

- (1) *Conduct of counsel, in the matter of cross-examination of witnesses examined on commission, commented upon.* **Baqar Mirza v. Mehdi Hasan**, 19 O.C. 246.

LINDSAY, J.C. and KENDALL, A.J.C.

Cross-objections.

- (1) *Appeal dismissed as time-barred—Memo of cross-objections if can be heard.* See **APPEAL (GENERAL)**, No. 1, 8 L.W. 109.

Cross-objections—(Concluded).

(2) One respondent if can urge cross-objection against another respondent. See **CONTRACT**, No. 2, 23 C.L.J. 26.

Crown.

(1) Right of, to sue—Obligation to be sued—Duty of, to ascertain and obey law. See **INJUNCTION**, No. 1, 20 C.W.N. 457.

(2) Island arising in the sea within territorial limits—Title in—Crown opposed by squatters—Crown if must prove that squatters had not acquired title by adverse possession—*Onus*. See **LIMITATION ACT** (1908), No. 269, 31 M.L.J. 324.

Crown Grants.

Construction—Rules of interpretation—Inam—Enfranchisement, effect of—Seigniorage—Right of the Government to levy—Position of the Inamdar same as Zamindar under—Permanent Settlement—Inamdar not a permanent lessee under Government—Ryotwari tenant's position different from Inamdar's—Mad. Acts IV of 1862 and VIII of 1869.

The respondent was an Inamdar holding under a grant from the Nawab of Carnatic dated 1750 which recited that "a perpetual shrotriam was granted," and that the grantee was "to appropriate to his own use, the produce of the seasons, etc." The Inam village was enfranchised in July 1865. Since enfranchisement Government had acquired certain lands in the village from the respondents under the Land Acquisition Act and paid them compensation. It had also purchased stones quarried in the village from the respondents. In the earlier years the Board of Revenue had also declared that the Government had no right to any royalty from the Inamdars. In 1907 the Government claimed and levied seigniorage fee on the stones quarried from the lands of the respondents at a particular rate.

Held, that the grant conveyed all that the grantor had in the soil and that the Government did not acquire any new rights by enfranchisement; on the other hand the Government in enfranchising reserved only a right to quit-rent and parted completely with the freehold in the property.

Held also, that the purchase of stones, the grant of compensation and the earlier declarations by the Board of Revenue, though they did not estop the Government from setting up the present claim for seigniorage, were evidence against that claim.

The ordinary rule in construing the words of a grant is that the same principles of common sense and justice must apply whoever may be the grantor. But where the words are not sufficiently clear to gather the intention of the grant, then the doctrine "that if the King's grant can endure to two intents it shall be taken to the intent that makes most for the king's benefit" applies. Therefore the primary duty of the Court is to try to give a meaning to the document evidencing the grant and to see whether by itself it is not self-contained and plain.

Crown Grants—(Concluded).

In the present case as the grant was unambiguous and clear the ordinary rule of construction applied.

The Inamdar in this Presidency is in the same position as a zamindar who obtained his *sunnad* by the Permanent Settlement. His position is not the same as that of a ryotwari tenant nor is he a permanent lessee from the Government. **Secretary of State v. Srinivasa Charlar**, 31 M.L.J. 483=20 M.L.T. 323=5 L.W. 170=40 M. 268=(1917) M.W.N. 292 (F.B.).
ABDUR RAHIM. O.C.J., SESHAGIRI IYER and PHILLIPS, JJ.

Cruelty.

(1) Judicial separation of what kind requisite for divorce. See **ACT IV OF 1869 (DIVORCE)**, No. 4, 8 L.B.R. 345.

(2) Repeated acts of—Cumulative effect of such acts. See **ACT IV OF 1869 (DIVORCE)**, No. 4-A, 36 Ind. Cas. 982.

Cultivation.

Tank bed land if can be leased for. See **REGISTRATION ACT** (1908), No. 8, 35 Ind. Cas. 108.

Cultivator.

Suit to recover Kattubadi—Inamdar not a—Civil Court. See **JURISDICTION OF CIVIL AND REVENUE COURTS**, No. 7, 30 Ind. Cas. 927.

Currency (Paper) Act.

See **ACT II OF 1910.**

Custom (General).

(1) *Custom of primogeniture—Grants by the Maharaja of Chota Nagpur—Impartibility of the estate—Proof of custom, onus of—Lex loci custom of Chota Nagpur—Meaning of putra paultradi.*

Certain grants of *jaigirs* by the Maharaja of Chota Nagpur to a person related to him or to his descendants dating from 1769 to 1786 were in terms to the grantee and his sons and grandsons (*putra paultradi*). The family of the grantee had for several generations interpreted the words "*putra paultradi*" in the literal sense, namely, to mean, son and son's son.

Held—that at the time of these grants the words had not acquired in Chota Nagpur the technical meaning which according to the Privy Council in 24 I.A. 76=1 C.W.N. 387 they came to have by 1868 when used in wills executed in Bengal, and the grants in this case did not convey an absolute estate unconditional and unlimited.

Per *Atkinson, J.*—That, although, as held by the Privy Council, the words convey an absolute estate in lands descendible from generation to generation coupled with full power of alienation, these words of limitation may be controlled by custom limiting their scope and operation (a).

Up to 1862, the lands granted descended regularly according to the rule of primogeniture to the eldest lineal descendant of the eldest son when, the last male descendant of that line

Custom (General)—(Continued).

dying leaving a widow, the Maharaja proceeded to resume the property, whilst two brothers, the descendants of a younger son, claimed to succeed to the property. The disputes terminated in two deeds one executed by the brothers agreeing that the widow should hold possession of the property as long as she lived upon payment of rent to the Maharaja and that they should take possession after her death, and the other by the Maharaja purporting, on receipt of consideration, to release the lands to the brothers in equal shares.

Held—that, as there was no failure of heir in the line of the grantee, the Maharaja had no right to resume and the *sanad* to the brothers was a nullity.

Per Chapman, J.—That as the younger of the brothers had the right to succeed on the death of the older without male issue, his concurrence to the deed in favour of the widow might have been taken to avoid future trouble.

Per Atkinson, J.—That the agreement was ineffective to alter or vary the impartible character of the property or to change its method of devolution.

Per Atkinson, J.—The custom of primogeniture which prevails in Chota Nagpur in the case of grants made by the Maharaja whereby the property so granted is deemed impartible and descends to the eldest male heir by lineal descent applies with greater force in the case of grants of property made between the Maharaja and his relations (b).

Where a custom prevails in one branch of a family it is strong evidence to be relied on that it applies with equal force to another branch of the same family (c).

The custom is recognized, not only as a family custom prevailing in the Maharaja's family, but also as the *lex loci* custom of Chota Nagpur. **Lal Gajendra Nath Sahi Deo v. Lal Mathura Nath Sahi Deo**, 20 C.W.N. 876=1 Pat. L.J. -109=35 Ind. Cas. 183.

CHAPMAN and ATKINSON, JJ.

References—(a) 31 C. 561, *Rel. on.* (b) 22 W.R. 17, R. (c) 5 C.W.N. 13=23 A. 37 (P.C.), *Rel. on.*

(3) *Custom re sale of grove—Vendee whether liable to ejectment—"Land"—Act II of 1901 (Agra Tenancy)*, S. 4 (2).

A custom by which a grove-holder can sell the grove is not unusual, the sale carrying with it the right of occupation of the land. A person to whom a grove, even though the sale was contrary to custom, had been sold is not liable to ejectment by notice. In the case of a grove it is not sufficient to allege that occupancy rights have determined. It is necessary to prove that the sale of the trees by the original tenant was a breach of the special terms on which the land was held for the purposes of a grove (a).

Reynolds, J.M.—Land which had been let for the purpose of planting groves and on which a grove is still in existence is not "land" within the meaning of the Tenancy Act.

Custom (General)—(Continued).

Jagadamba Prasad v. Behari Lal, 81 Ind. Cas. 979.

BAILLIE, S.M. and REYNOLDS, J.M.

References—(a) S.D. No. 1 of 1908, S.D. No. 2 of 1892 R.

(3) *Questions as to, to be decided on texts, decisions are on evidence.*

Per Sankaran Nair, J.—In deciding questions as to customary law, if there are texts or series of decisions, we should follow them. Otherwise such a question has to be decided upon evidence. **Yeluthakkal Chirudevi v. Yeluthakkal Tarwad Karnavan**, 81 M.L.J. 879=(1917) M.W.N. 106.

COUTTS-TROTTER and SESHAGIRI IYER, JJ.

(4) *No express record in wajib-ul-arz—Inference of custom to be on clear grounds—Setting up of custom different from that pleaded in written statement.*

The Court will not allow a party to set up a custom in the appellate Court different from that set up in the pleadings in the first Court.

Where a custom excluding the daughters and their issue from inheritance was not found in the *Wajib-ul-arz* produced in the lower Court such custom could be affirmed by implication only when there are very clear grounds to justify the inference that a custom so repugnant to the ordinary Hindu Law does in fact exist. **Surajball v. Tilok Chand**, 36 Ind. Cas. 66.

LINDSAY, J.C.

(4-a) *Custom, documents constituting proof of—Finding—Oudh Civil Digest 1912, Vol. I, Ch. VII, para. 272, r. III.*

The finding of the lower appellate Court that certain documents constitute sufficient proof of an alleged custom is binding on the second appellate Court (a).

R. III of para 272 (Ch. VII), Oudh Civil Digest (1912) Vol. I as corrected by the correction slip dated 18th February 1914 declares the meaning of the rules as they stood before. **Baadeo Singh v. Ram Phal Singh**, 32 Ind. Cas. 748.

LINDSAY, J.C.

Reference—(a) 4 O.O. 71, R.

(5) *Custom—Judicial notice by Courts—Only one instance and no further evidence—No such inference—Intention of parties where no particular system.* **Thayoth Puthia Purayil Seethi v. Mangottil Ryrath Ummayya**, (1915) M.W. N. 805=2 L.W. 969=18 M.L.T. 389=30 Ind. Cas. 977. See Final Part, 1915, Col. 600.

(6) See OUDH ACT XVIII OF 1876 (OUDH LAWS), No. 6, 36 Ind. Cas. 668.

(7) *Rent free lands—Local, Entry in Wajib-ul-arz—Absence of Musafidar's attestation.* See OUDH ACT XXII OF 1886 (OUDH RENT), No. 24, 30 Ind. Cas. 208.

(8) *Liability of broker as principal—Custom and usage of Calcutta Gunny Market—Evidence of custom—Admissibility.* See BROTHERS, No. 2, 20 C.W.N. 865.

Custom (General)—(Continued).

(9) Chinese Buddhist Law—Marriage—Law of domicile as affecting marriage—Customary Law of woman when to be considered. See **BUDDHIST LAW (MARRIAGE)**, No. 3, 8 L.B.R. 399.

(10) See **GRANT**, No. 4, 31 Ind. Cas. 565.

(11) See **HINDU LAW (ADOPTION)**, No. 11, 152 P.W.R. 1916.

(12) Daughter appointed as son—Obsolete—Liability of appointed daughter to pay father's debts—If exists. See **HINDU LAW (ADOPTION)**, No. 14, 1 Pat. L.J. 581.

(13) Estate of Maharaja of Chota Nagpur—Of impartibility and primogeniture—Court of appeal, duty of—Conclusion of fact by Trial Court. See **IMPARTIBLE ESTATE**, No. 1, 35 Ind. Cas. 392.

(14) To pay enhanced rent. See **LANDLORD AND TENANT**, No. 35, 30 Ind. Cas. 486.

(15) Rent payable according to, of kwin—Proof of. See **LEASE**, No. 13, 33 Ind. Cas. 756.

(15-a) Suit for money on *thavanai* account—Of Natukottai Chetties—Fixing of rate of interest. See **LIMITATION ACT (1909)**, No. 130, 36 Ind. Cas. 497.

(16) Mahomedans following Marumakkattayam Law—Of affiliation of strangers to tarwad. See **MAHOMEDANS**, No. 1, 31 Ind. Cas. 385.

(17) Rajput Mussalmans—Widow's right to take life-estate in her husband's entire property—No proof of custom establishing the right. See **MAHOMEDAN LAW (CUSTOM)**, No. 1, 33 Ind. Cas. 114.

(18) Burden of proof of *wasib-ul-ars*, evidentiary value of statements in. See **MAHOMEDAN LAW (INHERITANCE)**, No. 1, 20 M.L.T. 362.

(19) Proof of dedication—Allegation of, governing succession opposed to general rules—Burden of proof. See **MAHOMEDAN LAW (WAKF)**, No. 8, 36 Ind. Cas. 951.

(20) See **PRE-EMPTION**, No. 23, 33 Ind. Cas. 801.

(21) Hindus of Godhra governed by the, of pre-emption—Suit to pre-empt a portion of the property sold. See **PRE-EMPTION**, No. 11, 18 Bom. L.R. 693.

(22) Property to be sold to co-sharer first—Co-sharer informed of sale—Refusal to purchase—Effect of. See **PRE-EMPTION**, No. 17, 14 A. L.J. 1138.

(23) See **RELIGIOUS ENDOWMENTS**, No. 4, 35 Ind. Cas. 630.

(24) Succession to office of darago. See **RELIGIOUS ENDOWMENTS ACT**, No. 3, 1 Pat. L.J. 437.

(25) Suit in which family custom was the subject of contest and threshed out in the presence of all branches of the family—Right of descendants of non-contesting branches to reopen the matter. See **RES JUDICATA**, No. 8, 1 Pat. L.J. 221.

Custom (General)—(Concluded).

(26) See **RIGHT OF SUIT**, No. 1, 1 Pat. L.J. 381.

(27) Applicability of customary law to aboriginal tribes. See **ACT X OF 1865 (SUCCESSION)**, No. 14, 30 C.W.N. 1082.

(28) See **WAJIB-UL-ARZ**, No. 4, 30 Ind. Cas. 392.

(29) See **WAZIB-UL-ARZ**, No. 3, 30 Ind. Cas. 503.

(30) Proof of, of resumption. See **WAJIB-UL-ARZ**, No. 2, 30 Ind. Cas. 805.

Customary Rent.

Judi, payment of—Liability of tenant to pay, to Inamdar. See **INAM**, No. 4, 18 Bom. L.R. 950.

Customs—Punjab.

- 1.—GENERAL.
- 2.—ADOPTION.
- 3.—ALIENATION.
- 4.—DEBTS.
- 5.—GIFT.
- 6.—INHERITANCE AND SUCCESSION.
- 7.—PRE-EMPTION.
- 8.—SUCCESSION.
- 9.—WILL.

—1.—General.

(1) Point of custom—Second appeal—Certificate when to be granted—Certificate when not to be acted upon. See **PUN. ACT III OF 1914 (PUNJAB COURTS)**, No. 14, 82 P.R. 1916.

(2) Second appeal—Absence of certificate—Jurisdiction of Chief Court, to interfere on a point of custom. See **PUN. ACT III OF 1914 (PUNJAB COURTS)**, No. 13, 22 P.R. 1916.

(3) Incompetency of Court to lay down general principles of Custom. See **CUSTOMS (PUNJAB—ALIENATION)**, No. 3, 17 P.W.R. 1916.

—2.—Adoption.

(1) *Hindu Law or custom—Appointment of heir—Banias of seventeen villages in Mukhtear Tahsil—Succession to natural father, general rule of—Riwaj-i-am entry in, whether instances necessary to give effect to—Collaterals, exclusion of—Pleadings—New defence, whether can be raised & appeal.*

Held, that a recital in the *Riwaj-i-am* of a particular custom, opposed to general custom and unsupported by instances, is insufficient to prove the existence of that custom.

A clause in the *riwaj-i-am* provided that, when a man was adopted and subsequently his brothers died without issue, the adoptee could succeed to his natural father's estate only in the absence of brothers and nephews of his natural father:

Held, that the recital of the custom in the *riwaj-i-am* was opposed to general custom and unsupported by instances and, therefore, insufficient to prove its existence.

Customs—Punjab—(Continued).**—2.—Adoption—(Concluded).**

Held, further that:—

1. According to the Customary Law of the Punjab, in the absence of all other lineal male descendants of the natural father, an adoptee succeeds his natural father to the exclusion of the collaterals of that father.

2. In cases where an entry in *riwaj-i-am* has been attested by people for whom it has been prepared, the Courts have to see what the real custom is and not what the people think to be the custom.

3. A party is entitled to advance any argument even in appeal for the first time which might enable him to prevent the other party from getting a decree. *Dewa Singh v. Lehna Singh*, 8 P.W.R. 1916=14 P.L.R. 1916=45 P.R. 1916=31 Ind. Cas. 740.

CHEVIS and LEROSIGNOL, JJ.

(2) *Proprietor—Adoption—Daughter-in-law—No right to challenge.*

Under Customary Law, a daughter-in-law cannot attack the adoption made by her father-in-law (a).

A person who cannot contest the power of testamentary disposition of a proprietor cannot be allowed to challenge the power of nominating an heir. (b) *Musammatt Basanti v. Natha*, 12 P.R. 1916=58 P.W.R. 1916=33 Ind. Cas. 147=36 P.L.R. 1917.

CHEVIS and SHADI LAL, JJ.

References:—(a) 63 P.R. 1912; 94 P.R. 1913; 291 P.L.R. 1913, R. (b) 68 P.R. 1903, *Exptl.*

(3) *Second appeal—Irregularity in procedure—Evidence—Statements in other cases—Arguments—Case decided without—Admission of adoption by widow in favour of daughter's son—Admission of adoption by alienate person.* *Arjan Singh v. Darbara Singh*, 193 P.L.R. 1915=140 P.W.R. 1915=32 Ind. Cas. 312. See Final Part, 1915, Col. 603.

(4) Right of adopted son to succeed collaterally in adoptive family. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 18, 65 P.R. 1916.

—3.—Alienation.

(1) *Custom—Khokkar Rajputs of Malakpur in Sialkot District—Alienation by father of ancestral property, ratification of—Sons, if bound—Mala fides—Civ. Pro. Code (1909), S. 11—"Claiming under," meaning of—Daughter's daughter's or son's marriage by widow—Legal necessity—Appeal—Court Fees Act (VII of 1870), S. 7 (w). Sch. I, Art. 1—Acquiescence—Reversioner born after the sale, whether can attack the sale—Case decided finally by Chief Court without remand.*

In a case in which the whole subject-matter of the suit is also the subject-matter of appeal, the amount or value of the subject-matter of appeal is nothing more than the value of the property which the plaintiff is seeking to recover and possession of which the defendant is seeking to retain. (2).

Customs—Punjab—(Continued).**—3.—Alienation—(Continued).**

A more remote reversioner is not bound by a ratification made by a nearer reversioner which is demonstrably improper and when *mala fides* on the part of the nearer reversioner is established, the next reversioner will not be bound even by a decree.

Under the Customary Law a son has a right in his ancestral property independently of his father and has thus an independent right of suit with regard to the ancestral property and cannot be said to be "claiming under" his father, within the meaning of S. 11 of the Civ. Pro. Code, 1909, and is not bound by anything done by his father with regard to such property (b).

The expenses incurred by a widow for the marriage of a daughter's daughter and a daughter's son out of her husband's property are not for valid necessity under the customary Law of the Punjab.

Some of the facts not decided by the Courts below were decided without remanding the case.

It does not make any difference if the reversioner is not born at the time of an alienation. *Sohan Lal v. Sardar Khan*, 16 P.W.R. 1916=25 P.R. 1916=32 Ind. Cas. 121.

JOHNSTONE, C.J., and LESLIE-JONES, J.

References:—(a) 71 P.R. 1911=305 P.W.R. 1911=13 Ind. Cas. 305, R; 76 P.R. 1913=141 P.W.R. 1913=19 Ind. Cas. 961; 92 P.R. 1900; 25 Ind. Cas. 325=36 A. 322=12 A.L.J. 481; 19 P.R. 1908=38 P.W.R. 1908; 55 P.R. 1903, D. (b) 26 P.R. 1911 (F.B.)=33 P.W.R. 1911=9 Ind. Cas. 300, F.

(2) *Limitation—Sale in 1893 by father—Suit by son to contest it in 1911 governed by Act. 120 of Act XV of 1877 and not by Act I of 1900.*

Held, that, a suit by the son for declaring that a sale of ancestral landed property by his father shall not affect his reversionary rights is governed by Art. 120, Limitation Act (1877) and not by the Punjab Act I of 1900, where both the sale and his father's death have taken place before the latter Act comes into force. *Mangal Singh v. Mangal Singh*, 15 P.W.R. 1916=34 Ind. Cas. 253.

RATTIGAN and SHADI LAL, JJ.

(3) *Jai Sikhs of Jullundur District—Custom—How far females are competent to control—Incompetency of Court to lay down general principles of custom—Alienation by widow—Daughter not found competent to contest—Practice—Remand technically permissible but useless not allowed—True Waris defined.*

I. Mr. (now Sir) Justice Johnstone (Mr. Justice Beadon, concurring) laid down the following proposition for the consideration of the Full Bench:

That, in the Punjab, in the absence of proof of any special custom to the contrary.

(a) Among tribes subject to agricultural custom, no female, whether heiress or not, can

Customs—Punjab—(Continued).**—3.—Alienation—(Continued).**

contest alienations of ancestral land made by a male proprietor.

(b) No female, unless she is a true *Waris* can contest alienations made by a female holder in possession, who is a true *Waris*.

(c) No female, not a true *Waris* can contest alienation even by a female holder who is not a true *Waris*.

II. The learned judge further pointed out that these propositions virtually involve the opinions:

(1) 5 P.R. 1895 is correct.

(2) 19 P.R. 1906=61 P.W.R. 1906 limited to its peculiar facts, is correct in its conclusions.

(3) 61 P.R. 1906=110 P.W.R. 1906 is correct.

(4) 72 P.R. 1906=125 P.W.R. 1906 states unsound principles and should be *overruled*.

(5) 60 P.R. 1910=92 P.W.R. 1910 is not good law for Punjab agriculturists generally.

(6) 13 P.R. 1912=199 P.W.R. 1911 is sound except in this, that in the case quoted in it—135 P.R. 1908=194 P.W.R. 1908 laying down an implied proposition that a female who is next in succession can, whether a true *Waris* or not, contest alienations by a female holder who is not a true *Waris*.

III. That by the term 'true *Waris*' is meant an agnatic heir near enough to be entitled to control the owner of the estate in dispute, or a female who, by the custom of the tribe, comes into the category of heirs as high as or higher than such agnatic heirs. Primarily the right of control rests with male agnates, but if by special custom of a tribe, a daughter or sister excludes in succession, say, collaterals beyond the third degree, that female comes well within the category of heirs entitled to exercise control at least over alienations by females; for in that tribe probably collaterals of 4th and 5th and even higher degrees would, according to general custom, have power of control. On the other hand, if in a given tribe daughters or sisters only come in as heirs after all male collaterals or after all male collaterals recognized as having powers of control, those females are not true *Warisan* and have no power of control, unless they can prove a special custom.

Ruling of the Full Bench; *Held* by a majority of the Full Bench (*Kensington, C.J., and Rattigan and Shah Din, JJ.*),

(i) that it is not the function of a Judge to enunciate general principles of law and custom irrespective of the facts of a case, which, however advantageous in producing certainty, really falls within the duties of the Legislature, and,

(ii) that cases under Customary Law should be decided according to the facts established by the evidence produced in those cases, and that the opinions of the Judges in other cases, however valuable they may be—by way of illustration or advice, cannot safely be applied to parties who do not belong to the race, creed, tribe, caste and locality to which the parties in the particular case belong, especially where

Customs—Punjab—(Continued).**—3.—Alienation—(Continued).**

they lay down propositions in wide and far reaching terms, however, those propositions may be justified by the evidence in that particular case.

Held by the Division Bench (Sir Donald Johnstone, Chief Judge and Chevis. J.):—

(i) that the power to control an alienation by a female (she may be a widow or not) is usually vested in agnates which a daughter is not;

(ii) that the burden of proving the power to contest an alienation by the widow of the last male-holder (*semble*, in this particular case) lies on the daughter, is not an agnate; and that the daughter failed to establish such custom;

(iii) that, in view of the Full Bench ruling in this case, the *dictum* of *Roe, C.J.*, in 5 P.R. 1895 laying down certain general propositions is little better than a pious opinion and is *obiter*, and that similarly expressions of opinion and finding in other cases cited should be confined to the particular facts of those cases; and

(iv) that a remand, *albeit*, technically permissible, is contrary to the practice of the Chief Court, if the party asking for it cannot state what evidence he proposes to produce after remand. *Musammatt Ram Devi v. Hazara Singh*, 17 P.W.R. 1916 (F.B.).

KENSINGTON. C.J., JOHNSTONE, BEADON and SHAH DIN, JJ.

References:—5 P.R. 1895; 19 P.R. 1906=51 P.W.R. 1906; 72 P.R. 1906=125 P.W.R. 1906; 60 P.R. 1910=92 P.W.R. 1910=7 Ind. Cas. 470; 61 P.R. 1906=110 P.W.R. 1906; 13 P.R. 1912=199 P.W.R. 1911=10 Ind. Cas. 236; 114 P.W.R. 1914=24 Ind. Cas. 470; 172 P.R. 1889; 68 P.R. 1878; 61 P.R. 1902, D.

(4) *Jat Sikhs of the Jullundur District—Alienation by a female—Power of another female to contest—Onus of Proof.*

Among the Jat Sikhs in the Jullundur District, a daughter cannot by custom contest an alienation made by her mother of land belonging to her father. The *onus* lies upon the daughter to prove that she has such right. *Musammatt Partab v. Hazara Singh*, 33 P.R. 1916=31 Ind. Cas. 794.

JOHNSTONE, C.J., and CHEVIS, J.

References:—5 P.R. 1895; 19 P.R. 1906; 172 P.R. 1889; 68 P.R. 1878; 61 P.R. 1902; 72 P.R. 1906; 60 P.R. 1910, D.; 61 P.R. 1906; 13 P.R. 1912, *Appr.*; 47 P.R. 1912; 24 Ind. Cas. 470, R.

(5) *Necessity—Sale by widow and daughter-in-law of the deceased land-owner of village Pathiar in Kangra District—Expenses on Ohaubarkh ceremony of deceased's wife—Estoppel—Reversioner receiving money himself and taking active part in expenditure—Pleader's fee in such declaratory suits.*

1. The following items are to be considered for legal necessity and the sale of the ancestral land of N, a Hindu of the Pathiar village in

Customs—Punjab—(Continued).**—3.—Allentation—(Continued).**

the Kangra District by his widow D, and daughter-in-law G, respectively, in consideration thereof, is binding upon, and its validity cannot be contested by, his reversioners.

(1) Rs. 1,528—Paid to a previous mortgage; (2) Rs. 59—Expenses of execution and registration of the deed; (3) Rs. 613—Borrowed for building their house after the earthquake of 1905, and paid to the plaintiff himself; (4) Rs. 412-14-3—Spent on *Chaubarkh* ceremony of the 2nd wife of N, and mother of G's husband.

2. The plaintiff is also estopped from disputing necessity of items Nos. (3) and (4) as he received the former himself and he took an active part in spending the latter.

3. In such a case pleader's fee cannot be calculated on the sale consideration but on the thirty times Jama of the land.

Rs. 32 was allowed as pleader's fee in this case instead of 5 per cent. on Rs. 9, 725. *Rodu v. Musammat Daropati*, 27 P.W.R. 1916=33 Ind. Cas. 999.

SHADI LAL, J.

(6) *Dhillon Jats of Ambala District—Right of married daughter to contest alienation by her female predecessors in-title—Custom how to be proved—S. 11, Civ. Pro. Code (1908)—Several suits decided at same time—Meaning of 'former' suit in S. 11—Legal provisions in bar of suit—Strict interpretation.*

Among Dhillon Jats of the Ambala District, a married daughter, on succeeding to her father's estate, has no right by custom to challenge alienations by her female predecessors in title, viz., mother or step-mother.

The rights and privileges of a female heir have to be decided on the evidence of each particular case.

The only adequate proof of a custom is clear evidence that such and such a custom is followed, and not merely opinions, however numerous, that such and such a custom ought to be followed.

The plaintiff in this case originally brought one consolidated suit to contest a large number of alienations, but on the order of the Subordinate Judge, this original suit became three; some of the alienations were retained in the original suit, whilst others were excluded from it and formed the subject-matter of two separate suits. All three suits nevertheless were decided by the District Judge by one judgment, dated 15th August, 1910, and one of them of the jurisdictional value of Rs 295-5-0 was taken in appeal to the Divisional Court, Ambala, which maintained the District Court's decree on the ground, *inter alia*, that 135 P.R. of 1909 was authority for holding that the plaintiff did enjoy a right of challenge. The Divisional Court's confirmation of the first Court's finding was dated 14-7-1913 and was not challenged in second appeal, so that it became final. It was therefore contended for

Customs—Punjab—(Continued).**—3.—Allentation—(Continued).**

the plaintiff that the question as to her status to challenge the alienations in question was *res judicata* for the purposes of this first appeal to the Chief Court, by virtue of the above decisions of the District Court and the Divisional Court.

Held, that the question of plaintiff's status to challenge the alienations was not *res judicata* by virtue of those decisions. In this case the "former" suit within the meaning of S. 11, Civ. Pro. Code (1908), cannot refer to the District Judge's decision, because that decision was given in all three suits on one day at one time; and the Divisional Court's decision, though it was in a former suit, was not a decision by a Court which could have dealt with the present suit in appeal.

The 'Court' referred to in S. 11 of the Code of 1908 is the original Court, subject to the proviso that that Court's judgment cannot be held to be final until the time of appeal has lapsed or till the appeal has been finally decided. This view is confirmed by the language of Expl. II to the section.

Held, therefore, that there was no 'former' decision of the original Court, and the fact that a simultaneous decision was made final by the decision of the Divisional Court, a Court which was not competent to decide this appeal, before this appeal reached the stage of judgment, does not convert the simultaneous decision into a decision in a former suit(a).

Legal provisions in bar of any suit must be strictly interpreted in favour of the suit. *Dallpa v. Rani Suraj Khur*, 48 P.R. 1916=142 P.W.R. 1916=34 Ind. Cas. 581.

CHEVIS and LE-ROSSIGNOL, JJ.

References:—(a) 135 P.R. 1908, R.; 27 A. 37; 24 M. 360; 33 O. 1101; 33 A. 51; 33 A. 151; 32 A. 67, D.; 24 Ind. Cas. 243, Diss.

(7) Necessity—Proof — Declaratory suit—Speculative suit.

In a suit to set aside an alienation which took place in 1900, it appeared that the plaintiff was a remote reversioner and there were several reversioners who had equal rights with the plaintiff and the alienor had two brothers at the time of filing of the suit who were still unmarried.

The suit was filed some 12 years after the date of alienation.

Held, that a declaratory decree could not be passed in the suit, which appeared to be a speculative one, having regard to the fact that the years before and after 1900 were exceedingly hard years of draught and scarcity. *Held* also, that the vendee's allegation as to necessity was *prima facie* correct and that the lower Courts had exacted a standard of proof of necessity which was too high. *Fatteh Khan v. Baz Khan*, 87 P.L.R. 1916=165 P.W.R. 1916=85 Ind. Cas. 875.

LE-ROSSIGNOL, J.

(8) Alienation by sonless male proprietor—Gift—Brahmins of Dighal village, Jhajjar

Customs—Punjab—(Continued).**—3.—Alienation—(Continued).**

tahsil, Rohtak District—Second appeal—Question whether property is ancestral or self-acquired.

Held, that, among Brahmins of Dighal village in the Rohtak District, a sonless proprietor cannot alienate by gift ancestral property to a collateral, to the prejudice of other collaterals who are entitled to shares by rule of inheritance.

Held, also, that on second appeal the finding as to the property in dispute being ancestral or self-acquired cannot be attacked by the parties. **Ghansham v. Balak Ram**, 94 P.L.R. 1916=36 Ind. Cas. 215.

LESLIE JONES, J.

(9) *Mamanpur—Pathans—Alienation of property—Unrestricted power of males—Bequest and gift—No distinction between.*

Among the Pathans of Mamanpur, a male has, by custom, an unrestricted power of alienation of property, and the agnatio theory has no force among them.

There is no distinction in principle between a power to gift and a power to bequeath. **Akbar Khan v. Khan Bahadur**, 69 P.R. 1916=131 P.L.R. 1916=120 P.W.R. 1916=35 Ind. Cas. 335.

LE-ROSSIGNOL, J.

Reference:—48 P.R. 1903, *Rel.*

(10) *Mortgage—Competency of son to contest validity of alienation in suit for possession—Proof of consideration in case of registered deed—Proof of necessity after 30 years—Costs—Delay in bringing the suit—Adjournment granted on payment of costs—Effect of not paying costs.*

Where an alienee sues the son of the alienor, an agriculturist, for possession of the alienated land, want of necessity is a good defence.

After the expiry of 30 years, an alienee cannot be expected to give details of necessity, especially where the alienor is literate and the deed is registered and previous bonds and mortgage-deeds making up nearly the consideration have been produced; and the original alienee is dead and his successor is an employee and has not entered into his predecessor's business.

Where the plaintiff delays in bringing his suit and such delay is disapproved by the Court, he should not be allowed his costs.

Where a Court grants an adjournment on payment of costs and costs are not paid, the Courts would be justified in dismissing the suit. **Ram Chand v. Ali Akbar**, 90 P.W.R. 1916=158 P.L.R. 1916=35 Ind. Cas. 534.

SHADI LAL and LE-ROSSIGNOL, JJ.

(11) *Right, after born son to impeach alienation by father—Such son—Whether bound by ratification by nearest collateral made after the son's birth.*

Ordinarily a son born after the date of the alienation, would not be entitled to contest the alienation, which was made before his birth. But where it appears that the property alienated is ancestral *qua* a cousin of the alienor, who was in existence at the date of the transfer and

Customs—Punjab—(Continued).**—3.—Alienation—(Concluded).**

had not ratified the transfer and consequently had a right to impeach the same, a son of the alienor born subsequently can sue to set aside the alienation and get possession. A ratification by such cousin after the birth of the son would in no way affect the right of the son to impeach the alienation. **Ghulam Nabl v. Mohkam**, 105 P.R. 1916=36 Ind. Cas. 672.

SHADI LAL and LE-ROSSIGNOL, JJ.

Reference:—55 P.R. 1903 (F.B.), R.

(12) *Awans of mauza Marri Hasan, Rawalpindi tahsil—Childless proprietor—Power to alienate ancestral property in presence of first cousin.* **Nur Ahmad v. Ghulam Husain**, 56 P.R. 1915=135 P.W.R. 1915=30 Ind. Cas. 90=51 P.L.R. 1916. See Final Part, 1915, Col. 606.

(13) *Necessity—Alienation of ancestral property—Good faith—Second appeal—Question of law or of Customary Law or of fact.* **Raja v. Allah Ditta**, 112 P.W.R. 1915=29 Ind. Cas. 802=110 P.R. 1915=37 P.L.R. 1916. See Final Part, 1915, Col. 606.

(14) *Necessity—Antecedent creditor third party—Money borrowed from a third person by an agriculturist for trade—Second appeal—S 41 of Act III of 1914.* **Ali Mohammad v. Mamura**, 98 P.W.R. 1915=7 P.L.R. 1916=30 Ind. Cas. 507. See Final Part, 1915 Col. 607.

(15) *Sials of Jhang District—Alienation by daughter—Right of collaterals of 10th degree to question—Position of daughter and sister.* **Muhammad Bakhs v. Muhammad**, 90 P.R. 1915=170 P.W.R. 1915=31 Ind. Cas. 533. See Final Part, 1915, Col. 607.

(16) *Nature of property inherited by adopted son from adoptive father—Meaning of 'ancestral property'—Son of adopted son—Right to question alienations—Custom how to be established.* **Amla Chand v. Bhuja**, 107 P.R. 1915=32 Ind. Cas. 29. See Final Part, 1915, Col. 607.

(17) *Nearest reversioners omitting to protect the estate—Suit by remoter collaterals for declaration or pre-emption—Maintainability.* **Bahadur Singh v. Bhagel Singh**, 104 P.R. 1915=32 Ind. Cas. 11. See Final Part, 1915, Col. 607.

(18) *Powers of alienation inter vivos and of testation go together.* See CUSTOMS (PUNJAB)—INHERITANCE AND SUCCESSION, No. 14, 94 P.W.R. 1916.

(19) *Lahore—Saree Khattris—Hindu Law—Applicability of.* See HINDU LAW (REVERSIONERS), No. 2, 60 P.R. 1916.

(20) *Alienations by widow—Suit by near and remote reversioners to declare the invalidity of the alienations—Limitation—Applicability of Punjab Act I of 1900.* See LIMITATION ACT (1908), No. 213, 15 P.R. 1916.

—4.—Debts.

Money decree against male proprietor—His property passing to his widow—Liability of his

Customs—Punjab—(Continued).**—4—Debts—(Concluded).**

property to attachment under the decree. **Musammam Bham Bul Devi v. Narain Singh**, 39 P.R. 1915=103 P.W.R. 1915=8 P.L.R. 1916=29 Ind. Cas. 579. See Final Part, 1915, Col. 609.

—5—Gift.

- (1) *Quraishis of Hardosheikh village, Jullundur District—Sonless proprietor—Gift of ancestral land to daughter in the presence of the collaterals—Validity—Quraishis governed by custom.*

The Quraishis in the village of Hardosheikh who belong to an endogamous tribe are governed by custom and not by Mahomedan Law (a).

A sonless Quraishi proprietor in this village is empowered by custom to make a gift of ancestral land to his daughter in the presence of his collaterals. **Barkat Ali v. Musammam Sultan Bibi**, 19 P.R. 1916=92 P.W.R. 1916=33 Ind. Cas. 787.

RATTIGAN and SHAH DIN, JJ.

References:—(a) 101 P.R. 1902; 5 P.R. 1906, R.

- (2) *Gujars of Phillour tahsil, Jullundur District—Sonless proprietor—Gift of ancestral property to daughter and daughter's son—Validity in presence of collaterals.*

A sonless proprietor among Gujars of the Phillour tahsil has the power, in the presence of his collaterals, to make a valid gift of his ancestral land to a daughter whose husband was *Khanadamad* and to a daughter's son whom he had appointed as his heir. **Isa v. Samman**, 29 P.R. 1916=34 Ind. Cas. 936.

JOHNSTONE, C.J. and CHEVIS, J.

- (3) *Kalals of Alawalpur, District Jullundur—Custom or personal law, application of—Burden of proof.*

The head of the *Kalals* family in the village Alawalpur, District Jullundur, settled there along with the original founder of the village and ever since that time the family has been holding land therein but its members have depended for their livelihood on service and other non-agricultural pursuits. The *Kalal* community constitute a very small portion of the population of the village. One of the members of the family having gifted his land to a daughter and her son, the gift was questioned by the donor's brother;

Held, (1) that, under the circumstances, there was no initial presumption that the *Kalals* of the village followed agricultural custom, and not their personal law;

(2) that the plaintiff-appellant failed to discharge the *onus* which lay on him to show that his family was governed by agricultural custom under which a *Kalal* was incompetent to make a gift. **Diwan Singh v. Musammam Faro**, 70 P.W.R. 1916=89 P.R. 1916=33 Ind. Cas. 529.

SHAH DIN and CHEVIS, JJ.

References:—87 P.R. 1907=116 P.W.R. 1907, R.; 81 P.R. 1912=243 P.W.R. 1912=14 Ind. Cas. 239, D.

Customs—Punjab—(Continued).**—8—Gift—(Concluded).**

- (4) *Jhelum District—Gujars—Sonless proprietor—Gift of ancestral land to sisters' son—Whether valid by custom—Burden of proof.*

The *onus* of proving that, by custom, among Gujars of the Jhelum tahsil, a sonless proprietor who has left him surviving collaterals, can gift ancestral land to his sister's son lies on the latter (a). **Muhammed Alam v. Muhammad Hayat**, 127 P.R. 1916.

SHAH DIN, J.

- (5) *Sindhu Jats of Mauza Khatra, Kasur tahsil, Lahore District—Gift to step-son of another got—Validity in presence of collaterals in the 4th degree. Natha Singh v. Gandal Singh*, 95 P.R. 1915=175 P.W.R. 1915=31 Ind. Cas. 493. See Final Part, 1915, Col. 610.

(6) See PUN. ACT III OF 1893 (GOVERNMENT GRANTS), No. 1. 129 P.R. 1916.

—6—Inheritance and Succession.

- (1) *Hoshiarpur District—Rajputs of Garhshankar—Inheritance—Self-acquired property—Moveables and immovables—Daughter's right to succeed in preference to brother's—Acquisitions from income of ancestral property—Self-acquisition.*

Where, among the Rajputs of Garhshankar in the Hoshiarpur District, a special custom is pleaded, according to which a brother has got right to inherit the self-acquired moveable property to the exclusion of the daughters.

Held that the *onus* lies on the brother to prove his right of succession.

According to the Customary Law, moveable property, even if acquired with the income of ancestral property, must be regarded as the self-acquired property of the acquirer.

Under Customary Law, as regards succession to self-acquired immoveable property, a daughter is ordinarily preferred to a collateral. **Ghulam Jilani Khan v. Imdad Ali**, 13 P.R. 1916=33 Ind. Cas. 215.

CHEVIS and SHADI LATI, JJ.

Reference:—2 P.R. 1909, R.

- (2) *Ludhiana—Mauza Kum—Bhatti Rajputs—Succession, regulated by custom—Gift—Last male holder of property gifted—Sisters, not heirs—Reversion to donor—Assent of the father—Father's desire to follow Muhammadan law—Assent, not bona fide—Sons not bound.*

The Bhatti Rajputs of Kum village in Ludhiana are not in matters of succession governed by the Mahomedan Law but by a custom which appears to be indistinguishable from agricultural custom.

According to custom, the sisters of the last male holder of the donated property cannot be regarded in the character of the daughters of the original donee and are no heirs. Consequently their presence is no bar to the reversion of the gifted property to the family of the donor (a).

Customs—Punjab—(Continued).**—6.—Inheritance and Succession—(Ctd.).**

Where the father's assent to the alienation was given not because the parties observed Mahomedan Law in the past, but because the father desired to follow it in future, his assent cannot be called a *bona fide* assent by which the other members of the family would become bound (b). **Musammatt Jannat v. Abdulla**, 4 P.R. 1916=25 P.W.R. 1916=32 Ind. Cas. 817.

CHEVIS and LE-ROSSIGNOL, JJ.

References:—(a) 84 P.R. 1909, *Exp.* (b) 59 P.R. 1904; 7 P.R. 1905; 35 P.R. 1907; 37 P.R. 1907; 78 P.R. 1908; 68 P.R. 1913, *D.*

- (3) *Gaur Brahmins of tahsil Palwal, district Gurgaon—Succession—Self-acquired property of father—Collaterals of third degree not preferred to daughter and her sons—Riwaj-i-am—Entries opposed to general custom—Absence of proof of instances—Weight to be given.*

Held that no special custom was proved according to which, among *Gaur Brahmins* of the *Palwal Tahsil* of the *Gurgaon* district, collaterals of the third degree can exclude a daughter and her sons from succeeding to the self-acquired property of her father.

Statements contained in a *Riwaj-i-am* when opposed to general custom can carry very little weight unless supported by instances. **Chhut-tan v. Hazari Lal**, 7 P.R. 1916=46 P.L.R. 1916.

CHEVIS and LESLIE JONES, JJ.

- (4) *Khattiris—Succession—Brothers agreeing to limit the right of their widows to receive maintenance only and to exclude them from inheriting life estate in properties belonging to them—Unregistered document embodying the agreement—Inadmissibility in evidence—Registration Act (1908), S. 17—Document not a will but a disposition inter vivos—Widow—Incompetency to question husband's alienation.*

A widow is not competent to challenge any disposition of property by her husband (a).

But where an unregistered document made between the deceased husband of a *Khattiri* widow and his brothers embodied an agreement between all the brothers whereby they declared that their widows shall not inherit a life estate but shall receive only a maintenance allowance of Rs. 25 per mensem.

Held that the instrument was not admissible in evidence for want of registration and could not affect the widow's right to a life estate.

Held also that the clause which constituted the agreement was not of a testamentary character inasmuch as it was not unilateral and was also not revocable.

Both under Hindu law and agricultural custom, a widow is entitled to a life interest in her husband's estate. Therefore the *onus* of proving a special custom to the contrary by which she would become entitled to receive maintenance only will lie on those who plead

Customs—Punjab—(Continued).**—6.—Inheritance and Succession—(Ctd.).**

such special custom. **Moti Singh v. Musammatt Jamna Devi**, 9 P.R. 1916=32 Ind. Cas. 522.

CHEVIS and LE-ROSSIGNOL, JJ.

References:—(a) 135 P.R. 1908; 17 P.R. 1913, *R.*

- (5) *Succession—Hindu Law or Custom—Daughters—Immoveable property—Kapur Khatries of Hafizabad—Uncle excludes daughter whether immoveable property is ancestral or self-acquired—Value of Wajib-ul-ars and Riwaj-i-am when signed by parties' ancestors—Khattiris having long connection with landed property living in village—Onus probandi of proving that Khatries follow agricultural custom—Incompetency of making will—Circumstances showing testator had no disposing mind.*

The *onus* of proving that *Khattiris* follow agricultural customs in matters of succession lies on the person asserting it.

The *Kapur Khatries* of *Hafizabad Tehsil*, especially the family in this case living in village, are governed in matters of succession to immoveable property, whether ancestral or self-acquired, by customary rules obtaining among agricultural tribes in the Punjab and not by the ordinary principles of the *Mitakshara* Law, and a daughter is neither entitled to succeed to her father's immoveable property, even if self-acquired, nor can he alienate it to her by gift or will in presence of her uncle.

The following circumstances are sufficient to prove that either a will is not genuine or the testator had no disposing mind.

- (a) When it has been written by a legatee or one of the legatees.
- (b) Considerable and material discrepancies between the evidence of the attesting witnesses as to what occurred at the time of execution.
- (c) When testator is an enfeebled and paralysed man not able to dictate a long will.
- (d) Fixing thumb mark when he knows to write his name.
- (e) Interestedness of the attesting witnesses.
- (f) Absence of registration which could be effected without any trouble or inconvenience.
- (g) Omission to examine the doctor who was treating the testator.

The *Wajib-ul-ars* and the *Riwaj-i-am* are of great value when these are attested by ancestors of the parties. **Musammatt Rukman v. Sain Das**, 19 P.W.R. 1916=32 Ind. Cas. 375=71 P.R. 1916.

RATTIGAN and LE-ROSSIGNOL, JJ.

- (6) *Alienation—Custom—Khokhars of village Khalsa Hamid in the Dipalpur Tahsil of the Montgomery District—Daughters not excluded from succession to self-acquired landed property of their father—Onus of proving special custom—Declaratory decree when not to be granted.*

1. After setting aside the judgment of the lower appellate Court on the ground that the District Judge appointed under Act III of 1914

Customs—Punjab—(Continued).**—6.—Inheritance and Succession—(Ctd.).**

had no jurisdiction to hear the appeal against the order of the District Judge existing under the old Punjab Courts Act, 1912, as laid down in 30 P.R. 1915 = 25 P.W.R. 1915, the Chief Court can transfer the appeal to its own pending file and deal with it on the merits.

2. No custom exists among the *Khokhars* of the village *Khalsa Hamid* in the *Depalpur Tahsil* of the *Montgomery District* by which reversioners exclude daughters from inheriting their father's acquired landed property, against the general customary rule of the Punjab recognizing their right of succession to such property.

3. The *onus* of proving exclusion of daughters from acquired property of their father lies on the person asserting exclusion (a).

4. Where in such a case the chances of reversioner's succession are very remote, the Courts are justified in refusing to grant them a declaratory decree protecting their possible reversionary rights (b). *Laahkar Khan v. Shah Din*, 26 P.W.R. 1916 = 33 Ind. Cas. 997.

SHAH DIN, J.

References:—(a) 110 P.R. 1906 (F.B.) = 59 P.W.R. 1907; 2 P.R. 1909 = 25 P.W.R. 1909; 25 P.R. 1912 = 125 P.W.R. 1912; 43 P.R. 1913 = 270 P.W.R. 1912; 97 P.R. 1914 = 121 P.W.R. 1914, R. (b) 149 P.R. 1908 = 192 P.W.R. 1908, R.

(7) *Gil Jats of Mauza Lohara, tahsil Zira, district Ferozepore*—Succession to self-acquired property—Daughter and near collaterals—Preference—Entry in *Riway-i-am*—Evidentiary value.

Among *Gil Jats* of *Mauza Lohara*, the near collaterals of a deceased sonless proprietor are not entitled by custom to succeed to his self-acquired properties in preference to his daughter (a).

Where the *Riway-i-am* talks about landed property, and succession to it and so forth, without discrimination between ancestral and self-acquired, the rule laid down can usually only be taken to apply to ancestral property, especially where it was compiled more than 25 years ago when little attention was paid to the rights of daughters. *Musammam Raj Kaur v. Talok Singh*, 38 P.R. 1916 = 99 P.W.R. 1916 = 33 Ind. Cas. 992.

JOHNSTONE, C.J.

References:—(a) 2 P.R. 1909; 25 P.R. 1912, R.

(8) *Brahmins of Kangra District*—Widow of adopted son—Right of collateral succession.

Among *Brahmins* of *Kangra District*, the widow of an adopted son is not entitled by custom to succeed as heir to the collaterals of the adoptive father of her deceased husband. *Santu v. Musammam Jok*, 44 P.R. 1916 = 36 Ind. Cas. 625.

RATTIGAN and LESLIE JONES, JJ.

(9) *House left by sonless non-proprietor in abadi*—Right of his collaterals to succeed—No custom to the contrary—Onus of proving

Customs—Punjab—(Continued).**—6.—Inheritance and Succession—(Ctd.).**

such custom—Non-occupation by common-ancestor immaterial.

Held, that, where a non-proprietor in possession of a house in the village *abadi* dies without issue, his near collaterals are entitled to succeed as against the proprietors, in the absence of any special custom to the contrary, the *onus* of proving which lies on the latter; and that it is immaterial whether the common ancestor of the deceased and the collaterals has ever occupied it or not. *Kala v. Hasham*, 63 P.W.R. 1916 = 127 P.L.R. 1916 = 35 Ind. Cas. 291.

LESLIE JONES, J.

References:—34 P.W.R. 1911 = 33 P.L.R. 1911, F; 76 P.R. 1888, R.

(10) *Heterogeneous proprietors of village, right of, to succeed in preference to sister and sister's son of deceased proprietor*—Burden of proof—*Riway-i-am* entry, excluding sisters, interpretation of—*Garhi Kanungowan, District Hoshiarpur*—Sister's right to succeed against proprietary body.

Held, that where, in the absence of the customary heirs of a deceased proprietor, the heterogeneous body of the village proprietors claim to succeed to the estate of the deceased in preference to his sister and her son (the personal heirs of the deceased), the burden of proving that the latter are excluded from succession lies on the proprietary body (a).

In answer to a question of the *riway-i-am* of a Settlement, it was stated "no share is ever taken by the sister or sister's son."

Held, that the answer referred only to cases of succession in the presence of collaterals (b).

Held, further, that, in the village *Garhi Kanungowan* in the *Garhshankar Tahsil* of the *Hoshiarpur District*, in the absence of the customary heirs of a deceased Hindu proprietor, his sister and her son succeed to the estate of the deceased in preference to the non-homogeneous proprietary body of the village. *Musammam Ralli v. Ralla*, 79 P.W.R. 1916 = 85 P.R. 1916 = 33 Ind. Cas. 783.

SHADI LAL and LESLIE JONES, JJ.

References:—(a) 63 P.R. 1908 = 126 P.W.R. 1908, F; (b) 136 P.R. 1884; 2 P.R. 1911 = 3 P.W.R. 1911, Rev. = 10 Ind. Cas. 294; 28 P.R. 1904; 137 P.R. 1908, R.

(11) *Jullundar City, Basti Mithu—Pathans—Widow—Right to succeed to estate of husband's collateral.*

Among the *Pathans* of *Basti Mithu*, a suburb of *Jullundar city*, the widow of a deceased proprietor is entitled to succeed to his collateral's estate in the same way as the deceased husband would have done, if he had been living (a). *Khadim Hussain v. Sher Muhammad*, 121 P.R. 1916 = 36 Ind. Cas. 380.

JOHNSTONE, C.J. and SHADI LAL, J.

References:—32 P.R. 1915; 1 P.R. 1907; 126 P.R. 1912 (P.O.), R.

(12) *District Amballa, tahsil Jagadhri—Self-acquired property—Exclusion of daughter by collaterals—No custom proved.*

Customs—Punjab—(Continued).**—8.—Inheritance and Succession—(Ctd.).**

Held, that the plaintiff, a collateral of the sixth degree, failed to prove that, among Jains of Buria, Jagadhri tahsil, Amballa District, a custom exists by which a collateral excludes a daughter, even as regards self-acquired property of her father. **Bhagwan Das v. Mussamat Balwanti**, 74 P.R. 1916=30 P.L.R. 1917=36 Ind. Cas. 84.

CHEVIS and SCOTT-SMITH, JJ.

- (13) *Custom or Muhammadan Law—Bhutta Tarkhans of Multan City—Practice of males excluding females, whether proves custom—Onus—Suit for share in inheritance—Limitation—Cross-appeals decided by one judgment—Second appeal—Omission to file copy of decree in rival appeal—Effect—Costs.*

Where, in case of cross-appeals, the decree in one of them disposes of the whole suit and embodies the result of the rival appeal, a copy of the decree in the latter need not be filed.

Among Bhutta Tarkhans of Multan City, there is no definite custom excluding daughters from inheritance and the rule of succession applicable is that supplied by the Muhammadan Law (a).

A mere practice of males excluding females cannot be elevated to the dignity of custom unless there is clear and cogent evidence that it has been uniform and has existed for a sufficiently long period.

Where the parties are Tarkhans by profession, reside in the town of Multan and do not own any agricultural land, the onus of establishing a special custom overruling their personal law lies heavily on those who allege it.

A suit for a share in the inheritance, where there is no proof of the existence of a joint family, becomes barred after the lapse of 12 years from the death of the last owner (b).

The plaintiff's suit for a share in the inheritance was resisted on the ground of custom but decreed by the first Court. Both parties appealed, the defendants contesting the finding against them on the point of custom and praying for the dismissal of the entire suit, and the plaintiff praying for an increase in the share awarded. Both appeals were decided by one judgment and the plaintiff's suit was dismissed *in toto*. The decree in her appeal not only dismissed that appeal but also embodied the result of the rival appeal. The plaintiff having preferred a second appeal, the preliminary objection was taken that, as she had not filed a copy of the decree in the defendants' appeal to the Divisional Judge, she was precluded from impugning the finding on the question of custom.

Held, that the appellant's failure to file a copy of the other decree, which was due to a *bona fide* mistake, did not prevent her from attacking the decision of the Divisional Judge on the point of custom; but that on account of this omission the order relating to costs in that appeal was binding upon her. **Mussamat Murad Khatun**

Customs—Punjab—(Continued).**—8.—Inheritance and Succession—(Ctd.).**

v. Muhammad Bakhsh, 85 P.W.R. 1916=84 P.R. 1916=33 Ind. Cas. 742.

SHADI LAL and LESLIE JONES, JJ.

References:—(a) 47 P.R. 1900, F. (b) 89 P.R. 1888, F.

- (14) *Custom or Personal Law—Araons of Jullundur City—Succession—Burden of proof—Alienation inter vivos and testation, powers of.*

The power of alienation *inter vivos* and the power of testation go together, and if in a particular case the former is proved to be governed by custom, the latter is presumed to follow the same rule.

The Araons of the Jullundur City are governed in matters of testamentary and intestate succession by the Ordinary Customary Law of the Province.

As a rule, the onus lies on the person asserting that he is ruled in regard to a particular matter by custom to prove that he is so governed; but the onus shifts on to the opposite party in the case of a tribe which is one of the dominant agricultural tribes in the Province and to which the ordinary agricultural custom is generally applicable. **Taj Muhammad v. Sayad Muhammad**, 94 P.W.R. 1916=122 P.R. 1916=34 Ind. Cas. 126.

SHADI LAL and LE-ROSSIGNOL, JJ.

References:—110 P.R. 1906=59 P.W.R. 1907, R.

- (15) *Succession—Parachas of Mukhad in the Attock District follow Customary Law—Widow—Her brother—Muhammadan Law—Presumption of Custom—Value of oral evidence.*

Found, that Parachas of Mukhad, a large village or a small town on the Indus in the Attock District, follow generally Punjab Customary rules in the matters of succession and not their personal law.

Among them, in the absence of a son, a widow only takes an ordinary Punjabi widow's life estate, and on her death her husband's property reverts to his reversioners and not to her heirs.

Therefore a claim by her brother to get her 1/4th share in her husband's property to which she is entitled according to Muhammadan Law in the absence of children is not maintainable.

Obiters:

Held, that:—

1. In this tribe when there are more widows than one and one dies, the other takes by survivorship,—the deceased lady's own heirs do not come in.

2. In this tribe when a widow marries she forfeits her late husband's property.

3. In the Punjab where a widow takes the whole of her late husband's estate, there is a presumption that she takes only for her life.

4. Though it is laid down in several rulings of the Punjab Chief Court that, because a certain rule of Punjab agricultural custom is found to exist, it does not follow that other

Customs—Punjab—(Continued).**— 6.—Inheritance and Succession—(Ctd.).**

rules of custom in supersession of the personal law have also been adopted, yet, where there is a respectable body of evidence in favour of a rule of succession in controversy, the fact that in other matters connected therewith the parties appear to follow such custom is certainly some support to the party relying on custom. **Nur Muhammad v. Khuda Bakhsh**, 93 P.W.R. 1916=125 P.R. 1916=34 Ind. Cas. 135.

JOHNSTONE, C.J. and CHEVIS, J.

References:—110 P.R. 1906 (F.B.)=59 P.W.R. 1907, *Exp.*; 74 P.R. 1904 at p. 286=54 P.R. 1903 at p. 49 and 14 P.R. 1911=44 P.W.R. 1911, R.

- (16) Ambala district, Rurki Mausā—Jat—Succession—Daughters—Collaterals—Right of former to succeed—Ancestral property—Burden of proof—Former suit—Unnecessary finding—*Res judicata*.

Where, in a suit, the dispute was between the daughters and the collaterals with respect to the succession to the property left by a Jat of Mausā Rurki in the Kharar Tahsil of the Ambala District, the onus of proof is on the persons who allege the property to be ancestral. The circumstance that such persons happen as in this case to be defendants does not shift the onus on to the plaintiffs.

Held, that no special custom was proved whereby daughters are excluded by collaterals in the matter of succession to non-ancestral property.

An unnecessary finding that the property was ancestral made in a former suit brought to contest an alienation by a widow, cannot operate as *res judicata* in a subsequent suit. **Devi Ditta v. Mussamat Indar Devi**, 56 P.R. 1916=160 P.L.R. 1916=50 Ind. Cas. 542.

SHADI LAL and LESLIE-JONES, J.J.

- (17) Amritsar District—Bhandari Khatri of Jalalabad—Succession—Landed estate—Applicability of custom

Among Bhandari Khatri of Jalalabad, in matters of succession to landed estate, custom applies to the parties and not their personal law. **Shib Dial v. Mathra Das**, 61 P.R. 1916=161 P.W.R. 1916=5 P.L.R. 1917=35 Ind. Cas. 561.

SHAH DIN, J.

References:—60 P.R. 1895, 107 P.R. 1901, D.

- (18) Hoshiarpur district, Nurpur Mausā—Brahmans—Adoption—Collateral succession—Right of adopted son to succeed collaterally in adoptive family—*Res judicata*—Person only a formal party in former suit—Decision in that suit—Whether binds such person.

Among Brahmans of Mausā Nurpur, Tahsil Garshankar of the Hoshiarpur District, an adopted son is entitled to succeed collaterally in the adoptive family.

The circumstance that the Brahmans of this village form a compact village community and

Customs—Punjab—(Continued).**— 6.—Inheritance and Succession—(Ctd.).**

till the land with their own hands does not constitute an adequate reason for holding that amongst them the institution of adoption has lost all religious significance and has become a purely secular affair.

A decision arrived at in a previous suit cannot operate as *res judicata* against a person who was in that suit merely a nominal defendant. (a). **Gokal Chand v. Milkhi**, 65 P.R. 1916=157 P.W.R. 1916=1 P.L.R. 1917=35 Ind. Cas. 543.

SHADI LAL, J.

References:—(a) 60 P.R. 1891; 41 P.R. 1899; 25 B. 589, R.

- (19) Succession—Applicability of custom or of Muhammadan Law to non-agriculturist Mussalmans residing in Peshawar suburbs. **Mussamat Iqbal Jan v. Fida Mohammad**, 8 P.W.R. 1913 (N.W.F.P.)=91 P.L.R. 1916. See Final Part, 1913, Col. 512.

- (20) Daudzai Pathans—Peshawar District—Childless proprietor—Right of a widow of—To succeed to her husband's estate and to claim partition. **Zarif v. Bakht Nisa**, 7 P.W.R. 1913 (N.W.F.P.)=80 P.L.R. 1916. See Final Part, 1913, Col. 512.

- (21) Hoshiarpur—Kakezai Shoihs—Succession—Last male owner—Self-acquired property—Preference of collaterals over sisters—Not supported by custom—Second appeal—Change of case—Reliance on Mahomedan Law—Not permissible. **Tufel Muhammad v. Shahab Din**, 67 P.R. 1915=148 P.W.R. 1915=31 Ind. Cas. 85. See Final Part, 1915, Col. 614.

- (22) Hoshiarpur District, tahsil Una—Malakotra Rajputs—Succession—Rule applicable—Chandawand and not Pagwand. **Gopal Singh v. Prabh Dyal Singh**, 50 P.R. 1915=99 P.W.R. 1915=6 P.L.R. 1916=23 Ind. Cas. 650. See Final Part, 1915, Col. 615.

- (23) Alienation by father—Succession—Hindu Law—Adoption of custom in some matters—Ancestral property—Property acquired as income of ancestral property—Right to succeed with father in the estate of grandfather—Special custom not proved. **Budhu Ram v. Muhammad Din**, 196 P.L.R. 1915=86 P.R. 1915=165 P.W.R. 1915=32 Ind. Cas. 315. See Final Part, 1915, Col. 615.

- (24) Jals of Kakrola village, Delhi Tahsil—Succession—Pagwand or Chandawand. **Sher Singh v. Salig**, 72 P.R. 1915=149 P.W.R. 1915=31 Ind. Cas. 241. See Final Part, 1915, Col. 616.

- (25) Succession—Daughters of a Rau of the Jamal Patti of Mausā Lahu Darya in Mulian District married to her first cousin—Her other first cousin not excluded—One instance not sufficient. **Mussamat Sahib Zadi v. Allah Bakhsh and Co.**, 161 P.W.R. 1915=31 Ind. Cas. 863. See Final Part, 1915, Col. 616.

- (26) Arains of Pakki Thathi, Lahore—Succession to self-acquired property—Rights of daughters and paternal aunt's son—Burden of proof—

Customs—Punjab—(Continued).**—6.—Inheritance and Succession—(Old.).**

Question of onus of proof of custom—Whether can be raised in second appeal without certificate under S. 41 (b), Punjab Courts Act (III of 1914). **Allah Din v. Salam Din**, 96 P.W.R. 1915 = 169 P.W.R. 1915 = 31 Ind. Cas. 497. See Final Part, 1915, Col. 616.

(27) *Akal Nihangs of Tarn Taran—Succession to self-acquired properties—Preferential right of brother or daughter—Custom, proof of.* **Pala Singh v. Mussammat Lachhmi**, 105 P.R. 1915 = 32 Ind. Cas. 16. See Final Part, 1915, Col. 617.

(28) *Reversioners, suit by—Exclusion of daughters—Land not proved to be ancestral—Burden of proof—Riwaj-i-am, entry in—Effect of.* **Lelu v. Ram Chand**, 174 P.W.R. 1915 = 23 P.R. 1916 = 31 Ind. Cas. 294. See Final Part, 1915, Col. 617.

(29) *Succession—Rights of village proprietary body—Right to redeem mortgage executed by a person who died without heirs. See MORTGAGE (REDEMPTION), No. 9, 40 P.W.R. 1916.*

(30) *Arains of Lahore—Intestate succession—Rights of brothers and their sons as against widow and daughter's sons. See WILL, No. 3, 6 P.W.R. 1916.*

—7.—Pre-emption.

(1) *Mohallah Rahmat Ullah Qureshi, Lahore—Unchallenged sales—Effect of—Instances from adjoining Mohallas, whether relevant—Custom, admission of, value of.*

1. The custom of pre-emption prevails in Mohallah Rahmat Ullah Qureshi, Lahore.

2. It is unsafe to assume that no custom of pre-emption exists in a locality simply from the fact that a number of sales there have been left unchallenged.

3. A case in which the vendee admits the custom of pre-emption is not entirely valueless as a precedent regarding custom (2).

4. Instances of custom from adjoining mohallas are relevant evidence and not wholly valueless when there is other evidence to prove the existence of the custom in the mohalla concerned. **Kasim Beg v. Jhanda**, 65 P.W.R. 1916 = 77 P.R. 1916 = 33 Ind. Cas. 338.

RATTIGAN and SHAH DIN, JJ.

References: (a) 17 P.R. 1895, *Not approved*; 91 P.R. 1911 = 217 P.W.R. 1911 = 10 Ind. Cas. 380, *F.*

(2) *Lahore City—Kucha Dalo—Region of Wach howali or Kanjar Phala—Pre-emption* **Gobind Ramand Gurcham Das v. Basheeshar Das**, 9 P.R. 1915 = 28 Ind. Cas. 957 = 19 P.L.R. 1916. See Final Part, 1915, Col. 618

—8.—Succession.

(1) *Pichhlag son—Collateral succession—Treatment by family as son does not confer rights of son on pichhlag—Adoption—Alienation in favor of pichhlag son.*

Customs—Punjab—(Continued).**—8.—Succession—(Concluded).**

Held, that there is no authority for the proposition that because the members of a family make no objection to a man's being succeeded by his pichhlag son, therefore the pichhlag son acquires the right to succeed collaterally in the family generally.

Where the adoption of a stranger is invalid by custom the adoption of a pichhlag and gift of ancestral property to him cannot be recognised as valid. **Ram Parshad v. Harnam**, 116 P.L.R. 1916.

JOHNSTONE, C.J.

(2) *Ancestral property—Pathans of Kasba Shahabad, tahsil Thanesar, district Karnal—Sister or collaterals in fifth degree—Rights of succession—Riwaj-i-am—Costs.*

The parties in this case were Pathans of Kasba Shahabad in the Thanesar Tahsil of the Karnal District, who were admittedly governed by custom; and the sole question was whether a sister and a sister's son had the right to succeed to the said property in the presence of the deceased proprietor's agnate heirs related to him in the 5th degree. *Held*, that the custom recognising such right was not proved.

It was further found that among them the rights of daughters were well recognised and there was also a tendency to regard sisters and sister's sons favourably and to prefer them to remote collaterals (a).

Where it appeared to the Chief Court in second appeal that the lower Court has not attempted to deal with the case as it should have done it ordered the parties to bear their own costs throughout. **Musammam Nur Bhar. v. Abdul Ghani Khan**, 100 P.R. 1916 = 36 Ind. Cas. 712.

RATTIGAN, J.

Reference:—(a) 134 P.R. 1907 (F.B.), *R.*

(3) *Custom versus Hindu Law—Sodhi Khatri of village Samalsar, Tahsil Moga, Ferozepore District—Daughter or nephew—Certificate for second appeal filed after 90 days—Practice.*

Held, that in matters of succession the Sodhi Khatri of village Samalsar, Tahsil Moga, Ferozepore District, follow Hindu Law and not agricultural custom (a).

Therefore, a daughter and daughter's son succeed to the ancestral immoveable property of a male Sodhi Khatri proprietor of a Samalsar in preference to his nephews and grand-nephews.

Held, also, that the fact of not filing within 90 days, the certificate for leave of second appeal is immaterial where sufficient cause exists for not applying for it within the prescribed period. **Harchand Singh v. Munahi Ram**, 143 P.W.R. 1916 = 142 P.L.R. 1916 = 35 Ind. Cas. 471.

SHADI LAL and LE-ROSSIGNOL, JJ.

References:—(a) 50 P.R. 1895; 84 P.R. 1898, *D.*; 43 P.R. 1911 = 86 P.W.R. 1911 = 10 Ind. Cas. 365; 79 P.R. 1909 = 127 P.W.R. 1909 = 3 Ind. Cas. 689, *R.*

Customs—Punjab—(Continued).**—9.—Will.**

- (1) *Custom—Quraishi of Dehra Ismail Khan—Whether a proprietor, who is a member of the Quraishi tribe, can will away his property in favour of his widow and daughter in the presence of near collaterals.*

Held, that, according to custom, a Quraishi cannot will away his property in favour of his wife and daughter in the presence of near collaterals (a).

Obiter dictum:—Possibly the general custom would recognize a bequest to a daughter of a reasonable part of the property. **Muhammad Shah v. Muhammad Mahmud**, 4 P.W.R. 1916 (N.W.F.P.).

BARTON, J.C.

References:—(a) Judicial Record No. 12 of 1903; 48 P.R. 1903, *Diss.*; 69 P.R. 1890; 76 P.R. 1892; 79 P.R. 1895, R.

- (2) *Custom—Alienation—Will—Awans of Tappa Khalsa—Peshawar District—Competency of an owner to make a will in favour of a distant relation in the presence of sons and grandsons.*

Held, that, considering the practice of will-making which prevails to a very considerable extent in the Peshawar District, it would be safe to hold that the power of will-making exists in Tappa Khalsa subject to restrictions.

Held, also that the will having given a portion only of the testator's estate could hardly be considered an unfair one. **Azad Khan v. Yakub Khan**, 5 P.W.R. 1916 (N.W.F.P.).

BARTON, J.C.

References:—59 P.R. 1913=6 P.W.R. 1913; 62 P.R. 1913=9 P.W.R. 1913; 66 P.R. 1914=2 P.W.R. 1914; 176 P.R. 1888, R.

- (3) *Awans of Fattahjang Tahsil, right of, to bequeath property to prejudice of reversioners.*

Held, that a sonless Awan proprietor of Fattahjang Tahsil is not by custom entitled to bequeath his property to the prejudice of his reversioners. **Sher Zaman v. Karm Baksh**, 76 P.W.R. 1916=32 Ind. Cas. 806.

CHEVIS, J.

- (4) *Collaterals of 5th degree consenting to Will in favour of daughters—Consent given bona fide, whether binding on sons.*

Held, that, where the collaterals of the 5th degree are doubtful about their right of inheritance in the presence of the daughters of the owner holding ancestral property, and, therefore, consent *bona fide* to the disposition by the latter of the property by a Will in favour of his daughters, their consent is binding on their sons, especially when they have kept quiet for many years. **Shera v. Gauhar Khan**, 83 P.W.R. 1916=33 Ind. Cas. 738.

SHADI LATI and LESLIE JONES, JJ.

- (5) *Muhammadzais of Peshawar District—Power of a proprietor to make a testamentary disposition of property in favour of his widow to the exclusion of his son. Saldan Shah v. Muhammad Durani*, 9 P.W.R. 1918 (N.W.F.P.)=84 P.L.R. 1916. See Final Part, 1913, Col. 518.

Customs—Punjab—(Concluded).**—9.—Will—(Concluded).**

- (6) *Gujars of Gujar Khan Tahsil, District Rawalpindi—Will in favour of mother and maternal uncle in presence of near collaterals—Validity—Custom how to be proved. See PUN. ACT I OF 1900 (LIMITATION), No. 3, 43 P.R. 1916.*

Cutchi Memons.

- (1) *Emigration—Memons of Cutch—Settlement in East Africa amongst Mahomedans—Hindu Law rules of succession, if continue to apply to emigrants—Presumption—Domicile.*

Where a Hindu family migrate from one part of India to another, *prima facie*, they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate to another country and being themselves Mahomedans settle among Mahomedans, the presumption that they have accepted the law of the people whom they have joined is one that should be much more readily made.

Where certain members of the Memon community at Cutch (who, being originally a sect of Hindus, upon conversion to Mahomedanism, did not adopt the Mahomedan law as to succession but retained the Hindu law of succession as a customary law binding upon the entire community) about half a century ago emigrated to Mombasa in East Africa where they settled down among people who professed the Mahomedan religion:

Held—that, in order to raise the presumption that the emigrants accepted the Mahomedan law of succession, all that had to be shown was that they had so acted as to raise the inference that they had cut themselves off from their old environments.

That the analogy here was that of a change of domicile on settling in a new country rather than the analogy of a change of custom on migration within India.

Held—that the Mahomedan law of inheritance governed the devolution of property left by a deceased Memon settlor in Mombasa when it did not appear from the evidence that the Memons in Mombasa had at any time established any distinctive political or social organisation for themselves or ever as a body claimed to be outside the system of law which prevailed among the Mahomedans of Mombasa. **Abdurahim Haji Ismail Mithu v. Hallmabai**, 20 O.W.N. 362=30 M.L.J. 227=(1916) M.W. N. 176=32 Ind. Cas. 413=18 Bom. L.R. 635 (P.C.).

EARL LOREBURN, VISCOUNT HALDANE and LORD WRENBURY.

- (2) *Custom—Will of entire property valid—Hindu law of self-acquisition applies to Cutchi Memons—Hindu Law of ancestral property not applicable—Bequests for charity not void for vagueness or as in futuro—Construction of will. The Advocate-General v. Jimbabai*, 17 Bom.

Catchi Memos—(Concluded).

L.R. 799=81 Ind. Cas. 106. See Final Part, 1915, Col. 621.

Cypres Doctrine.**Application extra territorium—Jurisdiction—Court.**

Where the charitable objects lie without the jurisdiction of the Court, the most the Court can do is to safeguard the funds intended to be applied to those charitable purposes where such funds lie within the Court's jurisdiction, and thereafter leave the application of them to the intended objects of the testator's bounty to the Courts of the country within whose jurisdiction those objects are.

A Court has no jurisdiction to apply the cypres doctrine *extra territorium*. *Kanji Jethal v. The Advocate-General*, 18 Bom. L.R. 60=32 Ind. Cas. 925.

BEAMAN, J.

Daily Fee.

Authority to Court to fix, to adversary's advocate. See LEGAL PRACTITIONERS ACT, No. 13, 33 Ind. Cas. 107.

Dakhlanama.

Public document—Admissibility of copy. Satnarain Dube v. Narain Bargah, 13 A.L.J. 935=30 Ind. Cas. 830. See Final Part, 1915, Col. 621.

Damages.

See CARRIERS.

See COMPENSATION.

See CONTRACT.

See RAILWAY COMPANY.

- (1) *Sale of goods—Order for goods placed with a firm of good reputation—Wrong labels put on the goods—Purchaser misled by acting up to instructions on the label—Loss—Right to damages—Contributory negligence—Appellate Court—Appreciation of evidence—Findings of lower Court—Power to interfere.*

B placed an order with L, a firm whose business reputation was high for a quantity of arsenite of Soda for the purpose of making 'dips' for cattle. L delivered 5½ cwt. of arsenite of Soda but the drums containing the Soda were wrongly labelled as containing 8½ lbs. only. Instructions were contained on the label as to the quantity of water to be used for mixing up with the Soda. The servant obeyed the instructions and prepared the 'dip'. The result was a strong 'dip' was prepared and cattle were injured. B sued L for damages and the defendants L pleaded contributory negligence on the part of L in not making enquiries and in not having averted the consequences of their failure to use reasonable care.

Held that the plaintiffs were justified in putting great faith in the correctness of the labels under which the firm of L sent out their goods and that there was no contributory negligence on their part.

Damages—(Continued).

There are cases in which, in face of the irrefragable testimony of contemporary written communications or of a course of business, an Appellate Tribunal may bring their knowledge of life and business to bear and say, confidently and rightly, that evidence given about them at the trial cannot be true, be the Trial Judge's impression of the witness what it may. *British South Africa Company v. Lenon Lim*, 34 Ind. Cas. 273 (P.C.).

VISCOUNT HALDANE, LORD DUNEDIN and LORD SUMNER.

- (2) *Reference to an officer of Court for determining market rate and assessment of damages for breach of contract if and when proper—Court should not refer where it can take evidence and ascertain damages at the trial—State of facts before referee if and when varied by evidence. D.N. Ghosh v. Popat Narain*, 19 C.W.N. 609=42 C. 819=30 Ind. Cas. 990. See Final Part, 1915, Col. 621.

- (3) *Assault—Compensation for assault—Costs incurred in prosecuting assailant. Jagan Nath v. Hakim*, 176 P.L.R. 1915=117 P.W. R. 1915=17 P.R. 1916=30 Ind. Cas. 485. See Final Part, 1915, Col. 622.

- (4) *Suit for damages—Promise to perform on demand after a certain date—Breach of contract—Commencement of the period of limitation—Meaning of "on demand"—Limitation Act (1908), Arts. 40, 115, 120. Tirumalanadham Surayya v. Tirumalanadham Bapirazu*, 18 M.L.T. 459=(1916) M.W.N. 121=31 Ind. Cas. 335. See Final Part, 1915, Col. 623.

- (5) *Suit for damages for causing pollution and loss of caste—Cognizability by Small Cause Court. See ACT IX OF 1887 (PROVL. S.C. COURTS), No. 31, 12 N.L.R. 7.*

- (6) *Award of interest on arrears of rent—Mandatory provision. See BEN. ACT VIII OF 1885 (TENANCY), No. 35-b, 36 Ind. Cas. 955.*

- (7) *Lessee inducted on land by a void lease if may plead lease void and created no rights—Lease registered in contravention of the law—Suit for, for breach of covenant—Estoppel. See BEN. ACT VIII OF 1885 (TENANCY), No. 41, 20 C.W.N. 1340.*

- (8) *Trespasser in occupation—Right of owner to sue for possession and—Necessity to recognise trespasser as tenant. See OUDH ACT XXII OF 1886 (RENT), No. 44, 30 Ind. Cas. 364.*

- (9) *See PUN. ACT XIII OF 1900 (ALIENATION OF LAND), No. 3, 120 P.R. 1916.*

- (10) *Money paid under compulsion of legal process—Suit to recover the money if lies—Bona fides of party receiving payment—Attachment of debt ostensibly payable to other than judgment-debtor—Necessity of enquiry as to who is real creditor—Duty of Court. See CIV. PRO. CODE (1908), No. 460, 20 C.W.N. 188.*

- (11) *Unliquidated damages—Pleadings and proof as to. See CIV. PRO. CODE (1908), No. 369, 20 C.W.N. 1192.*

- (12) *Jurisdiction—Suit for, for breach of betrothal tried by wrong Court—How dealt*

Damages—(Continued).

with by appellate Court. See CIV. PRO. CODE (1908), No. 59, 93 P.R. 1916.

(13) See CIV. PRO. CODE (1909), No. 195, 34 Ind. Cas. 909.

(14) Breach of contract—Suit for—Measure of profits See CONTRACT ACT, No. 85, 36 Ind. Cas. 264.

(15) Contract—Anticipatory breach—Delivery by instalments—Assessment of damages. See CONTRACT, No. 1, 20 C.W.N. 240.

(16) Effect of war on contract previously concluded—Contract for sale of goods—Seizure and release of goods by the Crown, effect of—For breach of contract. See CONTRACT, No. 17, 33 Ind. Cas. 510.

(17) Hire—Omission to return article after specified date—Remedy for breach of contract—Suit for. See CONTRACT, No. 21, 36 Ind. Cas. 276.

(18) Shipping contract—Carriage by sea—Shipper and shipowner, their rights and liabilities—Omission to call at appointed port—Breach of contract—Suit for. See CONTRACT, No. 20, 34 Ind. Cas. 813.

(19) Stipulation for payment of interest and—Unconscionable bargain—Award of reasonable compensation See CONTRACT ACT, No. 95, 36 Ind. Cas. 404.

(20) Contract for sale of sugar—No date fixed for delivery—Termination of contract—Breach of contract—Damages—Principle of assessment. See CONTRACT ACT, No. 89, 14 A.L.J. 597.

(21) Buyer failing to take delivery of goods and the seller exercising his powers of re-sale, claim for, at market rate—Maintainability. See CONTRACT ACT, No. 105, 8 L.B.R. 367.

(22) Delay of buyer in taking delivery—Damage to goods—Liability of purchaser. See CONTRACT ACT, No. 84, 10 S.L.R. 14.

(23) Deposit not a penalty—Forfeiture of deposit—Right of defaulter to claim credit in mitigation of. See CONTRACT ACT, No. 87, 10 S.L.R. 4.

(24) Bailment—Return of bailed goods—Liability for refusal to return on expiry of period—Conversion of goods—Measure of. See CONTRACT ACT, No. 138, 9 Bur. L.T. 224=34 Ind. Cas. 297.

(25) Conversion—Suit for—Measure of damages—Full value of the goods—Delay in bringing suit—Damages and full value not to be decreed. See CONTRACT ACT, No. 138, 34 Ind. Cas. 297=9 Bur. L.T. 224.

(26) Suit for ejectment and for, for use and occupation—Suit after termination of tenancy—Claim whether for distinct subjects. See COURT FEES ACT, No. 19, 36 Ind. Cas. 883.

(27) Lands situated in the mofussil—Exchange effected before the Transfer of Property Act—Warranty of title—Breach. See EXCHANGE, No. 1, 31 M.L.J. 350.

(28) Contract, breach of—Indemnity bond—Damages—No actual loss, if action premature

Damages—(Concluded).

—No action for damages on future loss of possession—Loss of title, substantial loss. See INDEMNITY BOND, No. 1, 20 M.L.T. 263.

(29) Suit for possession or, against perpetual hereditary lessees. See JURISDICTION OF CIVIL COURTS, No. 5, 19 O.C. 339.

(30) Suit for, for act amounting to offence against property—Non-cognizability by Small Cause Court. See JURISDICTION OF SMALL CAUSE COURT, No. 1, 33 Ind. Cas. 728.

(31) See LAND ACQUISITION ACT (1894), No. 13, 31 Ind. Cas. 259.

(32) Suit for, for breach of covenant in a registered *Zur-i-peshgi* lease. See LIMITATION ACT (1909), No. 192 b, 34 Ind. Cas. 51.

(33) Suit for, for failure to restore crops deposited with defendant, cognizance of. See SMALL CAUSE COURT, No. 1, 19 O.C. 236.

(34) Suit for, for injuries caused by animal—Negligence to be proved. See TORT, No. 1, 8 L.B.R. 358.

Damages, Suit for.

(1) *Obtaining search warrant maliciously and without reasonable and probable cause—Burden of proving malice and absence of reasonable and probable cause—Malicious prosecution suit for—Suit dismissed—Appeal—Death of the appellant pending appeal—Abatement—Probate and Administration Act, S. 89—"Other personal injuries," meaning of.*

Held, in a suit for damages, for having obtained a search warrant for account maliciously and without reasonable and probable cause, the burden of proving malice and want of reasonable and probable cause is on the plaintiff.

Held also, that the appeal against the decree of the lower Court dismissing a suit for damages for malicious prosecution and for maliciously obtaining a search warrant in that prosecution abated on the death of the appellant pending the appeal as the cause of action being a personal one did not survive to the appellant's heirs.

The well-known maxim of English law "*Actio personalis moritur cum persona*" is applicable in India.

The words "other personal injuries" in S. 89 of the Probate and Administration Act refer not only to bodily injuries but also to injuries similar to defamation such as those caused by malicious prosecution and wrongful search. *Gadgil Mareepa Veerabhadrapa v Marwadi Yannaajee Yajanjee*, 20 M.L.T. 303=4 L.W. 351.

ABDUR RAHIM, O.C.J. and KRISHNAN, J.

(2) Charge of illegal distraint—Malicious prosecution—Maintainability. See ACT I OF 1871 (CATTLE TRESPASS), No. 1, 20 M.L.T. 308.

(3) Second appeal—Suit for damages for cutting trees—Small Cause nature. See CIV. PRO. CODE (1908), No. 194, 20 M.L.T. 281.

(4) See LIMITATION ACT (1908), No. 105, 31 M.L.J. 267.

Damdapat.

- (1) *Damdapat*—*Usufructuary mortgage*—*Date of document*—*Date of possession by mortgagee*—*Interest for the period of interval*—*Non-applicability of the rule.*

In the case of a usufructuary mortgage in which the mortgagees obtain possession at a later date, the rule of *damdapat* does not apply to the interest recoverable during the interval between date of document and date of obtaining possession. **Panduji v. Panduji**, 12 N.L.R. 1=32 Ind. Cas. 231.

PRIDEAUX, OFFG A.J.O.

References:—5 B.H.C.R. 196; 24 B. 114, F.; 20 B. 721; 22 B. 86, R.

- (2) *Rule of—Applicability to mortgages between Hindus—Practices of Calcutta High Court—S. 4, Transfer of Property Act—S. 37, Contract Act, Kunja Lal Banerji v. Narsamba Debi*, 42 C. 826=20 C.W.N. 110=31 Ind. Cas. 6. See Final Part, 1915, Col. 624.

Dancing Girl.

Hindu Law—Right of dancing girl to adopt—*Abhinanaputri*. See HINDU LAW (ADOPTION), No. 10-a, 32 Ind. Cas. 743.

Darago.

Succession to office of, Custom. See RELIGIOUS ENDOWMENTS ACT, No. 3, 1 Pat. L.J. 437.

Darimla Inams.

Incidents of. See INAM, No. 2, 3 L.W. 573.

Darmakartha.

See HINDU LAW (RELIGIOUS ENDOWMENTS).

See RELIGIOUS ENDOWMENTS.

Temple and its lands originally subject to the Devasthanam Committee of one Taluq—Lands assigned to another taluq in another district—Revenue redistribution—The Committee to appoint, of such temple is the former Committee. See RELIGIOUS ENDOWMENTS, No. 3, 31 M.L.J. 360.

Dasabandham Rights.

Grant of—Mortgage of such rights by grantees—Rights of mortgagee. See GRANT, No. 4, 31 Ind. Cas. 565.

Dastbardinama.

Dastbardinama—*Deed, construction of—Widow relinquishing her life-estate for consideration—Sale or relinquishment—Consideration not passed—Deed, validity of Musammat Fazlan v. Imam-ud-din*, 95 P.W.R. 1915=29 Ind. Cas. 253=70 P.R. 1915=10 P.L.R. 1916. See Final Part, 1915, Col. 626.

Daughter.

(1) *Appointed as son*—Custom obsolete—Liability of appointed daughter to pay father's debts—If exists—Gift by Hindu to his daughter—Description of daughter as putrika—Effect. See HINDU LAW (ADOPTION), No. 14, 1 Pat. L.J. 581.

Daughter—(Concluded).

(2) *Money borrowed for marriage of, of a deceased member—Family necessity*. See HINDU LAW (JOINT FAMILY), No. 9, 19 O.C. 113.

Daughter's Son.

Adoption of, by widow under authority of husband—Gift of immoveable property by widow in favour of daughter after adoption is invalid—Means profits. See HINDU LAW (ADOPTION), No. 11, 152 P.W.R. 1916.

Day.

(1) *Law of limitation does not take portions of days into account*. See LIMITATION ACT (1908), No. 42, 12 N.L.R. 66.

(2) *Fractions of a day—Calculation of interest*. See TRANSFER OF PROPERTY ACT, No. 116, 30 M.L.J. 607.

Death.

See ABATEMENT OF APPEAL.

(1) *Adjudication directing abatement of suit on account of plaintiff's, whether decree—Appeal*. See CIV. PRO CODE (1908), No. 6, 111 P.W.R. 1916.

(2) *Choukidar's register, value of, as to date of birth or*. See HINDU LAW (REVERSIONER), No. 3, 19 O.C. 221.

(3) *Presentation of appeal beyond time—Of defendant after argument but before judgment—Appeal by defendant's heirs after prescribed period—Sufficient cause*. See LIMITATION ACT (1908), No. 10, 18 Bom. L.R. 751.

(4) *Registration of deed of gift—Death of donor—Execution admitted by donee—Registration if proper*. See REGISTRATION ACT (1908), No. 33, 20 C.W.N. 1315.

(5) *Deed of gift—Requirements of—Donor's, after execution—Compulsory registration at the donee's instance—Gift, if complete and valid*. See TRANSFER OF PROPERTY ACT, No. 147, 31 M.L.J. 690.

Debenture Deed.

See COMPANIES ACT (VI OF 1882), No. 2, 32 Ind. Cas. 91.

Debt.

See ACKNOWLEDGMENT

See ATTACHMENT.

See HINDU LAW (DEBTS).

See MAHOMEDAN LAW (DEBTS).

(1) *Decree for maintenance of wife, not a, provable in insolvency*. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 12, 10 S.L.R. 28.

(2) *Meaning of 'debt.'* See CIV. PRO CODE (1908), No. 137, 30 M.L.J. 361.

(3) *Attachment and sale of*. See CIV. PRO. CODE (1908), No. 458, 35 Ind. Cas. 469.

(4) *"Distress," how affects the meaning of moveable property—If moveable property*. See CRIM. PRO. CODE, No. 6, 4 L.W. 613.

(5) *Liability of appointed daughter to pay father's—If exists—Gift by Hindu to his*

Debt—(Concluded).

daughter—Description of daughter as putrika—Effect. See **HINDU LAW (ADOPTION)**, No. 14, 1 Pat. L.J. 591.

(6) Insurance policy—Unascertained sum of money due thereunder—Whether forms part of estate of deceased—Not a, for which succession certificate can be issued—Certificate if necessary for realising the same. See **SUCCESSION CERTIFICATE ACT (1889)**, No. 3, 33 Ind. Cas. 157.

(7) Rent—Assignment—Simple mortgage and subsequent lease of the hypotheca to mortgage—Meaning profit. See **TRANSFER OF PROPERTY ACT**, No. 16, 31 Ind. Cas. 475.

Debtor and Creditor.

See **BURDEN OF PROOF**.

See **EXECUTION OF DECREE**.

See **SALE**.

(1) Promissory note payable on demand to person or bearer or order—If illegal and void—Right of creditor to get a decree apart from the note—Negotiable Instruments Act, Ss. 1 and 19. See **ACT II OF 1910 (PAPER CURRENCY)**, No. 1, (1916) 2 M.W.N. 210.

(2) Civ. Pro. Code, 1903, O. XXI, r. 5—Agreement prior to decree between one of the judgment-debtors and the decree-holder to enter up satisfaction of the decree—Application to enter up satisfaction, if maintainable. See **CIV. PRO. CODE (1903)**, No. 431, 39 M. 541.

(3) See **ESTOPPEL**, No. 4, 30 Ind. Cas. 323.

(4) Condition that principal and interest shall both become due in default of payment of interest—Default in payment of interest—Creditor whether bound to enforce the default clause. See **LIMITATION ACT (1908)**, No. 152, 4 L.W. 77.

(5) Debtor appointed as executor, effect. See **WILL**, No. 18, 32 Ind. Cas. 267.

Debutter Estate.

Will, construction of—Dedication to idols—Complete dedication or charge—Surplus income arising from debutter estate—Accumulation—Power given to shewait to invest—Cash and money—Devise of residuary estate. See **WILL**, No. 6, 23 C.L.J. 241.

Declaration.

(1) *Suit to declare lease as void and inoperative—Power of Court to grant declaration in modified form.*

Where the plaintiff in a suit prayed for a declaration that a lease for a long term granted by the owner of the property is void and inoperative against him, it is competent to the Court to grant a declaration in a modified form, that the lease is void and inoperative only in so far as the term of the lease is concerned. **Syed Hussain v. Bank of Upper India, Ltd.**, 30 Ind. Cas. 289.

LINDSAY, J.C. and KANHAIYA LAL, A.J.C.

(2) Jurisdiction—Suit for, of title—Monies in hands of third person—Recovery not payable

Declaration—(Concluded).

in same suit—Declaration, if an incidental relief—Suit, whether cognizable by the Presidency Small Cause Courts. See **ACT XV OF 1883 (PRESIDENCY SMALL CAUSE COURTS)**, No. 1, 4 L.W. 339.

(3) Order of Deputy Collector debarring one from appearing as vakil for parties in Village Courts, *ultra vires*—Specific Relief Act (I of 1877), S. 42—Suit for, of invalidity of order, maintainability of. See **MAD. ACT I OF 1909 (VILLAGE COURTS)**, No. 2, 39 M. 608.

(4) Suit to contest notice of ejectment, dismissal of—Suit for, of status as under-proprietor before actual ejectment, maintainability of—Jurisdiction of Civil Court—Oudh Rent Act, S. 101, cls. (8) and (10). See **OUDDH ACT XXII OF 1896 (RENT)**, No. 1, 19 O.C. 67.

(5) Suit against order on claim petition—plaintiff's right to, and consequential relief—Sale of property before order on the claim petition—Limitation Act. See **CIV. PRO. CODE (1908)**, No. 156, (1916) 2 M.W.N. 207.

(6) See **CIV. PRO. CODE (1908)**, No. 33, 94 P.R. 1916.

(7) Suit for, that decree obtained by defendant against plaintiff was satisfied and for injunction restraining execution, if maintainable. See **CIV. PRO. CODE (1908)**, No. 115, 31 M.L.J. 429.

(8) Temple Committee—Suit for declaration of supervisorship and for production and inspection of accounts—Limitation. See **RELIGIOUS ENDOWMENTS ACT (XX OF 1863)**, No. 1, 4 L.W. 185.

(9) Right to officiate at funeral, suit for, of. See **RIGHT OF SUIT**, No. 1, 1 Pat. L.J. 391.

(10) Unregistered deed of sale—Subsequent sale of same property by registered deed—Suit by first vendee for registration of his deed and for, that the subsequent transaction was void, whether suit for specific performance. See **SPECIFIC RELIEF ACT**, No. 14, 1 Pat. L.J. 455.

(11) Suit for, of title to properties in possession of Receiver. See **SPECIFIC RELIEF ACT**, No. 30, 35 Ind. Cas. 17.

Declaratory Decree.

See **SPECIFIC RELIEF ACT**, S. 42.

(1) *Declaratory suit for removal of a mahant in possession and declaration that plaintiff has the right to nominate a successor—Consequential relief for possession—Costs.*

Where, in a suit for the removal of a Mahant in possession, from his office, and to have it declared that the plaintiff, as a spiritual relation of the late mahant and as mahant of the parent shrine had the right to nominate a new mahant, where it appeared that the prayer for removal from the office did not necessarily imply the mahant's physical dispossession, and where all that was sought was a decree which would enable the successor, on appointment, to enforce his own right to take possession of the

Declaratory Decree—(Concluded).

property, it was held that the suit as laid was competent. The objection to the maintainability of the suit on the ground that the plaintiff could bring a suit for possession was held not to be a valid objection (a).

In this case the Court declined to allow costs to plaintiff on the ground of want of clearness in the pleading. **Tilok Chand v. Ram Chand**, 95 P.R. 1916.

SHAH DIN and OREVIS, JJ.

References:—(a) 56 P.R. 1895, F.; 15 M. 15; 16 M. 31; 22 M. 117, *Not F.*

(2) See SPECIFIC RELIEF ACT, No. 51, 35 Ind. Cas. 106.

Declaratory Suit.

- (1) *Plaintiff's title and previous possession, suit to establish, whether suit for mere declaration—Maintainability—Whether catching fish in a streamlet amounts to dispossession.*

Where the plaintiffs in a suit establish their title to a village and also that they have been in possession of it and of a streamlet which lies within it, but that the plaintiffs' possession has been disturbed inasmuch as the defendant's people have caught fish in it.

Held, that under such circumstances that plaintiff's suit for a mere declaration is maintainable.

Even if the defendants are found to have granted the right to catch fish in the streamlet to other persons not parties to the suit, that act would not amount even to disturbance of possession still less to dispossession, nor would the fact that some persons have at times caught fish in the streamlet show that the plaintiffs have been dispossessed. At most the catching of fish in the streamlet would be a disturbance of possession. **Sahdeo Lal Bhagat v. Kesho Mohan Thakur**, 20 C.W.N. 1274=35 Ind. Cas. 916.

CHAMIER, C.J. and SHARFUDDIN, J.

- (2) *Life estate held by widow—Money received as compensation for acquisition of land by Government—Consent of husband's brothers for payment of the amount to her—Suit by sons of latter for declaration of their reversionary right—Maintainability—Cause of action—Second appeal—Question of fact.*

S, H and M were three brothers holding an estate in equal shares. On the death of M, his widow succeeded to a life interest in her husband's share of the estate. A part of the estate was acquired by the Government under the Land Acquisition Act, the widow's share amounting to a sum of Rs. 6,115-2-3. In spite of the provisions of S. 32 of the Land Acquisition Act, this sum was paid in cash by the Land Acquisition Officer to the widow. Plaintiffs, the minor sons of S and H, instituted the present suit for declaration that the widow is only entitled to use by way of maintenance the income of the sum which she received as compensation, and that after her death the

Declaratory Suit—(Continued).

plaintiffs shall be entitled to the capital and for other reliefs.

It was contended *inter alia* that the plaintiffs were bound by their fathers' consent. Both the Courts below found that the consent was not given *bona fide*.

Held that the plaintiffs were not estopped from suing by their fathers' consent.

The question whether the consent was given *bona fide* or not is one of fact and could not be reopened on second appeal. The plaintiffs having alleged that the defendant denied that the plaintiffs had any right present or reversionary in the property and that she set herself up as the absolute owner and threatened to use the capital, it could not be said that the plaintiff disclosed no cause of action. **Musammam Sardar Begam v. Muhammad Shariff**, 63 P. R. 1916=160 P.W.R. 1916=3 P.L.R. 1917=35 Ind. Cas. 555.

RATTIGAN and JESLIE JONES, JJ.

References:—1 W.R. 125; 47 P.R. 1884; 22 M. 126, D.

- (3) *Adverse entry in Revenue Registers—Suit for declaration—Limitation—Procedure—Amendment of plaint—Prayer for new relief—If allowable.*

Where by reason of an adverse entry in the Revenue Registers, a cloud is thrown upon the plaintiff's title, *held* that a suit for a declaration that that entry shall not affect the plaintiff's rights is barred unless brought within six years from the date on which the entry was first made in the revenue papers.

Where a person in possession of the properties against whose title an adverse entry had been made in the Revenue Registers instituted a suit framing the suit as one for recovery of possession, treating the refusal of the Revenue authorities to amend their registers as amounting to a dispossession of him from his properties, *held* that he could not subsequently be allowed to amend his plaint and ask for a declaration that he is entitled to possession of the property in suit, especially when a suit for a declaratory relief is barred by limitation. **Ali Hussain Khan v. Bandi Bibi**, 34 Ind. Cas. 775.

LINDSAY, J.C.

- (4) *Suit for declaration that land is free of assessment and for recovery of assessment—Art. 14 and Art. 131, Limitation Act. Subbanna v. The Secretary of State*, (1915) M.W. N. 915=31 Ind. Cas. 267. See Final Pat. 1915, Col. 629.

(5) See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), No. 5, 4 L.W. 402.

- (6) *Wrong entry in Record-of-Rights—Suit for declaration—Whether governed by Bengal Tenancy Act—Holding at fixed rates—Evidence of long payment at unchanged rate—Admissibility—Presumption.* See BEN. ACT VIII OF 1885 (TENANCY), No. 30, 1 Pat. L.J. 67.

- (7) *Plaintiff shown as tenant liable to pay rent in Record-of-Rights—Suit for declaration that he was a lakheraj tenant not liable to pay rent*

Declaratory Suit—(Concluded).

—Nature of Suit—Limitation. See BEN. ACT VIII OF 1885 (TENANCY), No. 59, 1 Pat. L.J. 73.

(8) See CIV. PRO. CODE (1908), No. 487, 9 Bur. L.T. 89.

(9) Suit for declaration that certain *ex parte* decree is invalid. See COURT-FEE. No. 3, 35 Ind. Cas. 797.

(10) By reversioners when not to be decreed. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 6, 26 P.W.R. 1916.

(11) Objection based on document of title dismissed—Suit for declaration of title—Burden of proof. See EXECUTION PROCEEDINGS, No. 1, 19 O.C. 64.

(12) Hindu Law—Alienation by widow—By reversioner — Maintainability. See HINDU LAW (ALIENATION), No. 22, 33 Ind. Cas. 183.

(13) Hindu widow—Gift of property with consent of reversionary heir expectant—Donee given possession—Suit for declaration of proprietary title in widow's lifetime against strangers—Decree if may be made apart from proof of necessity. See HINDU LAW (WIDOW), No. 10, 20 C.W.N. 1149.

(14) See IRRIGATION RIGHT, No. 1, 34 Ind. Cas. 9.

(15) Suit for declaratory relief with prayer for confirmation of possession and for injunction—Limitation. See LIMITATION ACT (1908), No. 201, 23 C.L.J. 561.

(16) Title to immoveable property. See LIMITATION ACT (1908), No. 200, 36 Ind. Cas. 292.

(17) Pardanashin lady, transaction with—Gift deed—Undue influence—*Bona fides*—*Oxus*—Maintainability of, when possession not delivered. See PARDANASHIN WOMAN, No. 1, 35 Ind. Cas. 395.

(18) Declaratory decree prayed for—Strict fulfilment of statutory conditions necessary. See PROBATE, No. 2, 20 C.W.N. 738.

(19) By claimant under Civ. Pro. Code, O. XXI, r. 63—No prayer for possession—S. 42, Specific Relief Act—No bar. See SALE, No. 12, 34 Ind. Cas. 125.

(20) Illegal contract—Parties *in pari delicto* if entitled to declaratory relief. See SPECIFIC RELIEF ACT, No. 23, 20 C.W.N. 760.

(21) Specific Relief Act, S. 42—Essence of section—Suit by trespasser for declaration that he is trespasser—Maintainability. See SPECIFIC RELIEF ACT, No. 26, 1 Pat. L.J. 25.

Decree.

See APPEAL.

See ATTACHMENT.

See CIV. PRO. CODE (1908), Ss. 2, 47, O. XXI.

See ESTOPPEL.

See EVIDENCE.

See EXECUTION OF DECREE.

Decree—(Continued).

See RIGHT OF SUIT.

See SALE.

(1) *Fraud—Pre-emption decree obtained by B against N—Decree afterwards set aside on the ground of fraud in another suit by N—Previous suit not revived—Effect of the subsequent decree on the previous decree.*

Held, that, where a judgment-debtor obtains another decree declaring that the 1st decree against him was obtained by fraud and is consequently not binding upon him, the first suit cannot thereby be re-opened and retried on the merits.

The effect of the subsequent decree is simply to declare that the 1st decree is null and void and shall not affect the parties thereto. *Net Ram v. Mussammatt Elah Begam*, 32 P.W.R. 1916=32 Ind. Cas. 890.

SCOTT-SMITH, J.

References:—10 B. 338, F.; 2 C. 184, D.

(2) *Decree—Not in accordance with judgment—Mortgage decree taken by decree-holder to be a charge—Amendment of decree—Proper course—Power of Construction of an executing Court. Yegnanarayana v. Makayya*, (1915) M.W.N. 914=31 Ind. Cas. 478. See Final Part, 1915, Col. 632.

(3) *Decree, suit to set aside, on ground of mistake if lies—Finality of litigation—Difference between consent decree and decree made on contest—Fraud. Kusodhaj Bhakta v. Brojo Mohan Bhakta*, 19 C.W.N. 1229=43 C. 217=31 Ind. Cas. 13. See Final Part, 1915, Col. 633.

(4) *Decree passed after death of defendant—Legal representatives not brought on record—Validity of decree—Objection to such decree whether can be taken in execution. M. Subramania Aiyar v. Valthinatha Aiyar*, 38 M. 682=31 Ind. Cas. 198. See Final Part, 1915, Col. 633.

(5) *Decree based on award—Suit to set it aside on ground of fraud, perjury, etc.—Evidence available at a later date—Remedy of litigant—Review when will be granted—Delay in applying for review—Effect. Skinner v. Badri Kishen*, 98 P.R. 1915=179 P.W.R. 1915=31 Ind. Cas. 196. See Final Part, 1915, Col. 633.

(6) Promissory note payable on demand to person or bearer or order—If illegal and void—Right of creditor to get it, apart from the note—Negotiable Instruments Act, Ss. 1 and 19. See ACT II OF 1910 (PAPER CURRENCY), No. 1, (1916) 2 M.W.N. 210.

(7) Attorney, if may claim lien on his client's (plaintiff's), as against defendant's prior decree against plaintiff—Equities between attorney, client and others interested in property. See ATTORNEY'S LIEN, No. 1, 43 C. 932=21 C. W.N. 106.

(8) Decree for possession—Execution barred by limitation—Suit on the basis of decree if maintainable. See CIV. PRO. CODE (1908), No. 31-b, 14 A.L.J. 102.

(9) Order overruling preliminary objection against maintainability of suit—Not a decree—

Decree—(Concluded).

No appeal lies. See CIV. PRO. CODE (1908), No. 2, 8 L.B.R. 213.

(10) Adjudication directing abatement of suit on account of plaintiff's death, whether—Appeal. See CIV. PRO. CODE (1909), No. 6, 111 P.W.R. 1916.

(11) *Reductio ad absurdum*—Defective judgment and See CIV. PRO. CODE (1908), No. 287, 170 P.W.R. 1916.

(12) See CIV. PRO. CODE (1908), No. 549, 31 Ind. Cas. 4.

(13) Finding not forming basis of. See CIV. PRO. CODE (1909), No. 23, 33 Ind. Cas. 620.

(14) Interest on costs—Judgment not allowing, if can include. See CIV. PRO. CODE (1909), No. 74, 35 Ind. Cas. 219.

(15) Compromise, effect of. See COMPROMISE, No. 3, 31 Ind. Cas. 902.

(16) When decision becomes final—Appeal—Expiry of time for filing the same. See FINAL DECREE, No. 1, 31 Ind. Cas. 204.

(17) Effect of fraudulent, as between parties thereto—Decree not a nullity. See FRAUDULENT DECREE, No. 1, 30 Ind. Cas. 696.

(17-a) Suit merely for a declaration to set aside, by minor after attaining majority—Form of decree. See GUARDIAN AND WARD, No. 1, 117 P.L.R. 1916.

(18) Decree—Appeal against one portion of by one defendant, if saves limitation as regards the other portion or against other defendants—Rule, if different when the decree of first Court consist of two independent decrees—Limitation periods to be laid down with clearness and certainty—Subtle distinctions not to be introduced, if not, warranted by language—Final decree, if two, can exist—'Imperiling decree,' theory of, limitation, if can be made to depend on. See LIMITATION ACT (1909), No. 284, 3 L.W. 521.

(19) Calculation of period of limitation for filing the same—Time between delivery of judgment and signing—Right to deduct. See LIMITATION ACT (1909), No. 38, 1 Pat. L.J. 573=35 Ind. Cas. 869 (F.B.).

(20) Decree for possession and mesne profits—Assignment of, with respect to mesne profits. See MESNE PROFITS, No. 7, 1 Pat. L.J. 427.

(21) Decree against minor when can be set aside. See MINOR, No. 2, 14 A.L.J. 438.

(22) Obtained by fraud. See RES. JUDICIAL, No. 19, 19 O.C. 334.

(23) Decree against two defendants in prior suit—Decree indivisible—Effect of order setting it aside. See SUMMONS, No. 1, 23 C.L.J. 436.

(24) Transfers of preliminary and final decree for foreclosure to different persons—Substitution of names. See TRANSFER OF PROPERTY, No. 1, 9 Bur. L.T. 121.

Dedication.

See HINDU LAW (RELIGIOUS ENDOWMENT).

See MAHOMEDAN LAW (WAKF).

See RELIGIOUS ENDOWMENT.

See TRUST.

(1) Vacant space—User by public—Presumption of. See PUN. ACT III OF 1911 (MUNICIPALITY), No. 2, 108 P.R. 1916.

(2) Limited access of public to a private place—Presumption of dedication of road to public. See PUN. ACT III OF 1911 (MUNICIPALITY), No. 1, 109 P.R. 1916.

(3) See CIV. PRO. CODE (1908), No. 303, 36 Ind. Cas. 976.

(4) Voluntary settlement—Void as against creditors—Reserving life estate to settlor in the income of property, if valid. See MAHOMEDAN LAW (WAKF), No. 6, 31 M.L.J. 431.

(5) What it involves—Proof thereof—Limited dedication—Possibility—Express or implied dedication—Presumption. See MAHOMEDAN LAW (WAKF), No. 11, 33 Ind. Cas. 91.

Deed, Mutilation of.

Document—Deed of mortgage—Mutilation—Effect—No intention to keep mortgage alive. See VENDOR AND PURCHASER, No. 4, 31 Ind. Cas. 47.

Defamation.

See LIBEL.

See SLANDER.

Right to maintain suit for damages for defamation—Test.

In a suit for damages in consequence of defamation, the true test of the right to maintain the suit should be, whether the defamatory expressions were used at a time, and under such circumstances, as to induce in the person defamed reasonable apprehension that his reputation had been injured, and to inflict on him the pain consequent on such a belief. *Nga Nyo v. Mi Te*, U.B.R. (1916), 4th Qr., p. 98=33 Ind. Cas. 673.

SAUNDERS, J. C.

References:—8 M. 175, P.; 7 Bur. L.T. 253; 26 C. 653; 28 C. 452, R.

Defendant.

Liability of plaintiff and, under joint decree—Plaintiff paying and suing defendant for recovery of whole sum—Nature of defence open. See PLEADINGS, No. 5, (1916) 2 M.W.N. 214.

Dekkan Agriculturists' Relief Act.

See BOM. ACT XVII OF 1879.

Delay.

See ACQUIESCENCE.

(1) Wife's adultery—Decree nisi not granted on account of proved adultery of husband. See ACT IV OF 1869 (DIVORCE), No. 5, 18 Bom. L.R. 918.

Delay—(Concluded).

(2) Conversion—Suit for damages—Measure of damages—Full value of the goods, in bringing suit—Damages and full value not to be decreed. See CONTRACT ACT, No. 138, 34 Ind. Cas. 297=9 Bur. L.T. 244.

(3) Delay in suing whether proves acquiescence or waiver. See EVIDENCE ACT, No. 44, 97 P.W.R. 1916.

(4) Presentation of appeal to wrong Court—*Bona fide* mistake—, in filing appeal—Saving of limitation. See LIMITATION ACT (1908), No. 12, 30 Ind. Cas. 211.

(5) 'Delay defeats equities'—Limitations to the maxim—Laches and inconvenience when no bar to re-opening of settled matters. See MAHOMEDAN LAW (GUARDIANSHIP), No. 3, 3 L.W. 379.

Delegation of Authority.

Where a statute expressly or by implication leaves the determination of certain matters to the body corporate created by it, the latter has no power to delegate its authority on matters within its competence to a third person. See ACT VIII OF 1904 (UNIVERSITIES), No. 1, 31 M.L.J. 632.

Delegation of Powers.

(1) Mortgage by insolvent within 2 years of insolvency—Petition to set aside—Report by Official Receiver—Inquiry—No power to delegate functions to Official Receiver. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 47, (1916) 2 M.W.N. 182.

(2) Executive authorities—Legislature, delegation, to executive. See BEN. ACT V OF 1911 (CALCUTTA IMPROVEMENT), No. 1, 24 C.L.J. 246.

(3) Appearance by pleader not duly authorized—Delegation of duties by one legal practitioner to another—Practice as to—Legality—Power of attorney. See CIV. PRO. CODE (1909), No. 344, 12 N.L.R. 189.

Demand and Refusal.

Limitation Act (IX of 1908), Art. 131—Recurring right—Mere omission to exercise right does not start limitation. See INAM, No. 4, 18 Bom. L.R. 950.

Dependent Judgment.

Restitution, or order—Restitution, when to be had. See RESTITUTION, No. 1, 24 C.L.J. 467.

Deposit.

(1) *Deposit of money in a bank—Proof of payment—Burden of proof—Fraud.*

When a bank denies an alleged deposit of money by any of its clients, it is for the latter to prove the payment; and he has proved his case as soon as it is shown that the money was made over in the bank premises, to the cashier, or to some employee of the bank authorized to receive money on behalf of the bank, for credit to the client's account. It is unnecessary for him either to allege or to prove fraud on the

Deposit—(Concluded).

part of any of the bank's servants. *Manekji Palonji v. Nederlandsche Handel*, 9 Bur. L. T. 160.

FOX, O J, and PABLETT, J.

(2) By client—Proof of handing money to cashier in the Bank premises—Sufficiency—Liability of Bank—Cashier—His position—Fraud on the part of Bank official—No necessity to prove. See BANK, No. 1, 34 Ind. Cas. 176.

(3) Distinction between a deposit and a loan—Presumption. See CONTRACT, No. 5, (1916) M.W.N. 206.

(4) Sale of immoveable property—Earnest money—Deposit of—Default—Forfeiture—Damages—Time, when essence of the contract. See CONTRACT, No. 12, 9 S.L.R. 137.

(5) By purchaser—Stipulation as to forfeiture if purchaser makes default—Relief against forfeiture. See CONTRACT ACT, No. 91, 12 N.L.R. 177.

(6) Not a penalty—Forfeiture of deposit—Right of defaulter to claim credit in mitigation of damages. See CONTRACT ACT, No. 87, 10 S.L.R. 4.

(7) Of money for safe custody—Deposit by depositors in bank where he had his own money—Failure of Bank—Liability to make good loss. See CONTRACT ACT, No. 135, 36 Ind. Cas. 31.

(8) Gold deposited with goldsmith to be made into ornaments—Suit to recover—Limitation. See LIMITATION ACT (1908), No. 129, 20 C.W.N. 232.

(9) 'Deposit,' meaning of—Entrustment of money to a trader who was not a banker—Nature of relationship. See LIMITATION ACT (1908), No. 133, 3 L.W. 168.

(10) Mortgage—Deposit—Interest stops from what date—Deposit falling short by 9½ paise—Effect—Fractions of day—Calculation of interest—Interest for day of deposit—*Bona fide* mistake in calculating the days for which interest payable—Effect. See TRANSFER OF PROPERTY ACT, No. 116, 30 M.L.J. 607.

(11) Of money in Court after suit—Abatement of interest. See TRANSFER OF PROPERTY ACT, No. 117, 31 M.L.J. 548.

(12) Tender and, difference between. See TRANSFER OF PROPERTY ACT, No. 117, 31 M.L.J. 548.

Deposit in Court.

Power of officer conducting sale to extend time for deposit of purchase-money—Failure to make deposit within time, effect of. See CIV. PRO. CODE (1908), No. 283, 30 Ind. Cas. 230.

Deposit of Purchase-money.

Power of officer conducting sale to extend time for—Failure to make deposit within time, effect of. See CIV. PRO. CODE, No. 283, 30 Ind. Cas. 230.

Deposit of Title-deeds.

(1) Gross and culpable negligence of vendor (first mortgagee), in leaving title-deeds with vendee (mortgagor)—Whether prior mortgage postponed thereby in favour of subsequent mortgage by. See MORTGAGE (GENERAL), No. 29, 43 C. 1052.

(2) Letter accompanying—Giving a personal remedy to the mortgagee, if simple mortgage requiring to be stamped and registered as such. See TRANSFER OF PROPERTY ACT, No. 82, 31 M.L.J. 347.

Derelict Land.

(1) See ADVERSE POSSESSION, No. 5, 19 O.C. 374.

Devasthanam Committee.

(1) Temple and its lands originally subject to the, of one taluq—Lands assigned to another taluq in another district—Revenue redistribution—The Committee to appoint Darmakartha of such temple is the former Committee. See RELIGIOUS ENDOWMENTS, No. 3, 31 M.L.J. 360.

(2) See RELIGIOUS ENDOWMENTS ACT, No. 6, 31 M.L.J. 777.

Difference of Opinion among Judges.

Judges of Division Bench differing on a question of law—Course to be adopted—Reference to Full Bench illegal—Reference to one or more of the Judges other than composing the Bench. See PUN. ACT III OF 1911 (COURTS), No. 5, 109 P.W.R. 1916.

Digwar.

Digwar of Ghat Burrah—Position—Civil Court, if can reinstate Digwar—Declaratory relief—Specific Relief Act, S. 42—Object or motive of party—Relief to be specifically stated—Argument from analogy. **Hemendra Nath Roy v. Upendra Narain Roy**, 22 C.L.J. 419 = 20 C.W.N. 446 = 13 C 743 = 32 Ind. Cas. 437. See Final Part, 1915, Col. 639.

Dihdar.

Dihdar, meaning and incidents of—Under proprietary right, acquisition of—Grant presumed from acknowledgment—Estoppel—Oudh Sub-Settlement Act (XXVI of 1866), r. 10.

Held, that r. 10 of the rules appended to the Sub-Settlement Act (XXVI of 1866) is not exhaustive of the manners in which under proprietary right can be acquired.

Held further, that a grant can be presumed from an acknowledgment by the Taluqdar.

Where the defendants-appellants had been in the enjoyment of *dihdari* rights within the knowledge of the previous superior proprietors, paying rent as such and mortgaging the same from more than twelve years prior to the suit, *held*, that it was no longer open to the successor of the superior proprietors to question them.

A *Dihdar* was generally a person to whom a certain portion of the property sold was assigned by the vendee for his subsistence. **Kishun v. Shyam Sundar**, 19 O.C. 27 = 35 Ind. Cas. 441. **PANDIT KANHAIYA LAL, A.J.C.**

Director.

See COMPANY.

Company accepting certain person for many years as—Right of third person to question his powers—Share-holder estopped. See COMPANY, No. 3, 81 Ind. Cas. 695.

Disabilities Removal (Caste) Act.

See ACT XXI OF 1850.

Discharge.

Bankruptcy—, by Singapore Court—Whether operates as discharge from debts in India—Discharge of father—Liability of sons in a joint Hindu family. See STRAITS SETTLEMENTS BANKRUPTCY ORDINANCE, No. 1, 31 M.L.J. 386.

Discovery.

See CIV. PRO. CODE (1908), O. XI.

See PRACTICE AND PROCEDURE.

Interrogatories—Object to discover nature of opponent's evidence—Of particulars of documents. See CIV. PRO. CODE (1909), No. 391-a, 36 Ind. Cas. 883.

Discretion.

(1) Of Revenue Court. See BEN. ACT VIII OF 1895 (TENANCY), No. 53, 1 Pat. L.J. 479.

(2) Evidence, admission of, in appeal. See CIV. PRO. CODE (1908), No. 667, 31 Ind. Cas. 873.

Discretion of Court.

(1) See CIV. PRO. CODE (1908), No. 405, 9 Bur. L.T. 250.

(2) Pendency of appeal against an order refusing to set aside *ex parte* decree—Stay of proceedings in execution. See CIV. PRO. CODE (1908), No. 498, 35 Ind. Cas. 443.

Dismissal.

Attachment by first Court—Sale stayed by appellate Court—Dismissal of execution application in consequence—Effect on attachment—Effect of dismissals for default under the old and the new Codes. See CIV. PRO. CODE (1908), No. 469, 3 L.W. 601.

Dismissal for Default.

(1) Suit dismissed for default—Restoration—Effect. See ARBITRATION, No. 4, 115 P.R. 1916.

(1-a) Appeal set down for hearing, and ordered to be heard next day—Date not communicated—Dismissal for default—Restoration—Appeal. See CIV. PRO. CODE (1908), No. 649-a, 32 Ind. Cas. 936.

(2) Application to set aside *ex parte* decree—Dismissal of application for default—Appeal. See CIV. PRO. CODE (1908), No. 388, 36 Ind. Cas. 798.

(3) See CIV. PRO. CODE (1908), No. 381, 1 Pat. L.J. 547.

(4) Party failing to appear at adjourned hearing. See CIV. PRO. CODE (1908), No. 397, 31 Ind. Cas. 869.

Dismissal for Default—(Concluded).

(5) Suit by co-sharer against Lambardar for profits—Dismissal of suit for default—Subsequent suit for certain years including years covered by previous suit—Bar to suit. See CIV. PRO. CODE (1909), No. 377, 30 Ind. Cas. 568.

(6) See EXECUTION OF DECREE, No. 18, 24 C.L.J. 523.

(7) Information given to pleader as to date of hearing—Notice not served on party—Appearance by pleader without instructions—Legality of. See SERVICE OF NOTICE, No. 1, 30 Ind. Cas. 199.

Dismissal from Service.

Temple trustees—Dismissal—Propriety. See TRUST, No. 1, (1916) M.W.N. 181.

Dismissal of Appeal.

Against both sets of defendants, discretion regarding. See CIV. PRO. CODE (1909), No. 641, 31 Ind. Cas. 886.

Dismissal of Suit.

See RES JUDICATA.

(1) Position of an applicant for an order to set aside a. See ACT IX OF 1897 (PROVL. & O. COURTS), No. 5, 23 C.L.J. 147.

(2) Summons not served—Default of plaintiff—Suit dismissed—Appeal whether lies. See CIV. PRO. CODE (1909), No. 371, 14 A.L.J. 347.

(3) Authority for instituting suit not produced with plaint—Suit whether can be dismissed—Plaintiff having no title at date of suit—Effect. See CONTRACT, No. 2, 23 C.L.J. 26.

(4) Allegation of *prima facie* cause of action—on surmises—Procedure. See PAUPER SUIT, No. 1, 30 Ind. Cas. 689.

(5) Facts proved different from facts averred—Dismissal of suit whether proper—Decree on the basis of proved facts—Proper procedure. See PLEADINGS, No. 4, 12 N.L.R. 57.

(6) Exaggerated claim—If ground for dismissing the suit. See PLEADINGS, No. 5, (1916) 2 M.W.N. 211.

Disqualified Proprietors.

Disqualified proprietor—Protection of estates supervised by Court of Wards—Does it continue after such superintendence ceases—Oudh Land Revenue Act (XVII of 1876), Ss. 172, 174—North-Western Provinces Land Revenue Act (XIX of 1879), S. 205 (12).

If a contract, incurring of debt, or transaction is made by a person while his property is under the tutelage of the Court of Wards, the law of Oudh is to the effect that the property is protected against execution in respect of any decree following upon that transaction, that debt, or that contract.

A disqualified proprietor or in Oudh, whose estate had been taken under the superintendence of the Court of Wards, contracted debts. A decree was obtained against him, and the estate having been released by the Court of

Disqualified Proprietors—(Concluded).

Wards, the decree-holder sought to execute it against the estate.

Held, that such execution was prohibited by Act XVII of 1876, S. 174. *Debi Bakhsh Singh v. Shadi Lal*, 14 A.L.J. 477=20 C.W.N. 770=18 Bom. L.R. 412=24 C.L.J. 15=(1916) M.W.N. 425=19 O.C. 55=20 M.L.T. 53=31 M.L.J. 72=3 L.W. 625=35 A. 271=33 Ind. Cas. 681 (P.C.).

LORD SHAW, SIR JOHN EDGE and SIR LAWRENCE JENKINS.

Distrain.

(1) Charge of illegal—Malicious prosecution—Suit for damages—Maintainability. See ACT I OF 1871 (CATTLE TRESPASS), No. 1, 20 M. L.T. 308.

(2) Hotel keeper—Landlord and tenant—Right to sue for rent—Breach of contract. See CONTRACT ACT, No. 14, 112 P.L.R. 1916.

Distress.

How affects the meaning of moveable property—Debt, if moveable property. See CRIM. PRO. CODE, No. 6, 4 L.W. 613.

District Courts (Lunacy) Act.

See ACT XXXV OF 1858.

District Judge.

(1) Position of, in proceedings under the Lunacy Act, partly judicial and partly administrative—Inquiry under the Act, nature of. See ACT IV OF 1912 (LUNACY), No. 4, 19 O.C. 353.

(2) See C. P. ACT XVIII OF 1891 (LAND REVENUE), No. 4, 1 Pat. L.J. 290.

(3) Commissioners—Jurisdiction of District Judge over them—Nature and extent of. See RULES OF THE HIGH COURT, No. 1, 34 Ind. Cas. 855.

District Municipalities Act.

See BOM. ACT III OF 1901.

See MAD. ACT IV OF 1894.

District Munsif.

Power of, to review his own order. See REVIEW, No. 5, 34 Ind. Cas. 527.

District Police Act.

See BOM. ACT IV OF 1890.

Divorce.

(1) Judicial separation—Cruelty of what kind requisite for. See ACT IV OF 1869 (DIVORCE), No. 4, 8 L.B.R. 385.

(2) Guardianship—Father's right, if can be taken away—Divorce suit—Appeal by wife—Adultery admitted—Costs of appeal. See HUSBAND AND WIFE, No. 1, 24 C.L.J. 226.

Divorce Act.

See ACT IV OF 1869.

Documents.

See BURDEN OF PROOF.

See CIV. PRO. CODE (1909), O. XI.

See CONTRACT.

Documents—(Concluded).

See EVIDENCE.

See PRACTICE AND PROCEDURE.

(1) *Execution of document, Proof of—Admission of execution, meaning of—Evidence Act, S. 70—Registration Act, S. 60.*

Whether a document is one which the law requires to be attested or not, it is necessary in all cases to prove that the document has been executed, that is to say, signed by the party making the transfer.

S. 70 of the Evidence Act refers only to admissions made in the course of the trial and any admission which can be availed of under S. 70 is only evidence against the party himself.

Held further, that the endorsement of the Registrar cannot be relied upon under S. 60 of the Registration Act in proof of the execution of the document. **Hori Lal v. Thakur Bhagwan Bakhsh**, 19 O. C. 23=34 Ind. Cas. 281.

LINDSAY, J.C.

(2) *Non-production of documents—Fine when may be imposed* See CIV. PRO. CODE (1908), No. 394, 20 C.W.N. 511.

(3) *Will professing to be over 30 years old—Suspicious circumstances—Presumption under S. 90, Evidence Act, whether to be drawn.* See EVIDENCE ACT, No. 14, 97 P.W.R. 1916.

(4) *Execution of—One executant, non-signing of—Addition of that executant's name—No material alteration of.* See MATERIAL ALTERATION, No. 1, 33 Ind. Cas. 417.

(5) *Number of documents constituting lease—Legality.* See REGISTRATION ACT (1908), No. 8, 35 Ind. Cas. 108.

(6) *S. 42, proviso—Suit for declaration that an endorsement of a forgery.* See SPECIFIC RELIEF ACT, No. 44, 14 A.L.J. 980.

Domicile.

(1) *Of origin—Domicile of choice—Acquisition and abandonment of domicile—Burden of proof.* See ACT X OF 1865 (SUCCESSION), No. 2, 18 Bom. L.R. 715.

(2) *Chinese Buddhist Law—Marriage—Law of, as affecting marriage—Customary law of women when to be considered* See BUDDHIST LAW (MARRIAGE), No. 3, 8 L.B.R. 399.

(3) *Will it must be proved in country of domicile before proof in foreign Court.* See STRAITS SETTLEMENTS LIMITATION ORDINANCE, No. 1, 20 C.W.N. 839.

Dower.

Gift in lieu of—Hiba bil-ewaz. See MAHOMEDAN LAW (GIFT), No. 2, 32 Ind. Cas. 516.

Drain.

(1) *House, property in—Drain vesting in the Corporation, effect of.* See BEN. ACT III OF 1899 (CALCUTTA MUNICIPALITY), No. 2, 24 C.L.J. 358.

(2) *Part of public street.* See MAD. ACT III OF 1904 (CITY MUNICIPALITY), No. 1, 30 Ind. Cas. 683.

• Drainage and Canal (Northern India) Act.

See ACT VIII OF 1873.

Duty of Court.

Sale-certificate, to grant. See CIV. PRO. CODE (1908), No. 525, 1 Pat. L.J. 446.

Earnest Money.

(1) *Nature and origin of.* See CONTRACT ACT, No. 91, 12 N.L.R. 177.

(2) *Lease of wakf house property for more than a year—Sanction of Kazi, paid to Mutwalli for a lease—Right to recover.* See MAHOMEDAN LAW—WAKF, No. 10, 32 Ind. Cas. 205.

(3) *Receipt of—Proof—Evidence Act, S. 91.* See REGISTRATION ACT (1908), No. 15, 99 P.R. 1916.

Easements.

See BURDEN OF PROOF.

See EASEMENTS ACT.

(1) *Creation of, if must be in writing registered—Transfer of Property Act—Preamble, Ss. 3, 6 (cl. 54, 123—Easement, if immoveable property—General Clauses Act (X of 1897), S. 3, cl. (25)—Registration Act (1908), S. 2 (6)—Statute, interpretation of—Preamble, proper use of.*

The provisions of the Transfer of Property Act have no application to the creation of easements.

No writing was necessary for the imposition of an easement before the Transfer of Property Act was passed; and Ss. 54 and 123 of that Act were not intended to change and did not change the pre-existing law regarding easements so as to require a writing for their creation or imposition where no writing was previously necessary.

Where a right of way is created in writing, S. 2 (6) of the Registration Act may require registration but not if the value of the right is less than one hundred rupees.

Held, therefore, that the Courts below were right in decreeing the plaintiff's claim of a right of way by grant upon oral evidence only (a).

Though a right of way over other lands of the landlord cannot be acquired by prescription under S. 26, Limitation Act, it can be created by grant (b).

It is extremely doubtful whether a tenant who uses a pathway by the mere leave and license of the landlord is invested with anything in the nature of a right enforceable by suit.

Though the preamble of an Act does not control any plain enactment which follows it, it may be a most useful guide when a question of doubt arises upon the construction of a particular provision and considerations relating to the scope of the Act are involved. **Sital Chandra Chowdhury v. Mrs. A.J. Delaney**, 20 C.W.N. 1158=34 Ind. Cas. 450.

N.R. CHATTERJEA AND RICHARDSON, JJ.

References:—(a) 31 A. 612, R. (b) 19 C.W. N. 1211 (1214), F.

Easements—(Concluded).

- (2) *Right of support*—Raising a wall to a greater extent—Additional burden—Encroachment on original easement—Claim—Limitation—Art. 32, Limitation Act—Not applicable.

Where the defendant raised the plaintiff's wall abutting on the defendant's property from 11 feet to 19 feet erecting a second storey of his house and put a *dopalla* or double sided thatch, thereby placing an additional burden upon the plaintiff's wall.

Held, that the defendant's act amounted to an alteration which constituted an extension or encroachment upon the original easement enjoyed by the defendant and also an actionable wrong.

Held, that Art. 32, Sch. I of the Limitation Act was not applicable to the plaintiff's claim and that although an encroachment upon easement may amount to a perversion of the purpose for which the owner of the dominant tenement has the right to use the property, none the less the plaintiffs are not restricted to two years in order to bring their suit. (a). **Jaddu Ram v. Kanhaia Ram**, 33 Ind. Cas. 90.

WALSH, J.

References:—(a) 8 A.L.J. 914; 26 C. 564; 8 A. 446, R.

(3) *Right of way*—Permanent tenures held under same landlord—One if may acquire right by prescription against the other—Prescription by tenant in possession inuring to owner's benefit—Grant implied upon severance, in cases of continuous easements—Continuous easement, right of way when—Permanent adaptation of tenement—Grant inferred from long user alone—Easement of necessity—Grant if may be presumed upon severance—Suit for declaration of right of easement—All servient owners if necessary parties—Cause of action. **Madan Mohan Chakravarty v. Sashi Bhuesan Mukherji**, 19 C.W.N. 1211=31 Ind. Cas. 519, See Final Part, 1915, Col. 614.

(4) *Customary right*—Right of burial—Mahomedans claiming right to bury their dead in a certain locality. **Mathura Prasad v. Karim Baksh**, 13 A.L.J. 1091=31 Ind. Cas. 805. See Final Part, 1915, Col. 645.

(5) Distinction between creation of, and easement and a transfer of an—Registration. See TRANSFER OF PROPERTY ACT, No. 21, 9 Bur. L.T. 222.

(6) Suit for declaration of right to—Conversion of suit with one for declaration—Of title not allowed. See CIV. PROC. CODE (1908), No. 356, 31 Ind. Cas. 341.

(7) Right to discharge surplus water through watercourse—Natural right—Proof. See LIMITATION ACT (1908), No. 88, 35 Ind. Cas. 394.

(8) Grant of right of way—Verbal agreement—Sufficiency—No writing registered necessary. See TRANSFER OF PROPERTY ACT, No. 69, 34 Ind. Cas. 95.

Easements Act.

- (1) S. 15—Right to take water—Long user—Presumption of lawful origin—Difference between Indian and English Law.

Where there has been a long and uninterrupted user for a long series of years the law will presume that the user has been as of right and that the right had a lawful origin, if a lawful origin is possible.

P and M were admittedly from 1839 using the water from a tank situate on land B the sale deed for which was in the name of M one of "Thottam Mudaliars" applicable to both P and M for carrying on the cultivation of land A, belonging jointly to both P and M. The tank was dug sometime subsequent to the purchase by B, but by whom, it was not known. The water was being taken to A through a channel D belonging to both P and M. In the absence of anything to show that P was allowed the use of the water by the permission of any body.

Held that P was, as of right, entitled to the use of the water of tank B for the cultivation of plot A.

Per **Phillips, J.**—The law relating to the acquisition of rights of easements under the Indian Easements Act is the same as under the English Prescription Act.

The user by P jointly with M of the water from tank B for the joint cultivation of plot A does not affect the nature of the right which is a right over the servient heritage acquired by him by virtue of his ownership of plot A. The right prescribed for is not a right to irrigate jointly but a right as part-owners of a dominant heritage. **Saminatha Mudaly v. Yelu Mudaly**, 4 L.W. 128=(1916) 2 M.W.N. 192=20 M.L.T. 544=35 Ind. Cas. 749.

WALLIS, C.J. and PHILLIPS, J.

Reference:—8 O.W.N. 359, D.

- (2) S. 15—Easement—Prescriptive right, claim to—Duration of enjoyment to be proved.

To establish a right to an easement by statutory prescription it is necessary to prove enjoyment of the right (whether 20 years or 60 years) within "two years next before the institution of the suit wherein the claim to which such period relates is contested" (a).

Enjoyment for 20 years under the provisions of the Limitation Acts of 1871 and 1877 before Act V of 1892 came into force, which ended long before the beginning of the "two years next" before the institution of the suit, is ineffectual.

Proof of 12 years enjoyment is not sufficient to shift the onus of proof on the party denying the right (b). **Rangappa Nalcker v. Appala Raja**, 33 Ind. Cas. 503.

SADASIVA AIYAR and MOORE, JJ

References:—(a) 29 M.L.J. 685=18 M.L.T. 476=2 L.W. 1107=(1916) M.W.N. 113=31 Ind. Cas. 528, F.; (b) 33 M. 173=20 M.L.J. 71=6 M.L.T. 306=4 Ind. Cas. 1070, D.

- (3) S. 15—Scope of—Limitation Act (1908), S. 26—Prescriptive easement, acquisition of—Peaceable and open, enjoyment, meaning of—

Easements Act—(Continued).

Verbal dispute by servient owner, whether prevents enjoyment by dominant owner from being peaceable. **Muthu Goundan v. Anantha Goundan**, 2 L.W. 1107=29 M.L.J. 685=18 M.L.T. 476=(1916) M.W.N. 113=31 Ind. Cas. 528. See Final Part, 1915, Col. 647.

(4) S. 23—*Tiled roof changed to pukka roof—Additional burden.* **Damodar Das v. Tilak Chand**, 13 A.L.J. 791=30 Ind. Cas. 941. See Final Part, 1915, Col. 648.

(5) Ss. 28, 33, 51—*Light and air—Dominant owner—His rights—Extent of—Alienation of dominant tenement—No excuse for enlargement of right—Imposition of greater burden on servient owner—Not allowed.*

The dominant owner has the right that the servient owner shall not obstruct the free access to the ancient window of those cones or pencils of rays that have hitherto found access to it. This right is not lost by shifting the window backwards or forwards, but it is subject to the proviso that, if, in spite of an obstruction being erected by the servient owner, the same quantity of light still penetrates the ancient window, the dominant owner has no remedy in equity (a).

But where the dominant tenement has been rebuilt, the relief to which the dominant owner is entitled is still further limited by the terms of S. 51 of the Easements Act. There must be no greater burden imposed on the servient tenement. The right is the obstruction which is a nuisance under existing conditions must be such that it would have been a nuisance also under the conditions formerly obtaining. The dominant owner retains his right, but cannot, by altering his tenement, enlarge the remedy to which he is entitled (b). **Premji Ladha v. Yleram Amul**, 9 S.L.R. 101=33 Ind. Cas. 615. PRYTT, J.C. and CROUCH, A.J.C.

References:—(a) (1904) A.C. 175; (1907) 2 Ch. D. 500; (1913) 2 Ch. D. 421; 33 M. 347, R. (b) (1907) 2 Ch. D. 500, *relied on*.

(6) S. 33. See No. 5, *supra*.

(7) S. 47—*Water-course—Easement as against Government when and how acquired—Water cess, classification, of bed, for levy of, by Government.*

Right of easement against Government may be acquired in cases where water flows continuously through a *hill*, *Kutta* and another water course and forms a natural stream. Once the existence of an easement is shown, it is for Government to show under S. 47 of the Easements Act that it interrupted that easement more than 20 years ago or that the plaintiff rendered its use impossible. Mere failure on the plaintiff's part to repair the breach would not amount to obstruction by the servient owner or rendering the use impossible by the dominant owner.

Where the rills run through the plaintiff's patta land and their beds have not been separately demarcated as *poramboke*, they are part of the patta land and not the property of Government and the water course cannot be said to belong to Government. So Government

Easements Act—(Concluded).

cannot claim to levy water cess. **Kalyana Mudali v. Secretary of State**, 31 Ind. Cas. 982.

WALLIS, C.J. and AYLING, J

(8) S. 47—*Diversion of water route—Whether obstruction.* **Lachmi Narain v. Ram Sarup**, 13 A.L.J. 821=30 Ind. Cas. 503. See Final Part, 1915, Col. 649.

(9) S. 51. See No. 5, *supra*.

(10) Ss. 52, 53, 54, 60, 62—*Transfer of property coupled with license—Transfer void for want of writing or registration—Validity of mere license—Such license whether revocable.*

Transfers of different rights in two properties may be simultaneous and yet distinct, e.g., transfer of a mill and a license to use the site on which it is built.

In India, as in England, the express grant of a mere license need not be in writing (a).

But where a license is coupled with a grant of immoveable property or of an interest in immoveable property of a kind for which writing and registration are compulsory, the grant of property exists independently of the license; and, where writing and registration are compulsory, the grant, if unwritten and unregistered, would be void, and the license, stripped of its accompaniment, would remain a mere license (b).

The general proposition that a license coupled with a void grant remains nothing but a mere license and is accordingly revocable must be taken as subject to the following reservations:—

(a) A licensee under a void agreement made for valuable consideration, who has entered into occupation and paid rent, is in the same position in equity as if a valid grant had been made, and his license cannot therefore be revoked at will (c).

(b) A mere license is not revocable, when the licensee, acting upon the license, has executed work of a permanent character and incurred expense in so doing (d). **Narindas v. Ratanlal**, 12 N.L.R. 75=31 Ind. Cas. 471.

STANYON, A.J.C.

References:—(a) 4 M.H.C. 99; 31 A. 612; (1845) 13 Mec. & W. 838 (845)=67 R.R. 831; (1851) 21 L.J. (N.S.) Exch. 35=86 R.R. 576, R.; 1 N.L.R. 147, D. (b) 31 R.R. 757; (1834) 1 C. & R. 418=40 R.R. 626; (1834) 2 Ch. 437 (448); 16 C. 640, R. (c) (1842) 21 Ch. D. 9; (1901) 2 Ch. 598, R. (d) 8 A. 69, R.

(11) S. 53. See No. 10, *supra*.

(12) S. 54. See No. 10, *supra*.

(13) S. 60. See No. 10, *supra*.

(14) S. 62. See No. 10, *supra*.

Editor.

Newspaper—Co editor—Contract of service—Power of Managing Director to vary duties and hours of attendance—Refusal to do duties assigned—Claim for salary. See **CONTRACT**, No. 4, 30 M.L.J. 207.

Ejectment.

See BURDEN OF PROOF.

See CO-SHARERS.

See LANDLORD AND TENANT.

See POSSESSION.

(1) *Ejectment, suit for—Revenue sale—Adverse possession—Plaintiff to succeed on his own title—Defendant not able to establish title to all land in his possession.*

There were two contiguous estates A and B, held by X and Y respectively. X annexed a portion of B and professed to hold it as included in A, till the title of B was extinguished. X made default in the payment of Government revenue and his estate A was sold :

Held, that the Collector only sold the estate A as it stood at the time of the permanent settlement and did not put up to sale the portion of B annexed to A by X.

The effect of the adverse possession by X with regard to the lands of B was to make him a joint proprietor of B along with Y.

The plaintiff in an action in ejectment must succeed on the strength of his own title; he cannot succeed, merely because the defendant may not be able to establish title to all the lands in his possession. *Balkuntha Nath Rai Chaudhuri v. Basanta Kumari Dasl*, 23 C.L.J. 151=34 Ind. Cas. 946.

MOOKERJEE and ROE, JJ.

(2) *Suit for ejectment—Defendant in possession for a long time by building on the land—Kutch house—No presumption that land let for building purposes.*

The plaintiff, an auction-purchaser of the rights of a former zemindar, sued to eject the defendant from an enclosure. The defendant pleaded that he was in adverse proprietary possession. It was found that the defendant was not in adverse possession, but the suit was dismissed on the ground that, the defendant having built a *kachcha* house on the land and having been in possession thereof for a very long time, the presumption was that the land had been let to him for building purposes :—

Held that long possession on the part of the defendant raised no presumption that the land had been let for building purposes, and no arrangement having been proved that the defendant was to remain in possession for all time in consideration of services rendered by him, he was liable to ejectment at the suit of the zemindar. *Anand Sarup v. Chawwa*, 14 A.L.J. 115 = 31 Ind. Cas. 952.

RICHARDS, C.J., and RAFIQ, J.

(3) *Notice to quit by one of two joint Receivers, if valid—Joint Receivers, duty of—Direction in order of appointment—Joint tenants, demise by—Contract Act, S. 200—Ratification.*

A notice to quit given by one of two joint Receivers, on behalf of both, is not a valid notice and cannot terminate a tenancy.

The doctrine that where there is a demise by joint tenants, one may give notice on behalf

Ejectment—(Continued).

of all, does not apply to the case of joint Receivers.

If the notice to quit is given by an unauthorised person, a subsequent ratification will not make it effectual, since the notice must be one which is in fact binding on the tenant when it is served.

When two persons are appointed joint Receivers, unless there is a direction or an indication to the contrary in the order of appointment, the intention of the Court must be deemed to be that they, as officers of the Court, should meet and discuss together the questions, which come before them for determination in the course of the management of the estate, and that, in all matters which require the exercise of judgment and are not purely ministerial, the action taken should be the result of their united deliberation. The very object of appointment of joint Receivers would be defeated, if one were held competent to delegate his functions to the other.

Rights of property cannot be changed retrospectively by ratification of an act inoperative at the time; to make an act rightful which otherwise, would be wrongful, must be at a time when the principal could still have lawfully done it himself. *Cassim Ahmed Molla v. Eusuf Haji Ajam Popardi*, 23 C.L.J. 453=34 Ind. Cas. 421.

SANDERSON, C.J., WOODROFFE and MOOKERJEE, JJ.

(4) *Suit for ejectment—Defence of permanent and heritable rights—Burden of proof—Evidence Act (I of 1874), S. 18—Statements by persons from whom the parties to the suit have derived their interest in the subject-matter of the suit.*

Where in a suit for ejectment the defendant sets up the defence of heritable and transferable rights in the land, the burden of proving the plea is on the defendant.

Statements made by a person regarding his interest in the subject matter of the suit made after his interest in it has ceased cannot be used as admissions under S. 18 of the Evidence Act, and there is no other provision of the law under which they are admissible in evidence. *Ma Shwe Yat Aung v. Maung Da Li*, 9 Bur. L.T. 152=33 Ind. Cas. 888.

L' KIN, J.

(5) *Suit for possession and ejectment of trespasser—Landlord supporting trespasser.*

The fact that the landlord supports or in any other way assists a trespasser in his defence in a suit for his ejectment and for possession filed against him by the tenant, would not give the trespasser a right to retain the property against the tenant. *Kartik Rowant v. Central Karkand Coal, Co Ltd*, 1 Pat. L.J. 430.

CHAMBER, C.J. and SHARFUDDIN, J.

(6) *Homestead, transferability of—Ejectment of trespasser.*

On a partition between two landlords the house of a *raiyat* of an undivided estate fell within the *patti* of one landlord and cultivable

Ejectment—(Continued).

lands in the *patti* of another landlord. Subsequently to this partition the *rayat* sold the house to the defendant. The landlord brought a suit in the Munsiff's Court for ejectment of the defendant. *Held*, that the landlord was entitled to have the defendant ejected.

Where a landlord sues for the ejectment of the purchaser of a non-transferable holding as a trespasser, such a suit should not be regarded as one based upon the provisions of the Bengal Tenancy Act but as an ordinary suit for ejectment. **Raghubar Singh v. Ramgulum Misra**, 1 Pat. L.J. 502 = 36 Ind. Cas. 653.

SHARFUDDIN and ROE, JJ.

(7) Suit to contest notice of ejectment—Claim as under proprietors—Cancellation of notice by Revenue Court—Cause of action.

Where the plaintiffs in a suit to contest a notice of ejectment claimed to be under proprietors of the land, and the notice was cancelled by the Revenue Court on the finding that they had greater rights than those of a mere tenant, the said decision of the Revenue Court afforded a cause of action to the landlord to go to the Civil Court for a declaration that the plaintiffs did not possess any under-proprietary rights. **Ram Asre v. Muhammad Abul Hasan Khan**, 30 Ind. Cas. 218.

LINDSAY, J.C., and KANHAIYA LAL, A.J. C.

References :—11 Ind. Cas. 920 = 14 O. C. 196, R.

(8) Suit against sub tenant's sub tenant—Sub-tenant added as party after period of limitation.

Where, in a suit for ejectment against the sub-tenant's sub-tenant, the sub-tenant was made a party after the expiry of the period limited for ejectment suits the whole suit failed. **Fakhrun-nissa Bibi v. Imdad Ali**, 30 Ind. Cas. 795.

BAILLIE, S.M., and TWEEDY, J.M.

(9) Decree against pro forma defendant in—Ejectment suit wherein no relief claimed against him.

A decree against a pro forma defendant in an ejectment suit wherein no relief is claimed against him is in accordance with law when that person's rights have been thrashed out and he has been found to be a non-occupancy tenant. **Ganga Charan v. Manghi Prasad**, 31 Ind. Cas. 861.

BAILLIE, S.M.

(10) Zamindar's land—Trespasser—Trespass for non cultivation purposes—Suit in ejectment—Maintainability in Civil Court—Trespass for cultivation—Rent, Court—Jurisdiction.

If a person had trespassed upon the land of a Zamindar for purposes other than cultivation, a suit to eject him can be instituted in a Civil Court. But, should he cultivate the plot, a suit for his ejectment can be brought in a Rent Court. **Musat. Champa Kuar v. Pati Ram**, 33 Ind. Cas. 70.

HOLMS, S.M.

• **Ejectment—(Continued).**

(11) Land held on favourable rent—Right to eject by notice, not affected—Rules regarding resumption or assessment of rent—Effect.

Held that the mere fact that a low rent is paid, does not in itself operate to deprive the landlord of his right to eject by notice.

Held, also, that the sections relating to resumption or assessment of rent on holdings held at a favourable rate of rent provide an additional method of procedure but do not have the effect of making it incumbent on the landlord to proceed under them. **Ram Adhin v. Maharaj Bhagwati Prasad Singh**, 33 Ind. Cas. 141.

BALLIE, J.M.

(12) Ejectment, notice of—Land from which tenant to be ejected, clear specification of—Omission to include plots in tenant's possession—Notice bad.

A notice of ejectment in which the land from which the tenant is to be ejected is not clearly specified, is bad in law and cannot be acted upon. **Suraj Ball v. Manager of Nappara Estate**, 33 Ind. Cas. 168.

HOLMS, S.M. and CAMPBELL, J.M.

Reference :—S. D. No. 9 of 1892, R.

(13) Notice of ejectment, suit to contest—Claim of under proprietorship—Adjudication of claim by Court, necessity of.

In a suit to contest the notice of ejectment, if the plaintiff has set up a claim, that he is an under-proprietor and not a tenant, obviously it is the duty of the Courts to adjudicate on this claim in so far as a *prima facie* case is concerned. **Mahabir Singh v. Manager, Court of Wards, Ajodhya Estate**, 33 Ind. Cas. 246.

HOLMS, S.M. and CAMPBELL, J.M.

(14) Ejectment, suit for, in twelfth year—Effect.

Per Tweedy, J.M. :—An ejectment suit filed in the twelfth year is fatal even though the tenant is not actually ejected until the twelve years are over.

Per Baillie, S.M. :—A suit brought in the twelfth year of occupation must succeed, and this principle applies whether the tenant is entitled to hold throughout the twelfth year owing to its being the last year of a period or because he cannot, as of an ordinary right of occupancy tenant, be ejected till the expiry of the year. **Machley v. Bahrat Indu**, 33 Ind. Cas. 427.

BAILLIE, S.M. and HOLMS and TWEEDY, OFFG. J.Ms.

(15) Ejectment, suit in—Trespass—One tenant in common, right of, to sue alone—Civ. Pro. Code (1908), O. XXVI, r. 9—Personal inspection by Judge—Finding based on—Judgment, if valid. **Syed Ahamad Sahib Shutari v. The Magnesite Syndicate, Ltd.**, 2 L.W. 460 = 17 M.L.T. 387 = 28 M.L.J. 598 = 29 Ind. Cas. 60 = 39 M. 501. See Final Part, 1915, Col. 651.

(16) Ejectment, suit in—Trespasser in possession—Inability to plead non-abandonment by

Ejectment—(Continued).

tenant. **Sahasaram v. Sheonath**, 11 N.L.R. 124 = 31 Ind. Cas. 303. See Final Part, 1915, Col. 651.

(17) *Plaintiff's defective title—Person whose lands are sold in execution of a decree against him need not give possession except to the right-ful claimant.* **Maung Tey v. Maung On**, 8 Bur. L.T. 127 = 29 Ind. Cas. 891 = 8 L.B.R. 165. See Final Part, 1915, Col. 653.

(18) See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), No. 5, 4 L.W. 402.

(19) Chowkidari Chakran lands resumed and settled with zamindar—Suit by patndar for possession of those lands—Cause of action—Of tenants settled by zamindar. See BEN ACT VI OF 1870 (VILLAGE CHOWKIDAR), No. 1, 33 Ind. Cas. 593.

(20) Raiyat, transfer of holding by, to under-raiyat—Of under-raiyat by tenure-holder—Notice if necessary. See BEN. ACT VIII OF 1885 (TENANCY), No. 27, 34 Ind. Cas. 912. 21 C.W.N. 363.

(21) See BEN. ACT VIII OF 1885 (TENANCY), No. 74, 34 Ind. Cas. 537.

(22) See BEN. ACT VIII OF 1885 (TENANCY), No. 23-b, 32 Ind. Cas. 614.

(23) See MAD. ACT I OF 1908 (ESTATES LAND), No. 2, 35 Ind. Cas. 121.

(24) See U.P. ACT II OF 1901 (AGRA TENANCY) No. 55, 33 Ind. Cas. 69.

(25) In respect of grove. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 30, 31 Ind. Cas. 499.

(26) See U.P. ACT II OF 1901 (AGRA TENANCY), No. 31, 34 Ind. Cas. 84.

(27) In suit, question of proprietary title when arises—Appeal. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 51, 31 Ind. Cas. 853.

(28 & 29) See U.P. ACT II OF 1901 (AGRA TENANCY), No. 7-a, 32 Ind. Cas. 386.

(30) See U.P. ACT II OF 1901 (AGRA TENANCY), No. 21-b, 32 Ind. Cas. 395.

(31) See U.P. ACT II OF 1901 (AGRA TENANCY), No. 29 a, 32 Ind. Cas. 576.

(32) See U.P. ACT II OF 1901 (AGRA TENANCY), No. 8 a, 32 Ind. Cas. 595.

(33) Abandonment of holding—Cultivation by sub-tenant. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 7-a, 32 Ind. Cas. 396.

(34) Notice of—Decretal amount not deposited on account of illness—Service of notice—Diligence in effecting personal service. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 34-a, 32 Ind. Cas. 17.

(35) Suit for—Proprietary title—Acquiescence—Appeal. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 50, 31 Ind. Cas. 857.

(35-a) See U.P. ACT II OF 1901 (AGRA TENANCY), No. 35-a, 32 Ind. Cas. 755.

(36) Suit for, through Revenue Court—Recognition of trespassers as tenants. See OUDH ACT XXII OF 1886 (RENT), No. 43-a, 36 Ind. Cas. 770.

Ejectment—(Continued).

(37) Suit to contest notice of, dismissal of—Suit for declaration of status as under-proprietor before actual ejectment, maintainability of—Jurisdiction of Civil Court—Oudh Rent Act. 8. 103, cls. (8) and (10). See OUDH ACT XXII OF 1886 (RENT), No. 1, 19 O.C. 67.

(38) Of trespasser through Revenue Court—Jurisdiction of Revenue Court. See OUDH ACT XXII OF 1886 (RENT), No. 18, 30 Ind. Cas. 257.

(39) Suit for compensation for illegal—Parties—Limitation. See OUDH ACT XXII OF 1886 (RENT), No. 34, 31 Ind. Cas. 447.

(40) Any one of two lambardars alone entitled to eject tenant when. See OUDH ACT XXII OF 1886 (RENT), No. 38, 35 Ind. Cas. 760.

(41) Right of tenant-in-chief to eject trespasser as sub-tenant. See OUDH ACT XXII OF 1886 (RENT), No. 42, 30 Ind. Cas. 206.

(42) Co-sharers—Right of one co-sharer to apply for ejectment of tenant. See OUDH ACT XXII OF 1886 (RENT), No. 19, 34 Ind. Cas. 693.

(43) Lease under Oudh Circular XVI of 1874—Nature and incidents of. See OUDH ACT XXII OF 1886 (RENT), No. 16, 34 Ind. Cas. 760.

(44) See OUDH ACT XXII OF 1886 (RENT), No. 31, 33 Ind. Cas. 257.

(45) See OUDH ACT XXII OF 1886 (RENT), No. 17, 31 Ind. Cas. 472.

(46) Agreement between landlord and tenant—Rate of rent fixed—Liability to, in default of payment—No period fixed for tenure—Enhancement of rent—Not possible. See OUDH ACT XXII OF 1886 (RENT), No. 11, 33 Ind. Cas. 157.

(47) Suit—Bonamidar—Certified purchaser, if can recover possession. See CIV. PRO. CODE (1908), No. 150, 4 L.W. 609.

(48) Suit for—Error in the number of the plot—Amendment of plaint. See CIV. PRO. CODE (1908), No. 357, 32 Ind. Cas. 512.

(49) In spite of insufficient notice. See CIV. PRO. CODE (1908), No. 351, 31 Ind. Cas. 479.

(50) Suit, in—Appeal by defendant against decree of—Court in allowing appeal if may decree it in favour of non-appealing defendants. See CONTRACT, No. 13, 20 C.W.N. 1054.

(51) Suit for and for damages for use and occupation—Suit after termination of tenancy—Claim whether for distinct subjects. See COURT FEES ACT, No. 19, 36 Ind. Cas. 863.

(52) Re-sale of grove—Vendee whether liable to. See CUSTOM (GENERAL), No. 2, 31 Ind. Cas. 979.

(53) Decree for—Appellate decree—Merger of original decree—Appeal dismissed for default—Decree, which, to be executed. See EXECUTION OF DECREE, No. 18, 24 C.L.J. 523.

(54) See HINDU LAW (JOINT FAMILY), No. 27, 34 Ind. Cas. 827.

Ejectment—(Concluded).

(55) See LAND ACQUISITION ACT (1894), No. 5, 36 Ind. Cas. 265.

(56) See LANDLORD AND TENANT, No. 69, 36 Ind. Cas. 263.

(57) Tenant's right to compensation for buildings or for time to remove them after expiry of term—Equitable estoppel. See LANDLORD AND TENANT, No. 29, 9 Bur. L.T. 101.

(58) Lessor not a *de facto* landlord—Lessee not given possession—Effect—Ejectment. See LANDLORD AND TENANT, No. 14, 23 C.L.J. 563.

(59) Enhancement subsequently declared illegal—Notice of, if proper—Estoppel. See LANDLORD AND TENANT, No. 37, 33 Ind. Cas. 163.

(60) See LANDLORD AND TENANT, No. 64, 34 Ind. Cas. 711.

(61) See LANDLORD AND TENANT, Nos. 39 and 40, 33 Ind. Cas. 214.

(62) See LANDLORD AND TENANT, No. 46, 33 Ind. Cas. 263.

(63) See LANDLORD AND TENANT, No. 47, 33 Ind. Cas. 264.

(64) See LANDLORD AND TENANT, No. 57, 33 Ind. Cas. 556.

(65) Lease taken from one of co-sharers—Right of latter to sue in. See LANDLORD AND TENANT, No. 59, 34 Ind. Cas. 71.

(66) See LANDLORD AND TENANT, No. 42, 33 Ind. Cas. 232.

(67) Notice of, by single co-sharer—If proper. See LANDLORD AND TENANT, No. 41, 33 Ind. Cas. 215.

(68) See LANDLORD AND TENANT, No. 65, 35 Ind. Cas. 302.

(69) See LANDLORD AND TENANT, No. 61, 34 Ind. Cas. 304.

(70) See LEASE, No. 14, 34 Ind. Cas. 516.

(71) Covenant by lessor to renew—Possession; suit for—Ejectment. See LEASE, No. 10, 31 Ind. Cas. 919.

(72) Suit in Revenue Court to eject tenants—Subsequent suit by landlord in Civil Court—Saving of limitation. See LIMITATION ACT (1908), No. 45, 36 Ind. Cas. 770.

(73) See MORTGAGE (GENERAL), No. 50, 35 Ind. Cas. 87.

(74) Non-transferable occupancy holding—Purchaser of a share—Right to possession. See OCCUPANCY, No. 1, 23 C.L.J. 304.

(75) See POSSESSION, No. 7, 8 L.B.R. 372.

(76) See RES JUDICATA, No. 28, 34 Ind. Cas. 640.

(77) Decision of Revenue Court that plaintiff as co-sharer not entitled to sue for—Suit as lambardar. See RES JUDICATA, No. 20, 35 Ind. Cas. 612.

(78) Tender of lease at prevailing rate—Refusal of valid tender by tenant—Liability to. See TENDER, No. 1, 38 Ind. Cas. 450.

Ejectment Suit.

(1) *Proof of plaintiff's title—Defendant in possession for period less than 12 years—Suit land lying waste previously.*

In a suit for ejectment plaintiffs established their title to the plaint lands. As regards the question of limitation it was found that the defendant's possession arose within 12 years before suit and the suit lands were lying waste during the remaining portion of the 12 years. Held that, as the plaint lands were waste they were presumably in the possession of the plaintiff, who had title to them during the remaining portion of the 12 years. **Murugappa Mudaly v. Panaganti Jagannath Rayaolm Garu**, 30 Ind. Cas. 191.

SADASIVA AIYAR and SESHAGIRI AIYAR, JJ.

(2) Insufficiency or invalidity of notice, if can be pleaded for the first time in second appeal. See MAD. ACT I OF 1908 (ESTATES LAND), No. 20, 4 L.W. 168

Ekrarnamah.

Agreement to convey land by gift to Sitambari Jain Society—Construction—Agreement whether void for remoteness—Hindu Law—Ss. 2 (d), 14, 40, 54, Transfer of Property Act—Specific performance of the covenant whether can be granted—S. 22, Specific Relief Act. See AGREEMENT, No. 2, 1 Pat. L.J. 238

Elephant.

Trapped in pit dug in another's land, ownership of. See EVIDENCE ACT, No. 49, 31 Ind. Cas. 579.

Emigration.

Memons of Cutch—Settlement in East Africa—Law applicable—Presumption—Domicile. See CUTCHI MEMONS, No. 1, 20 C.W.N. 362.

Emigration and Labour (Assam) Act.

See ACT VI OF 1901.

Encroachment.

By neighbouring owner. See ADVERSE POSSESSION, No. 7, 34 Ind. Cas. 416.

Encroachment (Land) Act.

See MAD. ACT III OF 1905.

Endorsement.

See NEGOTIABLE INSTRUMENTS.

(1) 'Pledge' of goods—Nature of transaction—How effected—Necessity for, in case of Government securities—Rights of pawnee. See CONTRACT ACT, No. 139, 33 Ind. Cas. 891.

(2) Promissory note—Presumption of consideration—Oral evidence to prove consideration for endorsement. See EVIDENCE ACT, No. 62, 32 Ind. Cas. 233.

(3) Of payment towards principal signed but not written by debtor—Effect—Limitation if saved. See LIMITATION ACT (1909), No. 65, 3 L.W. 576.

(4) S. 42, proviso—Suit for declaration that an, of a document a forgery. See SPECIFIC RELIEF ACT, No. 44, 14 A.L.J. 980.

Enemy.

(1) Alien—Meaning of the term. See **ALIEN ENEMY**, Nos. 3, 5, 9 *Bur. L.T.* 176.

(2) Trading with. See **TRADING WITH ENEMY**, No. 3, 31 *M.L.J.* 860.

Enemy Trading.

Outbreak of war—Goods shipped in enemy ship—Arrest of the ship as prize—Non-payment of bill at maturity—Goods delivered later at destination—Liability to pay amount of bill with interest. See **CONTRACT**, No. 15, 18 *Bom. L.R.* 915.

Enfranchised Inams Act.

See **MAD. ACT IV OF 1862**.

English Law.

(1) English law as to 'real' and 'personal' action—Applicability to India—English Law as to several 'heirs' of a deceased owner taking as one 'heir' not followed in Hindu or Mahomedan Law. See **CO-OWNERS**, No. 3, 3 *L.W.* 542.

(2) Right to take water—Long user—Presumption of lawful origin—Difference between Indian and. See **EASEMENTS ACT**, No. 1, 4 *L.W.* 128.

(3) Distinction between freehold and copyhold law. See **LEASE**, No. 6, 20 *C.W.N.* 1135.

(4) Public and private nuisances—Right of suit—English and Indian Law—Special damage. See **NUISANCE**, No. 1, 12 *N.L.R.* 130.

Enhancement of Rent.

Basis of, discussed—Decree of special Judge determining amount of enhancement—Appeal. See **BEN. ACT VIII OF 1905 (TENANCY)**, No. 22, 1 *Pat. L.J.* 409.

Equitable Estoppel.

See **ESTOPPEL**.

See **LANDLORD AND TENANT**, No. 29, 9 *Bur. L.T.* 101.

Equitable Mortgage.

(1) Effect of—Mortgage, recovery of balance due on. See **CIV. PRO. CODE (1908)**, No. 612, 8 *L.B.R.* 150.

(2) See **TRANSFER OF PROPERTY ACT**, No. 82, 31 *M.L.J.* 347.

Equities:

(1) Attorney, if may claim lien on his client's (plaintiff's) decree against defendant's prior decree against plaintiff, between attorney, client and others interested in property. See **ATTORNEY'S LIEN**, No. 1, 43 *C.* 932=21 *C.W.N.* 106

(2) Attachment in execution—Transfer of property after attachment—Between decree-holder and auction purchaser. See **CIV. PRO. CODE (1908)**, No. 112 a, 36 *Ind. Cas.* 732.

(3) Usury—Abrogation of—Act XXVIII of 1855—Equitable considerations. See **MAHOMEDAN LAW (DOWER)**, No. 2, 14 *A.L.J.* 1055.

Equities—(Concluded).

(4) Courts of—Time, stipulation as to—Jurisdiction, exercise of—Vendor and purchaser. See **VENDOR AND PURCHASER**, No. 8, 33 *Ind. Cas.* 323 (*P.C.*).

Equity of Redemption.

See **MORTGAGE (REDEMPTION)**.

Suit by mortgagee—Owner of, not made party—Dispossession of owner by mortgagee decree-holder—Right of such owner to sue for khas possession. See **MORTGAGE (REDEMPTION)**, No. 24, 36 *Ind. Cas.* 744.

Error.

(1) Any mistake or error in an execution petition will not necessarily render such an application a nullity. **Ramachandra Naidu v. Tripathi Naidu**, (1916) 2 *M.W.N.* 128=35 *Ind. Cas.* 614.

SFENCER and KRISHNAN, JJ.

(2) Amendment of judgment and decree—In judgment. See **AMENDMENT OF DECREE**, No. 1, 169 *P.W.R.* 1916.

(3) Power of Court to rectify erroneous order—Limitation. See **CIV. PRO. CODE (1908)**, No. 283, 30 *Ind. Cas.* 230.

(4) Suit for ejectment—In the number of the plot—Amendment of plaint. See **CIV. PRO. CODE (1908)**, No. 357, 32 *Ind. Cas.* 512.

(5) Partition papers, clerical, in—If enhancement of rent. See **LANDLORD AND TENANT**, No. 43, 33 *Ind. Cas.* 234.

Escheat.

(1) **Iqar-malikan—Mafrur.**

If the terms of an *iqar-malikan* indicate that a house occupied by tenant escheats to the zemindar on the tenant becoming *mafrur*, that expression *mafrur* as used in the *iqar malikan* does not apply to the case of persons entitled to occupy as heirs but who had never actually been in possession of the house of a deceased tenant. **Sheo Nath v. Sampat**, 35 *Ind. Cas.* 843.

LINDSAY, J.C.

(2) Onus—Government to establish *prima facie* case—Shifting of onus to the defendant—Failure to prove relationship in a previous suit—Evidence against heirs—Evidence Act, S. 13. **Secretary of State v. Subraya Karantha**, 18 *M.L.T.* 504=2 *L.W.* 1175=41915) *M.W.N.* 962=31 *Ind. Cas.* 590. See *Final Part*, 1915, Col. 658.

Estate.

(1) Of lunatic—Properties in which he has beneficial interest—Joint property—Whether included in the term. See **ACT IV OF 1912 (LUNACY)**, No. 2, 33 *Ind. Cas.* 106.

(2) See **HINDU LAW (WIDOW)**, No. 19, 18 *Bom. L.R.* 954.

Estates Act.

See **OUDH ACT I OF 1869**.

Estates Land Act.

See **MAD. ACT I OF 1908**.

Estates Partitioning Act.

See BEN. ACT VIII OF 1876.

See BEN. ACT V OF 1897.

Estoppel.

See CIV. PRO. CODE (1908), S. 11.

See EVIDENCE ACT (1872), Ss. 115, 116.

See RES-JUDICATA.

- (1) *Evidence—Estoppel—Grantee as long as he holds a religious office—Cannot alienate nor set up a title inconsistent with that of grantor—Grantee's alienee also similarly estopped.*

A grantee of lands as long as he holds a religious office in a temple is estopped from setting up a title inconsistent with that of the grantor, and an alienee from such grantee is similarly estopped and the alienation itself is invalid as against the trustee of the temple. S. 116 of the Evidence Act is not exhaustive of the law of estoppel. *Thayelbagam Pillai v. Venkataramakrishnayyan*, (1916) M.W.N. 119 = 33 Ind. Cas. 852.

SADASIVA AIYAR and NAPIER, JJ.

- (2) *Feeding the estoppel—Applicability to transactions before 1872—Hindu conveyances—Transfer of Property Act, S. 43—Evidence Act, S. 115.*

The equitable principle laid down in S. 43 of the Transfer of Property Act is applicable to transactions before 1872.

When a grantor, by a recital, is shown to have stated that he is seized of specific estate, and the Court finds that the parties proceeded upon the assumption that such an estate was to pass, an estate by estoppel is created between the parties and those claiming under them, in respect of any after-acquired interest of the grantor, the newly acquired title being said to 'feed the estoppel.' This principle of 'feeding the estoppel' is applicable to Hindu conveyances and to cases before the Evidence Act. *Krishna Chandra Ghosh v. Rasik Lal Khan*, 23 C.L.J. 501 = 21 C.W.N. 218 = 33 Ind. Cas. 568.

CHAUDHURI and NEWBOULD, JJ.

References:—10 C.L.R. 61 = 6 C.L.R. 528, Ezpl.; (1866) 1 Agra H.C. 164; 15 W.R. 394, R

- (3) *Right of mortgagees to dispute mortgagor's right.*

It is not competent to a mortgagee to go behind a mortgage to dispute the right of the mortgagor to enforce redemption. *Jangl Ram v. Sheoraj Singh*, 30 Ind. Cas. 231.

STUART and KANAIYA LAL, A.J.Cs.

- (4) *Creditor and debtor—Plea of debtor—Creditor is bound by terms of agreement entered into between him and third party—No proof of inducement by creditor to break debtor's contract with third person.*

In a suit by a creditor to recover money the debtor pleaded that the plaintiff was bound by the terms of a contract arrived at between the debtor and a third person for the purpose of paying off the plaintiff's debt. There was no proof that the defendant was induced by the

Estoppel—(Continued).

plaintiff to break his contract with the third person. *Held* that the defendant could not invoke the aid of the doctrine of equitable estoppel against the plaintiff and contend that he was not bound by the contract entered into between them. *Babu Narendra Bahadur v. Oudh Commercial Bank, Limited*, 30 Ind. Cas. 323.

STUART, A.J.C.

- (5) *Revenue Registers—Land in name of husband and wife—Wife's right to claim property as heir.*

Certain land stood in the Revenue Registers in the joint names of the plaintiff and her husband. The wife was living on the property. *Held* that these facts did not prevent the plaintiff, from proving that the land in question was her sole and separate property. *Held* also that the circumstance that the wife lived on the property was one which was likely to put a mortgagee on enquiry to ascertain what her interest was. There was no estoppel and the mortgagee was grossly negligent in refraining from making the necessary enquiries. *Meyappa Chetty v. Ma Mo Yek*, 30 Ind. Cas. 692.

YOUNG, J.

- (6) *Party compromising suit not estopped from urging setting aside sale in entirety, when.*

A party who has entered into compromise is not estopped from urging that if sale in the suit is set aside at all at the instance of another party it must be set aside in its entirety. *Ichamoni Das v. Prosunng Kumar Mondal*, 31 Ind. Cas. 858.

CHAPMAN and NEWBOULD, JJ.

- (7) *Landlord and tenant—Non-transferable holding, usufructuary mortgage of, by the tenant—Acceptance of rent from the mortgagee—Validity of mortgage if can be questioned by the landlord.*

Where the under-proprietor of a non-transferable but heritable holding mortgaged the same with possession to certain persons whose names were also recorded in the Revenue Register as mortgagees: *Held* that the fact of the acceptance of the Rent for the holding from the mortgagees paid by them sometimes on behalf of the mortgagor, at other times jointly with the mortgagor and even the fact that the mortgagor and mortgagee were sued jointly for the rent are not sufficient to esop the landlord from setting up the invalidity of the mortgage and ejecting them from the holding on the relinquishment of the holding by the mortgagor's original tenant. *Must. Rajpal Kuar v. Rudra Pratap Narain Singh*, 34 Ind. Cas. 464.

HOLMS, S.M.

- (7-a) *Non-transferable occupancy holding sold in execution of money decree without objection—Purchaser, rights of—Civ. Pro. Code, 1908, S. 47—Act VIII of 1869 (B.C.) S. 27—Special limitation.*

On the sale of a non-transferable occupancy holding held by the proprietors of a share in a *mauza* in execution of a money decree against them, without any objection on their part as to

Estoppel—(Continued).

its saleability in these execution proceedings. a purchaser of the proprietary share of these properties would be estopped from objecting to the sale on the ground that the holding was not saleable by the custom of the locality.

S. 27, Act VIII of 1869 (B.C.), applies only to a case where dispossession of the tenant has been made by the whole body of the landlords. *Ramu Pal v. Prakash Chandra*, 32 Ind. Cas. 757.

CHATTERJEE and BEACHCROFT, J.J.

References :—7 C.L.J. 141 ; 32 Ind. Cas. 510, F.

(8) *Effect of land standing in Revenue Registers in the name of husband and wife—Wife whether precluded from showing that the land was her sole property.* P.L.R.M. *Mayappa Chetty v. Ma Mo Yelk*, 8 Bur. L.T. 124=30 Ind. Cas. 692. See Final Part, 1915, Col. 660.

(9) Doctrine of estoppel when not to be applied. See ACQUIESCENCE, No. 1, 20 C.W. N. 657.

(10) Lessee inducted on land by a void lease if may plead lease void and created no rights—Lease registered in contravention of the law—Suit for damages for breach of covenant. See BEN. ACT VIII OF 1885 (TENANCY), No. 41, 20 C.W.N. 1340.

(11) Co-sharer becoming tenant—Assertion of occupancy rights. See U.P. ACT III OF 1901 (LAND REVENUE), No. a, 32 Ind. Cas. 387.

(12) Determination of question as to nature of tenancy—Admissions as to non-existence of certain right. See U.P. ACT III OF 1901 (LAND REVENUE), No. 18, 30 Ind. Cas. 207.

(13) Appeal to Privy Council—Property in dispute, value of—Valuation, how to be determined—Valuation in the plaint, whether estops the plaintiff—Admission, if rebuttable. See CIV. PRO. CODE (1908), No. 225, 24 C.L.J. 350.

(14) *Res judicata*—Wrong decision in prior suit on question of law—Bar of subsequent suit. See CIV. PRO. CODE (1908), No. 24, 36 Ind. Cas. 268.

(15) Company accepting certain person for many years as director—Right of third person to question his powers—Shareholder estopped. See COMPANY, No. 3, 31 Ind. Cas. 595.

(16) When can be set up. See EVIDENCE ACT, No. 99, 1 Pat. L.J. 16.

(17) Evidence Act, S. 115—Scope—Point of law—Estoppel—Hindu widow adopting an orphan and supporting the adoption whether estopped from pleading invalidity of the adoption. See EVIDENCE ACT, No. 100, 12 N.L.R. 100.

(18) Tenant let into possession by landlord—Tenant, if can deny landlord's title—Estoppel, extent of—Landlord's right to dispose of land by will, if can be questioned—Estoppel, if extends in favour of exentors under the land-

Estoppel—(Concluded).

lord's will. See EVIDENCE ACT, No. 103, 4 L.W. 349.

(18-a) Judgment—debtor's objections in execution department—Estoppel and res judicata See EXECUTION OF DECREE, No. 34-d, 32 Ind. Cas. 754.

(19) Gift by co-parcener of lands, less than his share, validity of—Property given being reasonable in extent—Estoppel. See HINDU LAW (GIFT), No. 2, 39 M. 587.

(20) Against estoppel, effect of. See HINDU LAW (PARTITION), No. 8, 19 O.O. 240.

(21) Compromise by father as next reversioner Whether binding on son—Estoppel by conduct. See HINDU LAW (REVERSIONERS), No. 1, 19 M.L.T. 1.

(22) Attestation of deed does not by itself create against or imply consent of the attesting reversioner. See HINDU LAW (WIDOW), No. 14, 20 M.L.T. 335.

(23) Attestation by heir—Mortgage by widow. See HINDU LAW (WIDOW), No. 23, 30 Ind. Cas. 388.

(24) Institution of suit in Court of higher grade—Objection as to jurisdiction—When not maintainable—Estoppel. See JURISDICTION (GENERAL), No. 2, 9 S.L.R. 164.

(25) Suit to determine class of tenancy—No objection to jurisdiction—Decision on merits. See JURISDICTION OF CIVIL COURTS, No. 9, 36 Ind. Cas. 83.

(26) Tenant executing the lease but not let into possession by the lessor—Whether can deny lessor's title. See LANDLORD AND TENANT, No. 31, 31 M.L.J. 712.

(27) Enhancement subsequently declared illegal—Notice of ejectment if proper. See LANDLORD AND TENANT, No. 37, 33 Ind. Cas. 163.

(28) Estoppel—Tenant taking lease from one of several co-sharers—Right of his lessor to eject tenant—Latter precluded from disputing lessor's title. See LANDLORD AND TENANT, No. 59, 34 Ind. Cas. 71.

(29) See LANDLORD AND TENANT, No. 62, 34 Ind. Cas. 337.

(30) Whether a person can be estopped from pleading the provisions of a statute. See LIMITATION ACT (1908), No. 34, 4 L.W. 48.

(31) See PRE-EMPTION, No. 22, 33 Ind. Cas. 775.

(32) Plea of—To be put clearly in issue. See SALE, No. 5, 23 C.L.J. 122.

(33) Mere cultivation by Taraddadkar of *shamilat*—No objection—No estoppel. See SHAMILAT LAND, No. 2, 36 Ind. Cas. 601 ; 3 P. R. 1917.

Evidence.

See ADMISSION.

See EVIDENCE ACT, 1872.

(1) *Secondary evidence—Objection to—When to be taken—Relinquishment of an interest—Validity.*

Evidence—(Continued).

When a party produces in evidence a certified copy without proving the circumstances entitling him to give secondary evidence, objection to it must be taken by the other party at the time of admission and such objection will not be allowed at a later stage.

A relinquishment of an interest is valid unless the person executing the relinquishment deed repudiates any intention to convey an interest by the document and the Court is satisfied that there is no such intention. *Uppra Hanumanthu v. Peddapalle Samacharu*, (1916) M. W.N. 9—33 Ind. Cas. 188.

TYABJI and PHILLIPS, JJ.

(2) Admissibility in evidence—Proceedings not inter partes.

Proceedings in and documents filed in a previous suit are relevant evidence against a person not a party to that suit. *Madan v. Kirtiram*, 23 O.L.J. 578—34 Ind. Cas. 163.

TEUNON and CHAUDHURI, JJ.

(3) Fard Hissa Kashi Baghat—Admissibility of such document in evidence.

Held, that a *Fard Hissa Kashi Baghat* drawn up at the first regular settlement is a document admissible in evidence to prove the matter contained in it. *Lachhman v. Satrohan Singh*, 19 O.C. 363

LINDSAY, J.C.

(4) Evidence, omission to consider—Distinct irregularity.

Where a Court of first instance failed to pay any attention to evidence, which was produced before it, in that it did not take the trouble, while a *patwari* was being examined, to compare his map with the map produced from the record room, the omission to consider the evidence produced a distinct irregularity entitling the aggrieved party to get a revision of the order. *Ganga Kurmi v. B. Dip Narain Singh*, 33 Ind. Cas. 414.

BAILLIE, S.M. and TWEEDY, J.M.

(5) Secondary evidence—Degree of—Admissibility of—Practice—Appellate Court—Judgment—Contents of—Second appeal—Findings of fact—Interference.

Where the original of a registered document is not produced though steps had been taken for its production. The only evidence that ought to have been admitted of its contents is a certified copy of the document and no other kind of secondary evidence is admissible. But if without objection raised such evidence had been admitted the appellate Court will not interfere and reject the evidence so admitted.

In cases where there is an appeal it is most essential that the Court whose findings of fact this Court has to accept should deal with the material facts specially and decisively and not leave the matter in such a way that the final Court of Appeal has to draw conclusions as to what the real findings of fact were by the first appellate Court. Otherwise if the appellate Court is not satisfied it will be its duty to remand the case for re-hearing even though the litigation has been pending for a long time and

Evidence—(Continued).

the amount involved is insignificant. *Hasmatullah v. Hari Mohan Sarma*, 34 Ind. Cas. 942.

SANDERSON, C.J., and MOOKERJEE, J.

(6) Witnesses interested in the result of the suit—Credibility—Major described as minor in plaint, effect—Minor, appointment of guardian without notice—Decree not binding on minor—Civ. Pro. Code (Act V of 1908), O. XXXII, r. 3 (4)—Hindu Law—Debts—Trading family—Hereditary business—Debt contracted by manager—Limitation Act (IX of 1908), S. 5—One judgment in two suits—Confusion in applying for copies.

The mere fact that a party's witnesses are persons who are more or less interested in the result of the suit is no reason for disbelieving them where the only persons who could reasonably be expected to give reliable testimony regarding the point in question would necessarily be such persons.

A defendant who is of full age but who is described in the plaint as a minor cannot be properly represented in proceedings before a Court by a guardian *ad litem*.

A minor defendant is not properly represented in a suit if a guardian *ad litem* be not properly appointed. The language of O. XXXII, r. 3, sub-r. (4) is peremptory and no order for the appointment of a guardian *ad litem* is valid unless notice of the application has been given to the minor. If the rules of procedure relating to the appointment of guardian *ad litem* are not strictly complied with, the subsequent proceedings are invalid so far as the minor is concerned and the decree obtained against him under such circumstances is not binding upon him.

The law with respect to debts incurred by a member of a trading family differs from the ordinary law which governs the money dealings of an ordinary joint Hindu family. Debts contracted by a managing member of a joint family are binding on the other members only when they are for a family purpose. But where a family carries on a business or profession and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes and the creditor is not bound to inquire into the purposes of the debts in order to bind the whole family thereby, because that power is necessary for the very existence of the family (a).

In two suits filed in a Subordinate Judge's Court, there was only one judgment, but two separate decrees were prepared. In one case the appeal lay to the Judicial Commissioner's Court and in the other case the appeal lay to the District Court. The appellant thought that it was only necessary for him to obtain one copy of the decree and judgment. When he got this copy, he found that it related to that particular suit in which the appeal lay to the Judicial Commissioner's Court. But at the time the mistake was discovered, the period of limitation for an appeal to the District Court had expired.

Evidence—(Continued).

Therefore when the appeal was presented to the District Court, the presentation was barred by time. The appellant in his application for an extension of time with reference to the provisions of S. 5 of the Limitation Act explained that he, in making his applications for copies got confused. *Held* that under the circumstances the delay in the presentation of the appeal was excusable. **Ghanshyam Das v. Hardel**, 32 Ind. Cas. 380.

LINDSAY, J.C.

References :—(a) 2 Ind. Cas. 173=11 Bom. L.R. 255=34 B. 72, R.

(7) *Evidence, admissibility of—Birth-day books, entries in, if admissible to prove age—Husband's evidence as to wife's age, admissibility and value of—Affidavit by husband, before question litigated, as to wife's age, how far admissible—Settlement accepted by infant—Transfer of property by husband acting as attorney—Impossibility to restore status quo, bar to re-opening settlement—Ratification. Chuha Hooi Ghoh Neoh v. Khaw Sim Bee*, 19 C.W.N. 787=31 Ind. Cas. 637 (P.C.). See Final Part, 1915, Col. 665.

(8) *Inadmissibility in evidence of documents when not material—Finding of fact—Repayments not proved—Second appeal—S. 41 of Act III of 1914. Fazl Ahmad v. Jiwan Mal*, 158 P.W.R. 1915=31 Ind. Cas. 800. See Final Part, 1915, Col. 667.

(9) *Survey (of maps) as of title, value of. See ACT XXIII OF 1863 (WASTE LANDS)*, No. 1, 14 A.L.J. 1205 (P.C.).

(10) *Suit on a promissory note—Agreement to abide by oath, recorded prior to agreement—Agreement proving abortive—Suit, if can be decided on evidence taken—Practice. See ACT X OF 1873 (OATHS)*, No. 2, 4 L.W. 258.

(11) *Proceedings to set aside alienation by insolvent—Record of statements made before Official Receiver—Admissibility of such statements in proceedings before Court. See ACT III OF 1907 (PROVINCIAL INSOLVENCY)*, No. 47-a, 36 Ind. Cas. 906.

(12) *Report of Official Receiver—Admissibility as. See ACT III OF 1907 (PROVINCIAL INSOLVENCY)* No. 47-a, 36 Ind. Cas. 906.

(13) *Record of rights—Evidentiary value. See BEN. ACT VIII OF 1885 (TENANCY)* No. 47, 35 Ind. Cas. 424.

(14) *Evidentiary value of Khasra. See BEN. ACT V OF 1897 (ESTATES PARTITION)*, No. 2-a, 36 Ind. Cas. 513.

(15) *Effect of not considering evidence on record—Party not allowed to produce evidence—Interference in revision. See PUN. ACT I OF 1912 (COURTS AMENDMENT)*, No. 1, 25 P.L.R. 1916.

(16) *Misreading of evidence whether ground for second appeal. See APPEAL (SECOND APPEAL)*, No. 4, 81 P.R. 1916.

(17) See **BENAMI TRANSACTION**, No. 5-a, 32 Ind. Cas. 365.

(18) *Of adultery. See BUDDHIST LAW (DIVORCE)*, No. 1, 2 Ear. L.T. 74.

Evidence—(Continued).

(19) *Ex parte decree—Appeal—Power of appellate Court to direct production of additional evidence wrongly excluded by lower Court. See CIV. PRO. CODE (1908)*, No. 184, 9 S.L.R. 191.

(20) *Appeal—Additional evidence, produced after arguments heard—Admission of such, by the appellate Court, if proper—Reasons not recorded for admission of the evidence, effect of. See CIV. PRO. CODE (1908)*, No. 666, 24 C.L.J. 457.

(21) *Second appeal, Grounds of—Findings of fact—Consideration of, on record. See CIV. PRO. CODE (1908)*, No. 672, 108 P.L.R. 1916.

(22) *Opportunity to produce further evidence whether to be given after close of case. See CIV. PRO. CODE (1908)*, No. 396, 91 P.L.R. 1916.

(23) *Appellate Court—Admission of new evidence—No application made—No reasons recorded—Legality. See CIV. PRO. CODE (1908)*, No. 664, 3 L.W. 163.

(24) *Admission of, in appeal—Discretion. See CIV. PRO. CODE (1908)*, No. 667, 31 Ind. Cas. 873.

(25) *Fraud—Re-opening of suit for accounts. See CIV. PRO. CODE (1908)*, No. 353, 35 Ind. Cas. 603.

(26) *Contract—Rate of payment for work done under a contract—Construction—Admissibility of extrinsic evidence—Effect of an overall rate. See CONTRACT*, No. 3, 19 M.L.T. 103.

(27) *Of sonship or heirship. See FAMILY REPUTE*, No. 1, 31 M.L.J. 607.

(28) *Of adoption—Absence of entry in accounts—Evidence of surrounding circumstances. See HINDU LAW (ADOPTION)*, No. 10, 12 N.L.R., 164.

(29) *Previous judicial proceedings how far admissible in evidence. See HINDU LAW (RELIGIOUS ENDOWMENTS)*, No. 1, 20 C.W.N. 802.

(30) *As to uniform rate of rent. See LANDLORD AND TENANT*, No. 50, 33 Ind. Cas. 415.

(31) *Legal—Hearsay evidence, objection to, admission of—Hearsay statements recorded by Commissioner, if should be allowed to be read in Court. See MAHOMEDAN LAW (MARRIAGE)*, No. 3, 36 Ind. Cas. 20=21 C.W.N. 345.

(32) *Mortgage-deed—Execution proved—Denial of payment of consideration—Onus of proof. See MORTGAGE (GENERAL)*, No. 35, 33 Ind. Cas. 777.

(33) *Pedigree filed in settlement Court, proof of—Admissibility in, of settlement pedigrees—Evidence Act, S. 32. See PEDIGREE*, No. 1, 19 O.C. 321.

(34) *Variance between pleading and proof when fatal to suit. See PLEADINGS*, No. 1, 20 C.W.N. 297.

(35) *Practice of—Use of document as, in Privy Council. See PRIVY COUNCIL*, No. 1, 31 M.L.J. 607.

Evidence—(Concluded).

(36) Documents evidencing partition—Registration—Unregistered document—Admissibility for collateral purpose. See REGISTRATION ACT (1877), No. 1, 35 P.R. 1916.

(37) Unregistered deed of sale—Admission of sale by vendor—Inadmissibility of sale-deed in evidence—Mutation proceedings admissible to prove alienation irrespective of the sale-deed. See REGISTRATION ACT (1909), No. 18, 110 P.W.R. 1916.

(38) Document requiring registration not registered—Admissibility for collateral purpose. See REGISTRATION ACT (1903), No. 23, 3 L.W. 585.

(39) Petition for transfer of registry—Recital of a prior gift—Registration if essential—Admissibility in evidence—Limits of exclusion of evidence under statutory provisions. See REGISTRATION ACT (1908), No. 20, 3 L.W. 1.

(40) Deed of partition of moveables and immoveables—Registration whether necessary—Admissibility in evidence without registration. See REGISTRATION ACT (1908), No. 19, 19 M.L.T. 50.

(41) Lease of coal mine—Half share in lease and certain moveable property, etc., assigned by unregistered document for Rs. 12,500—Admissibility in evidence in regard to moveable property—Admissibility for collateral purposes. See REGISTRATION ACT (1909), No. 6, 49 P.R. 1916.

(42) See RELIGIOUS ENDOWMENTS, No. 4, 35 Ind. Cas. 630.

(43) Suit to set aside decree on ground of fraud—Proof. See SETTING ASIDE DECREE, No. 3, 35 Ind. Cas. 847.

(44) Whether the unregistered sale-deed admissible in. See SPECIFIC RELIEF ACT, No. 14, 1 Pat. L.J. 455.

(45) Unstamped instrument admitted in evidence—Effect—Procedure. See STAMP ACT (1899), No. 9, 31 M.L.J. 234.

(46) Chit given for an existing liability—Promissory note—Want of stamp—Inadmissibility of the document in—Right to recover on the original cause of action. See STAMP ACT (1899), No. 1, 34 Ind. Cas. 417.

(47) Admissibility in—Oral evidence of the terms of agreement—Evidence Act (I of 1872), S. 91. See SUB-LEASE, No. 1, 24 O.E.J. 539.

(48) Proof of testator's intention—Admissibility of oral. See WILL, No. 17, 30 Ind. Cas. 391.

Evidence (Oral Evidence).

Terms in partnership contract in writing not clear—Construction—Parol evidence—Evidence Act, S. 93. See CONTRACT ACT, No. 35, 31 Ind. Cas. 692.

Evidence (Secondary Evidence).

Objection to secondary evidence of registered will admitted without demur—Whether can be taken in appeal. See HINDU LAW (INHERITANCE), No. 5, 31 Ind. Cas. 600.

Evidence Act.

(1) *Admissibility of lease invalid for want of registration—Proof of collateral circumstances.*

Where a lease has become invalid for want of registration, it cannot affect the property leased, but it can be admitted in evidence to explain the circumstances under which the defendant got into possession. *Ram Sarup v. Suraj Din*, 30 Ind. Cas. 258.

KANHAIYA LAL, A.J.C.

(2) See EJECTMENT, No. 4, 9 Bur. L.T. 152.

(2-a) S. 9. See No. 13, *infra*.

(3) *S. 11—Forcible re-entry by landlord—Report to the police—Relevant fact.*

Where the case was that a forcible re-entry was made on behalf of the lessor upon a particular occasion, then the fact that a report to the police complaining of the use of force or intimidation was made soon after the occurrence was a relevant fact under S. 11 of the Evidence Act and admissible in evidence. *Habib Ullah Shah v. Bakht Ball Singh*, 30 Ind. Cas. 292.

LINDSAY, J.C. and KANHAIYA LAL, A.J.C.

(4) *S. 13—Suit for partition—Written statement by widow—Admissibility.*

Where in a suit for partition between the various male members of a certain family, the widow of deceased co-parcener puts in a written statement to the effect that a particular plot of land belonged to her husband such statement is clearly admissible evidence under S. 13 of the Evidence Act (I of 1872). *Rangaswami Pillai v. Yaldylinga Mudallar*, 33 Ind. Cas. 446.

COUTTS-TROTTER and MOORE, J.J.

(5) *Ss. 13 (a), 32 (1) and 43—Suit for possession—Admissibility of recital in judgment not inter partes—Recital of brahmatter title in will of deceased.*

This was a suit for possession of certain lands as plaintiff's Niskar brahmatter. On behalf of the plaintiff the will of the purchaser in title was produced showing the recital of brahmatter title. Reliance was also placed on a recital in a judgment in a claim case not *inter partes*. Held that the recital of the brahmatter title in the will was not admissible under S. 32 (1) of the Evidence Act read with S. 13 (a). Held also that the recital in the judgment in the claim case was not evidence. *Satindra Kumar Chaudhury v. Krishna Kumari Chaudhuranl*, 36 Ind. Cas. 882.

CHATTERJEE and NEWBOULD, J.J.

References.—35 Ind. Cas. 298=23 C.L.J. 583=20 O.W.N. 643, R.

(6) *Ss. 13, 35 and 83—Chitta prepared by Government for resuming surplus lands acquired for roadway, if public document—Admissibility as private document—Bengal Survey Act (V of 1875, B.C.), Ss. 41, 63—Register kept in Survey Office showing what are darpin lands—Admissibility. Mr. William*

Evidence Act—(Continued).

Graham v. Phonindra Nath Mitra, 19 C.W.N. 1038=31 Ind. Cas. 41. See Final Part, 1915, Col. 672.

- (7) Ss. 13 (b), 35, 159—*Age—Certificate by a Medical man, to private patient—Former judgment regarding age—Whether relevant—Value—Minority—Party pleading the same—Burden of proof.*

A certificate of age of a private patient is not relevant as a public record under S. 35 of the Evidence Act but could only be used for the purpose of refreshing the memory (S. 159 of the Evidence Act) when he is examined as a witness. A judgment in a former suit which held that an individual was a minor is not relevant as an instance in which a right was asserted or recognised (S. 13 (b) of the Evidence Act).

It is for the party who comes to Court and pleads minority, to make out his case before the adverse party can be required to rebut it. **Yenkata Rangappa Naicken v. Subbaraya Goundan**, 33 Ind. Cas. 142.

COUTTS TROTTER and SRINIVASA AIYANGAR, JJ.

References :—(a) 6 A.L.J. 693 ; 9 A.L.J. 103 Diss. ; 26 B. 109, F.

- (8) Ss. 13, 42, 43, 90—*Judgment not inter partes—Admissibility in evidence—Recitals in judgment if admissible.*

It is well settled that, although a judgment not *inter partes* may be used in evidence in certain circumstances, as a fact in issue, or as a relevant fact, or possibly as a transaction, the recitals in the judgment cannot be used as evidence in a litigation between the parties.

S. 90, Evidence Act, does not prove the authority of the person who has made the grant, the genuineness whereof is presumed by the Court under the provisions of that section. **Kashi Nath Pal v. Jagat Kishore Acharya Chowdhury**, 20 C.W.N. 643=23 C.L.J. 593=35 Ind. Cas. 298.

MOOKERJEE and ROE, JJ.

- (9) Ss. 18, 23—*Conversation between one of several defendants and the plaintiff's pleader about compromise of suit, if admissible in evidence—Admission of one defendant when evidence against others.*

The plaintiff sued the defendants for recovery of arrears of rent due on a lease executed in favour of their father. The substantial defence was a plea of payment which was overruled by the Courts below. The material evidence in the case was that of the plaintiff's pleader with whom one of the defendants had two interviews, once about a month before the institution of the suit, when a form of settlement was suggested, namely, diminution of interest, and again on the day the suit was instituted, when the pleader was asked to make a compromise.

Held, that as there was admittedly no express condition that the evidence of the interviews should not be given, and it could not be inferred from the circumstances that the parties had agreed that the evidence should not

Evidence Act—(Continued).

be given, the evidence could not be excluded under S. 23 of the Evidence Act.

That the evidence of the plaintiff's pleader as to what had passed between him and the defendants who interviewed for the settlement of the case was admissible and could be used even against the defendants other than the defendant who made the admission, all of them being jointly liable to the plaintiff as the representatives in interest of their father.

Per **Sanderson, C.J.**—That so far as the first interview was concerned, the mere fact that it was contemplated between the parties that the suit was about to be instituted did not prevent the conversation as regards a settlement of the claim from being given in evidence.

That the second conversation was a natural consequence of the first conversation and was not privileged.

That the question whether the evidence of the interviews could be given against the defendants other than the defendant who made the admission depended upon S. 18, Evidence Act, which enacted the principle that, for making statements with reference to the joint concern or common subject of interest, one partner or co-contractor is considered to be the agent of the other.

Per **Mookerjee, J.**—In the absence of any express or strongly implied restriction as to confidence, an offer of compromise is clearly admissible and may be material as some evidence of liability although it may not be proper to enquire into the exact terms offered.

That under S. 18 of the Evidence Act an admission by one defendant may in certain circumstances be admissible in evidence as against another defendant. The principle is that, when several persons are jointly interested in the subject-matter of the suit, an admission by any one of these persons is receivable not only against himself but also against the other defendants whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. **Manjan Matabor v. Allmuddin Mean**, 20 C.W.N. 1217=25 C.L.J. 42=44 C. 130=34 Ind. Cas. 571.

SANDERSON, C.J. and MOOKERJEE, J.

- (10) Ss. 18, 32 (3)—*Admissibility of evidence—Failure to object to the admissibility at the trial—Statement in a sale deed as to ownership of another land given as boundary—Subsequent suit between the purchaser and another about such land—Relevancy.*

As regards admissibility of certain evidence, where it has been admitted without objection in the trial Court no objection to its admissibility can be raised afterwards. But the erroneous omission to object to the admission of a certain piece of evidence does not make it relevant. The statement as to the ownership of a piece of land given as a boundary in a sale-deed in a suit between the purchaser and a third person in which the ownership of that

Evidence Act—(Continued).

land so given as a boundary was in question is not an admission but it is a relevant piece of evidence as a statement against interest under S. 32 (3) of the Evidence Act. *Kangali Molla v. Bent Madhab Biawas*, 34 Ind. Cas. 534.

CHATTERJEE and NEWBOULD, JJ.

References:—34 C. 1059 (P.C.), *F.*; 19 A. 76 (P.C.); 1 C.W.N. 530, *R.*; 22 W.R. 231; 14 C.L.J. 467, *F.*

(11) S. 21—Admission of person in his own favour—Effect. See *GUARDIANS AND WARDS ACT*, No. 15, 24 P.W.R. 1916.

(12) Ss. 21 (1) and 32—Statements as to date of birth, when admissible—Date of birth, knowledge of, presumption as to—Burden of proof as to date of birth—Limitation—Statements against interest, when admissible—Affidavit, statements in, uncontroverted—Plaintiff, if bound to prove that it was made under the circumstances therein mentioned—Horoscope, admissibility of, in evidence—Ainthugai, account, what is.

Per *Wallis, C.J.*—The burden of proving that a person was born on a particular date is on the person who alleges it.

Statements as to the date of birth of a person contained in his deposition and in affidavits filed by him are admissible in evidence under S. 21 (1) read with S. 32 (5), Evidence Act, if made by a person having special means of knowledge, whether personal or hearsay.

An European may be presumed to know his own birth-day as a matter of course, but there is no such presumption in the case of Hindus of the Nattukottai Chetty class.

Per *Seshagiri Aiyar, J.*—The burden of proving that a suit is in time is on the plaintiff.

Under S. 32, Evidence Act, the tests of admissibility of statements against interest made by deceased persons are (1) the deceased must have had personal knowledge of the facts he was stating; (2) the facts stated should have been to the immediate prejudice of the deceased; (3) the statement must have been, to the knowledge of the deceased, contrary to his interest; and (4) the interest must be either pecuniary or proprietary (a).

A plaintiff is not absolved from proving that an affidavit sworn to by him previously was made under the circumstances mentioned therein, even though there is no explanation on the defendant's side for the plaintiff having made such statements, if they are false.

A horoscope is receivable in evidence under S. 32, cl. (5), Evidence Act, and not under cls. 2 or (6) of that section, but the party making it must have had special means of knowledge.

Among *Nattukottai Chetties* an *Ainthugai* account is an account of the properties in the possession of a person. *Ramanathan Chetty v. Murugappa Chetty*, 3 L.W. 216=(1916), *M.* W.N. 208=33 Ind. Cas. 969.

WALLIS, C.J. and *SESHAGIRI AIYAR, JJ.*
Reference:—(a) (1913) 2 K.B. 130, *F.*

Evidence Act—(Continued).

(13) Ss. 21, 30, 8—Statement by a person as to the circumstances under which he executed document—Whether admissible long after execution—Terms of document clear—Construction of document—Whether can be controlled by subsequent conduct—Ancient documents—Construction—Gift to woman to enjoy property from generation to generation—Construction—Right of her children—Draft deed—Admissibility of, for construing fair document—Questions of fact not to be raised in second appeal—*Aliyasantana law. Narasamma Hegadthi v. Billa Kesu Pujari*, 25 M.L.J. 637=31 Ind. Cas. 543. See Final Part, 1913, Col. 561.

(13-a) S. 23. See No. 9, *supra*.

(14) S. 31—Admissions when conclusive. See *AWARD*, No. 10, 9 S.L.R. 183.

(15) S. 32—Recital of boundaries in documents of title—Transaction between third parties—Admissibility of such recital.

Recital of boundaries in documents of title in respect of land forming the subject-matter of a transaction between third parties are admissible in evidence under S. 32 of the Evidence Act, if those third parties are dead or outside the jurisdiction of the Court. *Lalu Singh v. Sahdeo Sing*, 36 Ind. Cas. 610.

ROY and PRASAD, JJ.

References:—26 Ind. Cas. 747=(1914) *M.W.* N. 779; 12 Ind. Cas. 149=14 C.L.J. 467=16 C. W.N. 252; 13 Ind. Cas. 120=15 O.L.J. 7=17 C.W.N. 108; 18 Ind. Cas. 752=11 A.L.J. 139, *F.*; 21 Ind. Cas. 618=19 C.W.N. 468, *D.*; 23 B. 63, *Not Appr.*

(16) S. 32. See *PEDIGREE*, No. 1, 19 O.C. 321.

(16-a) S. 32. See Nos. 5, 10, 12, *supra*.

(17) S. 32, cl. 5—Pedigrees—Preparation of pedigree at time of settlement—Admissibility thereof in Civil suit.

Where a pedigree was proved to have been filed at the time of settlement in connection with the preparation of the *khowat*, it could be admitted in evidence in a subsequent suit in the Civil Court under the provisions of S. 32, cl. 5, Evidence Act. In order to make it admissible as the statement of deceased persons relating to family connections, it is necessary to show that the person who made the statement had some special means of knowledge with regard to the relationship existing in the family in question. *Surajball v. Tilok Chand*, 36 Ind. Cas. 66.

LINDSAY, J.C.

(18) S. 32 (6)—Pedigree—Proof of—Person making the statements not known. *Jahangir v. Sheoraj Singh*, 13 A.L.J. 817=37 A. 600=30 Ind. Cas. 605. See Final Part, 1915, Col. 676.

(19) Ss. 32, 33. See *MUTT*, No. 1, 34 Ind. Cas. 875.

(20) S. 33—Evidence taken before a party is added as defendant if admissible against him—Objection taken for first time in second appeal.

Evidence Act—(Continued).

In this case it was contended that the evidence taken in the suit, before a defendant was newly made a party, should not have been used against him and relied on S. 33 of the Evidence Act. It appeared, that this defendant after he was made a party, was served with summons, took time and filed a written statement which was the same as that of the original defendant, took an adjournment for letting in his evidence and on the adjourned day put in his evidence. He did not require that the evidence previously taken should be re-heard, nor did he desire a *trial de novo* of the suit as against him. When the appeal was heard in the District Court he again took no objection to the evidence already taken in the case being considered against him. It was clear that the original defendant represented his interest in the previous stages of the proceedings, and he was fully cognizant of the steps taken by him to prove their common case. In fact he himself gave evidence at the previous trial, and the second appeal is a joint appeal by both the defendants on the same grounds. In these circumstances it was held that the new defendant was not entitled to take that objection in second appeal and S. 33 of the Evidence Act has no application to this case. **Rangasami Naidu v. Sundararajulu Naidu**, 31 M.L.J. 472=35 Ind. Cas. 52.

NAPIER and SRINIVASA AIYANGAR, JJ.

(20-a) S. 33. See No. 19, *supra*.

(21) Ss. 33, 70—*Proof of execution and attestation—Suit on mortgage. Raj Mangal Misir v. Mathura Dubain*, 13 A.L.J. 881=38 A. 1=30 Ind. Cas. 576. See Final Part, 1915, Col. 677.

(21-a) Ss. 34, 90. See **BEN. ACT VII OF 1885 (TENANCY)**, No. 28-c, 32 Ind. Cas. 794.

(22) S. 35—*Birth register—Admissibility in evidence.*

The birth register is an Official Register kept by the Tapedar who is a public servant in the discharge of his official duty. It is therefore relevant under S. 35, Indian Evidence Act. **Gehmal v. Karmumal**, 10 S.L.R. 38=35 Ind. Cas. 551.

PRATT, J.C. and CROUCH, A.J.C.

(23) S. 35—*Revenue Records—Evidentiary value.* See **LIMITATION ACT (1908)**, No. 58, 9 S.L.R. 143.

(23-2) S. 35. See Nos. 6, 7, *supra*.

(24) S. 41. See **ACT III OF 1907 (PROVINCIAL INSOLVENCY)**, No. 31, 33 Ind. Cas. 798.

(24-a) S. 42. See No. 8, *supra*.

(24-b) S. 43. See Nos. 5, 8, *supra*.

(25) S. 44.—*Compromise decrees—Right of party to prove that his consent was obtained by misrepresentation and fraud—Necessity for suit to set aside decree.*

Where a decree is alleged to have been obtained by fraud and misrepresentation it, is competent to a party to show under S. 44 of the Evidence Act that his consent was obtained by

Evidence Act—(Continued).

fraud and misrepresentation, and a separate suit is not necessary to set aside the compromise decree. **Bommareddi Polireddi v. Bommareddi Bapireddi**, 80 Ind. Cas. 699.

AYLING and TYABJI, JJ.

(25-a) S. 44. See **EX PARTE DEOREE**, No. 5-a, 32 Ind. Cas. 849.

(26) S. 44. See **RES JUDICATA**, No. 19, 19 O.C. 334.

(27) S. 58—*Admission by pleader dispensing with proof—Effect.* See **POSSESSION**, No. 4, 9 S.L.R. 220.

(28) Ss. 58, 91—*Contract to lease—Plea of inadmissibility for want of registration—Validity—Admission of genuineness in pleadings—Effect—Suit for specific performance—Maintainability—Evidence of negotiations and oral contract prior to written contract—Admissibility.* See **SPECIFIC PERFORMANCE**, No. 5, 20 M.L.T. 44.

(29) S. 63—*Translation of a document, if secondary evidence—Admissibility.*

A translation of a *purwanah* or grant is not secondary evidence of that grant and so is not admissible in evidence.

Where a written grant is lost, secondary evidence of it can be given only as defined by law. **Ambalavana Pandarasanavahli v. Kuppachi Janaki Ammal**, 4 L.W. 331=35 Ind. Cas. 201.

SADASIVA AIYAR and MOORE, JJ.

(30) S. 63 (5)—*Secondary evidence—Admission of mortgage in prior proceedings.*

Where in prior proceedings between the parties one of them admitted the existence and contents of a mortgage deed, such admission constituted a good secondary evidence within the meaning of S. 63 (5) of the Evidence Act and proved the execution of the deed. **Bahadur Singh v. Madho Singh**, 36 Ind. Cas. 696.

LINDSAY, J.C.

(31) S. 65, cls. (a) and (f)—*Suit on mortgage—Original deed in possession of defendant—Admissibility of certified copy—Proof of mortgage—Registration Act XVI of 1908, S. 57 (5).*

Plaintiffs sued to recover money upon a mortgage deed. The original mortgage deed, having been in possession of the defendant, plaintiff produced a certified copy thereof. There were three witnesses to the deed of which one of them was dead, the remaining two from a perusal of the certified copy could not remember whether they witnessed the deed. One of them, however, said that he knew well that the alleged executants jointly executed a document in favour of the plaintiff, though he did not remember if he attested it or not. Plaintiff further adduced evidence to prove payment of interest due under the document. Held that S. 65, cls. (a) and (f), of the Evidence Act, read with S. 57 (5) of the Registration Act made the certified copy of the mortgage deed admissible in evidence. Held also that in the circumstances of the case there was sufficient evidence to prove

Evidence Act—(Continued).

the genuineness of the mortgage-deed. **Musammatt Saleha Bibi v. Oudh Commercial Bank, Ltd., Fyzabad, 36 Ind. Cas. 673.**

KANHAIYA LAL and KENDALL, A.J.Cs.

(32) S. 65 (c)—Secondary evidence—Loss of original document—Strict proof of loss.

The Courts should be very strict before admitting secondary evidence in insisting on strict proof of the loss of a document like a mortgage or a special power-of-attorney authorising the creation of a mortgage. **Jaspat Rai v. Devi Dayal, 32 Ind. Cas. 399:**

RICHARDS, C.J. and RAFIQUE, J.

(33) Ss. 65, 66—Redemption, suit for—Mortgage-deed in mortgagee's possession—Oral evidence, admissibility of.

In a suit for redemption when the mortgagee is in possession of the mortgage-deed and fails to produce it, oral evidence is admissible under S. 65 (a) read with proviso (2) to S. 66 of the Evidence Act. **Ml Amin Nissa v. Ml Sura Bi, 9 Bur. L.T. 52=31 Ind. Cas. 892.**

PARLETT, J.

(34) Ss. 65, 66—Secondary evidence of old document, discretion to admit—Presumption when original not forthcoming.

When a Court of first instance decides to admit secondary evidence of a very old document when it is not known what had become of the original document, its discretion in admitting such secondary evidence ought not to be disturbed except upon very special grounds (a).

Walsh, J.—Ss. 65, 66 must be read together and the adverse party must not be presumed to have knowledge that he would be required to produce an original document so as to dispense with the necessity of a notice to produce, unless the original is shown or appears to be in the possession of the person against whom the presumption is drawn. Mangra v. Dedi Ram, 35 Ind. Cas. 328.

WALSH and SUNDAR LAL, JJ.

Reference:—(a) 19 C. 438 (P.C.), F.

(35) Ss. 65, 91—Document—Sufficient proof of loss—Finding by Court of first instance—Value—Not to be disturbed by higher tribunal—Registered sale-deed—Oral evidence to prove the same to be a mortgage—Inadmissibility.

The question whether or not sufficient proof of search for, or loss of, an original document, to lay a ground for admission of secondary evidence, has been given, is a point proper to be decided by the Judge of first instance and is treated as depending very much on his discretion and his conclusion should not be overruled, except in a clear case of miscarriage (a).

Any oral evidence to show that the transaction effected by a registered deed, though it purported to be a sale, was really a mortgage is not admissible (b). **Ma Falk v. Ma Nwal Pank, 34 Ind. Cas. 163=9 Bur. L.T. 174.**

MAUNG KIN, J.

References:—(a) 19 C. 438=19 I.A. 79, R. (b) 8 L.B.R. 100, F.

Evidence Act—(Continued).

(36) Ss. 65 (b), 91—Sale—Proof of title—Non-production of registered deed—Oral evidence if admissible—Vendor's admission—Effect. See SALE, No. 5, 23 Q.L.J. 122.

(37) S. 66—Suit for redemption—Mortgage-deed in possession of mortgagee—Admissibility of secondary evidence—Absence of notice to produce original.

In a suit for redemption the plaintiffs alleged in their plaint that the original document was in the defendants' possession. The Court was asked in the plaint to have the document summoned from the defendants. It did not appear that any formal petition asking the Court to call for the document was ever put in by the plaintiffs. Plaintiffs claimed to adduce secondary evidence to prove the mortgage in question. *Held* that, having regard to the attitude which the contesting defendants took up in their defence, the case was one in which the Court could, in the exercise of the discretion reserved to it by S. 66 of the Code, dispense with the issue of a notice to produce. *Held* also that as the defendants in their written statement had definitely averred that no such document was in existence, it was obviously useless for the Court to send out any notice calling upon them to produce it. The plaintiff was therefore entitled to adduce secondary evidence of the existence and contents of the suit mortgage-deed. **Bahadur Singh v. Mahadeo Singh, 36 Ind. Cas. 696.**

LINDSAY, J.C.

(37-a) S. 66. See Nos. 33, 34, supra.

(38) Ss. 66, 74—Order of Probate Court granting letters of administration with copy of Will annexed, if public document—Certified copy, if admissible—Admission as secondary evidence, though no steps taken to call for production of original—Assam Land and Revenue Reg. II of 1889, S. 154, if bars suit for declaration of title and possession by co-sharer. Habibram Das v. Hem Nath Sarma, 19 C.W.N. 1068=30 Ind. Cas. 690. See Final Part, 1915, Col. 680.

(39) S. 68—Scope and effect of.

S. 68 of the Evidence Act is imperative. So long as there is a witness alive and subject to the process of the Court, no document which is required by law to be attested shall be used in evidence until one such witness has been called. The fact that, when called, he will prove hostile, does not excuse the plaintiff of this duty. **Tula Singh v. Gopal Singh, 1 Pat. L.J. 369.**

ROE and JAWALA PRASAD, JJ.

(39-a) S. 68. See No. 42, infra.

(40) Ss. 68, 69—Transfer of Property Act (IV of 1882), S. 59—Document proved to have been executed in the presence of one attesting witness who was examined—Whether execution valid.

Ss. 68 and 69 of the Evidence Act read together were intended to lay down how a document which was required by law to be attested, could be proved, and the intention

Evidence Act—(Continued).

was, that if the provisions of the sections as to proof were complied with the document, in the absence of evidence to the contrary, must be considered proved, and that it was not the intention of the legislature that an attesting witness or some other witness should have to prove further that the document was in fact signed by the mortgagor in the presence of at least two attesting witnesses. **Ram Dei v. Munna Lal**, 14 A.L.J. 1041=39 A. 109.

RICHARDS, C.J. and BANERJI, J.

(40-a) S. 69 — *Finding by lower Court document having been "legally proved" — Interference by appellate Court.*

When the Court of first instance comes to a finding as to a document having been "legally proved" within the meaning of S. 69, Evidence Act, it cannot be legally interfered with by the appellate Court, especially when no objection was taken to the admissibility of the document at the time of the hearing. **Manch-konda Appadu v. Atchl Appalaswamy**, 32 Ind. Cas. 760.

ABDUR RAHIM and ALYING, JJ.

(40-b) S. 69. See No. 40, *supra*, and No. 42, *infra*.

(41) S. 70—Proof of execution of document — Admission of execution, meaning of. 'See DOCUMENTS, No. 1, 19 O.C. 23.

(41-a) S. 70. See No. 21, *supra*.

(42) Ss. 70, 68, 69—*Suit on a mortgage-bond — Admission of mortgagor if sufficient to make mortgage admissible against other parties not admitting execution, without proof by attesting witnesses—S. 70, effect of.*

Per Woodroffe and D. Chatterjee, JJ. (*New-bould, J., differing*).—In a suit on a mortgage-bond, the admission of execution by the sole mortgagor does not, under S. 70 of the Evidence Act, dispense with the necessity of complying with the provisions of S. 68 of the Evidence Act in order to prove the execution of the document as against other parties in the suit who do not admit such execution. The document must be proved as against them in accordance with the provisions of Ss. 68, 69 and 70 of the Act.

The effect of S. 70 is that the proof by calling attesting witnesses is dispensed with, when the party executant admits execution, only as against him. **Batish Chandra Mitra v. Jogendra Nath Mohalanabla**, 20 C.W.N. 1044 = 24 C.L.J. 175 = 34 Ind. Cas. 862.

WOODROFFE, J.

Reference:—7 C.W.N. 384, *Commented on*.

(42-a) S. 74. See No. 38, *supra*.

(42-b) S. 83. See No. 6, *supra*.

(43) S. 85—*Registration Act, S. 60 (2)—Power-of-attorney, admissibility of, in evidence—Civ. Pro. Code, O. III, r. 2.*

A registered power-of-attorney is admissible in evidence to prove the agency under S. 85, Evidence Act, and unless its genuineness is suspected in which case proof of its execution can be called for, the agent should be allowed to appear and act within the meaning of O. III,

Evidence Act—(Continued).

r. 2 of the Code of Civil Procedure. **Habib-un-nissa (Musammam) v. Musharraf Ali**, 18 O.C. 372=33 Ind. Cas. 661.

PANDIT KANHAIYA LAL, A.J.C.

(44) S. 90—*Will professing to be over 30 years old—Suspicious circumstances—Presumption, whether to be drawn—Delay in suing, whether proves acquiescence or waiver.*

The last male owner of the property in suit died, leaving two widows and a daughter. On 2nd January 1894, the widows gifted the property to the daughter who died on 7th November, 1894. On the death of the surviving widow on 24th October 1902, the reversioners got mutation of the landed property effected in their favour, but the property in suit remained with defendant No. 2 (the husband of the donee). On 17th September 1906, he sold the property to defendant No. 1. On 29th November 1910, the reversioners sued to recover their share. It was contended that the deceased male owner had gifted this property to his widows absolutely, who had gifted it absolutely to the daughter on whose death her husband became the owner:

Held, (1) that the suit was within time, having been brought within 12 years of the death of the second widow;

(2) that mere delay in suing was no proof of acquiescence or waiver by the plaintiffs of their rights;

(3) that, as there were circumstances giving rise to grave suspicions as to the genuineness of the will alleged to have been executed by the last male owner, the presumption allowed by S. 90 of the Evidence Act could not be drawn;

(4) that the alleged will not having been proved, the widows must be regarded as having held only on the usual tenure for life, and no gift by them could defeat the claims of the reversioners on the widow's death;

(5) that, therefore, the plaintiffs were entitled to a decree. **Gujar Singh v. Mehar Singh**, 97 P.W.R. 1916=34 Ind. Cas. 168.

JOHNSTONE, C.J. and CHEVIS, J.

(45) S. 90—*Sale-deed more than 30 years old presumed to be genuine.*

A Court is entitled to presume under S. 90 of the Evidence Act, 1872, that a sale-deed more than 30 years old is genuine. No evidence is required to prove its genuineness. **Gulab v. Muhammad Ismail**, 35 Ind. Cas. 598.

SUNDAR LAL, J.

(46) S. 90—*Document more than thirty years old, presumption as to—Proof of execution—Authority to sign on behalf of others, proof of.* **Shoo Nandan Ahir v. Ram Lagan Singh**, 13 A.L.J. 921=30 Ind. Cas. 908. See Final Part, 1915, Col. 682.

(47) S. 90—*Presumption as to the time of separation, where separation admitted.* See **HINDU LAW (JOINT FAMILY)**, No. 7, 19 O.O. 92.

(48) S. 90—*Ancient document bearing signature made by a person on behalf of another—*

Evidence Act—(Continued).

Presumption about authority to make the signature. See *PEDIGREE*, No. 1, 19 O.O. 321.

(48-a) S. 90. See Nos. 8, 13, *supra*.

(49) S. 90, 114—*Document 30 years old, copy of—Handwriting—Presumption as to stamp—Appellate Court's right of interference—Original document lost, proof of—Elephant trapped in pit dug in another's land, ownership of.*

In the case of a copy of a document 30 years old, S. 90, Evidence Act, empowers the Court to presume that the copy is in the handwriting of the person in whose handwriting it purports to be. Though S. 90 does not refer to stamps, when the Court of first instance has drawn a certain presumption which the law empowers it to draw, and especially when that presumption has reference to stamping, a Court of appeal ought not lightly to interfere with the exercise of the discretion vested in the Court of first instance.

On the loss of an original document it would be improper to expect that proof should be offered of the exact occasion when the document was lost. The question will only be whether the party offering the secondary evidence is unable to produce the original for reason not arising from his own default or neglect.

Difficult questions of law may arise as to the claim for an elephant if the pit for entrapping elephants is found to have been dug by one of the parties on land belonging to another (a). *Manavikraman v. Nilambur Thacharakavil*, 31 Ind. Cas. 579.

SPENCER and TYABJI, JJ.

References:—(a) 4 M. 268; (1865) 11 H.L. Cas. 621, R.

(50) S. 91. See CIV. PRO. CODE (1908), No. 405, 9 Bur. L.T. 250.

(51) S. 91—Receipt of—Proof. See REGISTRATION ACT (1908), No. 15, 98 P.R. 1916.

(52) S. 91—Admissibility in evidence—Oral evidence of the terms of agreement. See SUBLEASE, No. 1, 24 C.L.J. 539.

(53) S. 91. See TRANSFER OF PROPERTY ACT, No. 1, 12 N.L.R. 139.

(53-a) S. 91. See Nos. 28, 35, 36, *supra*.

(54) S. 91, ill. (b)—Loan—Execution of promissory note—Original consideration—Suit thereon, when maintainable. See STAMP ACT (1899), No. 3, 9 S.L.R. 150.

(55) S. 92—Adding to the terms of a written agreement by oral evidence.

Criminal proceedings started by the plaintiff against defendants Nos. 1 and 2 were withdrawn by the former in consideration of the agreement passed by the latter undertaking to do certain things with reference to a privy and passage between the houses belonging to the parties. The agreement made no reference to a projection beyond the *otta* belonging to the defendants. The plaintiff sued the defendants for the removal of the projection, stating that the

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complaint was withdrawn on account of the undertaking given by the defendants to remove the projection.

Held, that the plaintiff was, in putting forward his case as stated in the plaint, attempting to add a new term to the agreement which settled the terms of the compromise; and that, therefore, the alleged agreement sued upon was without consideration. *Jagjivan Mulji v. Nathji Jageshwar*, 18 Bom. L.R. 90=32 Ind. Cas. 938.

SCOTT, C.J. and BEAMAN, J.

(56) S. 92—Oral evidence to show if the transaction was *benami*—*Benami transactions generally—Oral evidence permissible between benamidar and true owner—Specific performance of contract.*

In a suit for specific performance of an agreement for purchase made and executed by defendant No. 1 alone, the plaintiffs alleged that the real purchaser was defendant No. 2 and that defendant No. 1 was acting merely as his *benamidar*. Defendant No. 1 also raised the like contention, but it was denied by defendant No. 2. At the trial, oral evidence was offered to show that defendant No. 1 was the *benamidar* of defendant No. 2.

Held, (1) that, although it was doubtful if parol evidence would be admissible in a contest between the plaintiffs and defendants, yet it was admissible as between defendants Nos. 1 and 2 to prove the true nature of any agreement which subsisted between them;

(2) that when the parol evidence was once let in there, it could be used in adjusting the legal rights and liabilities of the parties to the suit.

It is not a fraud merely to break promises or fail to perform obligations *in futuro*. Fraud ought to be restricted to misrepresentations, and dishonest misrepresentations, of existing facts.

A *benami* transaction is invariably triangular. The simple meaning of *benami* is that a purchaser desires to buy property but does not desire to buy in his own name and therefore buys in the name of some one else.

Where a transaction is truly *benami*, i.e., where the purchase has been effected in the name of the nominal purchaser, the contract would be between the nominal purchaser and the vendor, and in cases of dispute between the nominal and the real purchaser, there being no writing between them, no difficulty can arise, under S. 92 of the Evidence Act, in proving oral agreement.

Where, however, a person, with the object of shielding his property from his creditors, purports to sell it to some one named by himself and the sale-deed is accordingly made out in that person's name as the purchaser, the provisions of S. 92 would prevent the parties to such a contract from giving parol evidence of the true nature of the transaction underlying it. Parol evidence might be given to serve a different purpose; for, where the owner of property purports to transfer for consideration, his real purpose being to conceal or protect his property, the nominal purchaser has necessarily paid no

Evidence Act—(Continued).

consideration; and it is always open to show that the transaction is bad for failure of consideration. *Laxmibai v. Keshav Annaji Pokharkar*, 18 Bom. L.R. 134=33 Ind. Cas. 396.

BEAMAN, J.

(57) S. 92—Registered partition deed silent as to some items of property—Oral evidence, if admissible to explain those items—Negotiable instruments, construction of—Practice.

Where a partition deed was silent as to certain paddy belonging to the family which was subsequently sought to be divided.

Held, that oral evidence was admissible under the provisions of S. 92, cl. (2) of the Indian Evidence Act to show that in fact the paddy had not been divided by the partition deed.

It is settled law that notwithstanding the apparent tenor of a partition deed, it is open to parties to prove by oral evidence that the partition was incomplete or that certain properties were left out for future division.

Negotiable instruments being documents which are intended to pass freely from hand to hand, should be strictly construed, and evidence which would have the effect of adding new terms to such formal documents is altogether inadmissible. *Duraiswami Reddhar v. Rajagopala Reddhar*, 4 L.W. 329=34 Ind. Cas. 712.

SESHAGIRI AIYAR and BAKEWELL, JJ.

(58) S. 92—Redemption suit—Plea of oral sale discharging mortgage-debt, if admissible—Mortgagee's possession, nature of.

Plaintiff's suit for redemption and for accounts from defendants as mortgagees in possession having been dismissed on the plea of the defendants that there was an oral sale in discharge of the mortgage-debt, he appealed. The appeal was pressed on the following grounds:—(1) that the plea of oral sale had been negatived and that the matter was *res judicata* by reason of the decision in a previous suit and (2) that oral evidence of the alleged sale was inadmissible.

Held, that the existence of the oral sale not being directly and substantially in issue and not having been finally decided in the previous suit, the question was not *res judicata*; that the oral agreement was sought to be proved not as modifying the mortgage, but in order to prove the nature of possession taken by the mortgagee and oral evidence, therefore, was admissible; (But see *Spencer, J.*); that the defendants' possession had been all along adverse as against the mortgagor and that they had acquired a title by prescription (a).

Per *Phillips, J.*—Oral evidence of a sale by the mortgagor to the mortgagee in discharge of the mortgage-debt is admissible under S. 92 of the Evidence Act to prove discharge, although the sale itself is invalid and does not effect any legal transfer of the property, even though it is accompanied by delivery of possession (b).

Although an oral sale cannot in itself operate as an extinguishment of the mortgage, yet the proof of the payment of a mortgage-debt

Evidence Act—(Continued).

thereby is sufficient to prove the nature of possession by the mortgagee (c).

Per *Spencer, J.*—A simple mortgagee who gets into possession of immoveable property of Rs. 100 in value cannot prove an oral sale as a starting point of adverse possession against his mortgagor so as to acquire a prescriptive title by remaining in possession for over the statutory period (d).

A mortgagee's possession does not become adverse to the mortgagor merely by his styling himself as proprietor of the mortgaged property or by his denial of the mortgagor's right to redeem; there must be some act done by which the mortgagor may have reason to suppose that his rights have been invaded (e).

Sales and mortgages of immoveable property are both transfers of intangible rights, but one is a transfer of ownership and the other is transfer of an interest in the property concerned. The possession of a purchaser is of a full proprietary character, while the possession of a mortgagee in possession is of a limited nature. Both transactions are required to be registered, if the property is Rs. 100 in value or over. An extinguishment of a mortgage by the mortgagee's rights being merged in those of an owner, involves an alteration by the relationship of mortgagor and mortgagee into one of seller and purchaser. When each of these transactions requires a registered document to make it valid, the law does not permit the substitution of one for the other to be effected in a less formal manner. *Thotakura Govinda v. Pepakayala Mallayya*, 31 Ind. Cas. 678.

SPENCER and PHILLIPS, JJ.

References :—(a) 12 M.L.J. 387; 13 M.L.J. 302, R. (b) 11 Ind. Cas. 713=16 C.W.N. 137=14 C.L.J. 507; 30 M. 231=17 M.L.J. 30; 26 M. 195; 27 M. 368, F.; 15 Ind. Cas. 343=(1912) M.W.N. 854=12 M.L.T. 425=37 M. 423=23 M.L.J. 339, Dis. (c) 16 Ind. Cas. 694=12 M.L.T. 330=23 M.L.J. 360=(1912) M.W.N. 995=37 M. 545, F. (d) 15 Ind. Cas. 343=(1912) M.W.N. 854=12 M.L.T. 425=37 M. 423=23 M.L.J. 339, F. (e) 1 A. 655; 10 M. 189; 16 Ind. Cas. 694=12 M.L.T. 330=23 M.L.J. 360=(1912) M.W.N. 995=37 M. 545; 21 M. 153=8 M.L.J. 92; 27 B. 43=4 Bom. L.R. 721; 2 Ind. Cas. 612=19 M.L.J. 380=5 M.L.T. 84=32 M. 261; 22 M. 261=8 M.L.J. 196, F.

(59) S. 92—Document, extrinsic evidence to construe—Mortgage—Re-payment in kind by instalment—Default—Penalty—Contract Act, 1872, Ss. 37, 74.

Per *Curiam* :—Extrinsic evidence of intention of the parties held to be inadmissible to construe a document.

Ayling, J., dissentiente (a).—The proviso for payment of the total of unpaid instalments on default of any one instalment might be regarded as penal and the proviso for payment of interest on such instalments is undoubtedly penal; but in granting relief against the penalty the Court must not give plaintiff less than he

Evidence Act—(Continued).

would be entitled to if the document had contained no stipulation at all for consequences of breach.

S. 74 of the Contract Act authorises the Court to reduce the compensation to what is reasonable. It may conceivably be reasonable to reduce the compensation to a vanishing point; it cannot be reasonable to reward the defaulter for his breach. On the face of it S. 74 has reference not to the primary term of the contract but to stipulation as to the consequences of a breach.

A Court is not justified in ignoring the clear provisions of S. 37 of the Contract Act, by arrogating to itself powers of relief not conferred by that Act or by other legislative enactments **Suryadevara Seetharamayya v. Suryadevara Kotayya**, 35 Ind. Cas. 111.

ABDUR RAHIM and AYLING, JJ.

References:—(a) 22 C.L.J. 311; 36 B. 164; 12 C. 245 (P.C.); 42 C. 652; 25 A. 284; 9 A. 74; 36 M. 229, *Expt. & D.*

(60) S. 92—*Evidence of conduct as to whether a mortgage was really a kobala—Tenancy relinquished in favour of creditor—Mutation of names.*

Evidence of conduct is admissible to show that what was on the face of it a mortgage was in reality a kobala (a).

The effect of acceptance by the landlord of an application by a debtor for mutation of names of the creditor as *de facto* tenant after the debtor having executed a *kot kobala* of a holding is to render the transaction a complete alienation of the holding disentitling the debtor to redeem. **Ali Sheikh v. Imam Ali Sarkar**, 35 Ind. Cas. 104.

CHATTERJEE and NEWBOULD, JJ.

Reference:—(a) 28 C. 256, *F.*

(61) S. 92—*Suit on pro-note—Oral evidence to show agreement for different rate of interest from that provided in pro-note—Proof of repugnant or inconsistent terms.*

Under S. 92 of the Evidence Act no oral evidence is admissible to show that the interest mentioned in a pro-note was not payable, nor could any usage or custom repugnant to or inconsistent with the express terms of the promissory note be proved. **Muthu Erulappa Pillai v. Yunuku Thathayya Malaiy**, 36 Ind. Cas. 957.

FOX, C. J. and TWOMEY, J.

(62) S. 92—*Promissory note—Endorsement—Presumption of consideration—Oral evidence to prove consideration for endorsement.*

Where an endorsement on a promissory note contains no recital of consideration, though such endorsement implies a contract between the endorser and the endorsee similar to the contract in the note, it cannot amount "to a contract in writing" that the promise is to be performed in consideration of the receipt of the full consideration for the note. Therefore oral evidence is admissible to prove what the real consideration for the endorsement was. **Aiyathurai Ayyar v. Silva Rama Pattar**, 32 Ind. Cas. 233.

PHILLIPS, J.

Evidence Act—(Continued).

(63) S. 92. See CONTRACT ACT, No. 99, 34 Ind. Cas. 609.

(64) S. 92—*Landlord and tenant—Muchilika fixing rent—Lesser payment for some length of time—Effect—Letter, accepting lesser payment—Admissibility.* See LANDLORD AND TENANT, No. 1, (1916) M.W.N. 149.

(65) S. 92—*Agreement putting mortgagee in possession to appropriate profits in payment of principal money, admissibility of.* See MORTGAGE (GENERAL), No. 31, 19 O.C. 328.

(66) S. 92—*Oral agreement putting mortgagee in possession in lieu of interest—Evidence of such agreement, admissibility of.* See MORTGAGE BY CONDITIONAL SALE, No. 1, 19 O.C. 166.

(67) S. 92—*Hundi silent as to interest—Rate of interest—Oral agreement to pay interest at 12 per cent.—Admissibility.* See NEGOTIABLE INSTRUMENTS ACT (1881), No. 21 1 Pat. L.J. 71.

(68) S. 92—*Collateral agreement—Admissibility in evidence without registration.* See REGISTRATION ACT (1908), No. 5, (1916) M.W.N. 129.

(69) S. 92. See TRANSFER OF PROPERTY ACT, No. 82, 31 M.L.J. 347.

(70) S. 92, cl. 1—*Recital as to consideration—Proof of consideration of a different kind.*

Where a promissory note recites that cash was received for the execution of the note and it was sought to prove that the consideration was different from what was recited:—

Held, that such evidence is admissible and does not offend S. 92, cl. 1 of the Evidence Act. **Nara Reddiar v. Doraiswami Reddi**, (1916) M.W.N. 474=31 M.L.J. 96=3 L.W. 589=35 Ind. Cas. 301.

SESHAGIRI IYER, J.

References:—38 M. 514, *D.*; 32 I.A. 113; 33 A. 340; 36 A. 537, *R.*

(71) S. 92 (1)—*Kabuliat containing stipulation to pay excessive rate of interest—Assurance by landlord that covenant will not be enforced—Effect.* See LANDLORD AND TENANT, No. 24, 20 C.W.N. 1067.

(72) S. 92, proviso 1—*Mortgage document, description of land in—Mutual mistake, if can be proved by oral evidence—Specific Relief Act, S. 31—Rectification, suit for, if necessary—Rights of third parties.*

Oral evidence is admissible to prove a mutual mistake in the description of a piece of land in a registered mortgage deed, and when the mistake is so proved, the document can be construed by the Courts as if the mistake had been rectified, and a separate suit for rectification of the instrument under S. 31 of the Specific Relief Act is not necessary, provided that the rights of third persons acquired in good faith and for consideration are not prejudicially affected thereby. **Kolla Chinn Mallayya v. Kannekanti Veeriah**, 3 L.W. 551.

SADASIVA AYYAR and NAPIER, JJ.

Reference:—34 M. 61, *F.*

Evidence Act—(Continued).

- (73) S. 92—Proviso (1)—*Mutual mistake in description of land in registered mortgage deed, oral evidence to prove—Construction of document—Bona fide purchaser for value—Specific Relief Act, S. 31.*

A mutual mistake made in describing a piece of land in a registered mortgage-deed can be proved by oral evidence.

When such a mistake is so established the deed can be construed by the Court as if the mistake had been rectified without the instrument having been actually ordered to be rectified in a suit brought for the purposes under S. 31 of the Specific Relief Act, subject to the condition that the rights of third persons acquired in good faith and for value should not be prejudiced thereby (a). *Kota China Mellayya v. Kannikantee Yeeriah*, 31 Ind. Cas. 671.

SADASIVA AIYAR and NAPIER, JJ.

Reference:—(a) 34 M. 51, F.

- (74) S. 92 (2)—*Suit on hatchita—No mention of rate of interest—Evidence as to interest, admissibility of.*

Where an *hatchita*, on which a suit was brought, was virtually a memorandum of the loan without any mention of the rate of interest, S. 92, Sub-S 2 of the Evidence Act did not prevent the parties from letting in evidence showing the rate of interest agreed upon between the parties at the time of the loan. *Nabin Chandra Nath v. Debendra Mohun Mukhopadya*, 36 Ind. Cas. 612.

CHATTERJEE and NEWBOULD, JJ.

- (75) S. 92, cl. 4—*Surrender of property by vendee to vendor—Execution of mortgage deed evidencing oral agreement to surrender.*

Suit for redemption of mortgage. The defendants were the heirs and representatives of the interest of the deceased mortgagee. Their defence was that their ancestor had sold his rights in the mortgaged property prior to the mortgage and that the mortgage relied on by the plaintiffs was effected with the ostensible object of defeating a right of pre-emption, and was not supported by consideration. The plaintiffs alleged that the sale had been cancelled and was replaced by the said mortgage. The evidence showed that the mortgagee did not set up any rights higher than those of a mortgagee at any time since the date of the mortgage and that the mortgage could not be fictitious. *Held*, that S. 92, cl. 4 of the Evidence Act did not apply to the case, because prior to the passing of Act IV of 1882 (to which period the mortgage and sale in question related, there was no law which required a sale-deed of immoveable property to be in writing. The mortgage-deed, which evidenced the oral agreement rescinding or superseding the previous sale-deed, was registered, and there was nothing in law to prevent the vendee from surrendering his rights under the sale-deed in any manner he thought proper. *Jangli Ram v. Sheoraj Singh*, 30 Ind. Cas. 234.

STUART and KANHAIA LAL, A.J.Cs.

- (76) S. 92 (4). See MORTGAGE (GENERAL), No. 15, 51 P.W.R. 1916

Evidence Act—(Continued).

- (77) S. 92, cl. (a)—*Specific Relief Act, S. 31—Plaintiff's suit for possession of an item—Defendant's plea that the item was intended to be sold to him though another number stated—Defence open. Rangaswami Aiyangar v. Sourl Aiyangar*, (1915) M.W.N. 448=18 M.L.T. 75=29 M.L.J. 229=29 Ind. Cas. 686=39 M. 792. See Final Part, 1915, Col. 685.

- (78) S. 92, proviso 4—*Registered kabuliyaat—Acceptance by landlord for a long time of reduced rent, if precludes suit at kabuliyaat rate—Admissibility of evidence of conduct to prove agreement to take rent at reduced rate or to prove that kabuliyaat originally not intended to be acted upon.*

The mere fact that the landlord accepted rent at a reduced rate from that stipulated for in the *kabuliyaat* for some time does not bind the lessor to accept rent at that rate in future, as the reduced rent might have been accepted as a matter of indulgence which might be put an end to at any time (a).

Under S. 92, proviso 4, of the Evidence Act, any variation of rent reserved by a registered lease must be made by a registered instrument, and oral evidence is inadmissible to prove such variation and an agreement is none the less oral because it is inferred from the conduct of the parties.

Evidence that, since the execution of the *kabuliyaat*, the tenant paid rent at a lower rate than that stated in the *kabuliyaat* is admissible to show that the intention of the parties was that the *kabuliyaat* from the very first was not intended to be acted upon or that there had been a waiver of the strict terms of the lease. (b) *Manindar Chandra Nandi v. Srimati Durga Sundari Dasaya*, 20 C.W.N. 680=32 Ind. Cas. 185.

N. R. CHATTERJEE and NEWBOULD, JJ.
References:—(a) 37 C. 293=41 C. 493=18 C.W.N. 66, R. (b) 6 C.W.N. 242, F.

- (79) S. 92 (5)—*Broker liable as principal—Custom and usage of Calcutta gunny market—Evidence of custom—Admissibility.* See BROTHERS, No. 2, 20 C.W.N. 365.

- (80) S. 92 (6)—*Interpretation of documents—Mortgage-deed—Boundaries—Identification.*

If, in a deed of mortgage, the boundaries of the land mortgaged are described, and such boundaries can also be identified, they should generally be accepted as defining the area of the land affected by the deed. *Nga Cho v. Mi Se Mi*, U.B.R. (1916) 2nd Qr. 110=36 Ind. Cas. 7. SAUNDERS, J.

- (81) S. 92, proviso (6)—*Contract in writing—Simultaneous execution of memorandum—Postponement of right to sue—Extrinsic evidence, admissibility of.*

A contract reduced to writing must be construed on a consideration of the document itself, with only such extrinsic evidence of circumstances as may be required to show the relation of the written language to existing facts. (a)

Evidence Act—(Continued).

Two documents, one a promissory note and the other a memorandum, were signed by the defendant and were accepted by the plaintiff's agent. The circumstances under which the documents came to be signed by the defendant were that the plaintiff who advanced money to the defendant for defraying the cost of an appeal wanted to secure the repayment of the amount paid, when the defendant succeeded in the appeal. The memorandum contained a provision that the plaintiff should not file a suit on the pro-note against the defendant till he succeeded in the appeal.

Held that taking the two documents together it was clear that the words used could not be construed as meaning that the defendant was to be absolved from payment of the advance, if he was unsuccessful in the appeal. The defendant's liability on the pro-note remained in full force though the appeal proved unsuccessful to him. *Ebrahim Goolam Ariff v. A. K. A. M. Chetty Firm*, 36 Ind. Cas. 597.

FOX, C.J. and TWOMEY, J.

References:—(a) 22 A. 149=27 I.A. 58=4 C. W.N. 153=2 Bom. L.R. 523=7 Sar. P.C.J. 601=9 Ind. Dec. (N.S.) 130, *P.*

(82) S. 93—Terms in partnership contract in writing not clear—Construction—Parol evidence. See CONTRACT ACT, No. 35, 31 Ind. Cas. 632.

(83) S. 94—Misdescription of mortgaged property—Oral evidence whether admissible. See MORTGAGE (REDEMPTION), No. 1, 14 A.L.J. 15.

(84) Ss. 101, 103—*Hereditary Archaka—Temple trustees—Punishment of inferior by superior—Inquiry into charges—Notice of hearing—Burden of proof.*

The burden of proof of the giving of notice of the inquiry into the conduct of a person lies on the authority holding such inquiry (a).

Where the trustee of a temple purports to hold an inquiry into the conduct of a hereditary *Archaka* and inflicts punishment on him, the *onus* lies on the trustee to prove that the *Archaka* had notice of the hearing into the charges framed against him. *Rangaswamy Bhattar v. Seshadri Aiyangar*, 4 L.W. 611.

OLDFIELD and SADASIVA Aiyer, J.J.

References:—(a) 24 M. 179; 4 L.W. 306, *P.*; 43 L.J. Ch. 834; 23 B. 122, *R.*

(85) S. 102—Suit for rent against tenant—Plea of eviction by title paramount—Apportionment of rent—*Onus* on lessor to show fair rent. See LANDLORD AND TENANT, No. 27, 43 C. 554.

(85-a) S. 103. See No. 84, *supra*.

(86) Ss. 103, 104—Contract by minor—Burden of proof as to minority. See MINOR, No. 3, 9 S.L.R. 214.

(86-a) S. 104. See No. 86, *supra*.

(87) S. 106—*Applicability—Corporations and individuals—Difference in regard to burden of proof.*

Evidence Act—(Continued).

In order to apply S. 106, Evidence Act, the knowledge attributed to a particular person must be in the nature of something peculiar.

There is no difference between corporations and individuals so far as the rule of burden of proof goes. *Lachminarain Marwari v. Chairman of the Ranchi Municipality*, 1 Pat. L.J. 168.

MULLICK, J.

References:—(a) 5 W.R. 118; 21 C. 504, *D.*

(88) S. 106. See MORTGAGE (GENERAL), No. 52, 35 Ind. Cas. 455.

(89) S. 108—Suit by Hindu reversioner—Disappearance of widow—Presumption of death—Burden of proof on plaintiff to show that he was suing within 12 years of the widow's death. See LIMITATION ACT (1908), No. 245, 18 Bom. L.R. 14.

(90) S. 109. See LANDLORD AND TENANT, No. 7, 8 Bur. L.T. 292.

(91) S. 114—*Suit on bond—Original not produced—Plea of payment—Burden of proof.*

Where, in a suit for the recovery of money due on a registered mortgage bond executed by the defendant in plaintiff's favour, plaintiff does not produce the original but files a certified copy alleging that the original was lost, and the defendant pleads payment, the question of loss is not of much importance except as rendering improbable or probable the correctness of a plea of payment. The execution of the bond having been admitted, the *onus* lies on the defendant to prove payment either by the production of the bond or by other evidence or both. The question of the loss of the original is only material in so far as it may raise a presumption one way or the other under S. 114 of the Evidence Act (a). *Jagan Nath v. Kanta Singh*, 32 Ind. Cas. 349.

KANHAIYA LAL, A.J.C.

References:—(a) 6 A. 73=A.W.N. (1883) 221; 17 Ind. Cas. 396=15 O.C. 278=12 M.L.T. 392=(1912) M.W.N. 1052=34 A. 511=14 Bom. L.R. 1078=10 A.L.J. 373=17 C.W.N. 49=16 C.L.J. 629=23 M.L.J. 741=39 I.A. 68 (P.C.), *R.*

(92) S. 114. See ACT III OF 1914 (COPY-RIGHT), No. 1, 30 Ind. Cas. 721.

(93) S. 114. See HINDU LAW (JOINT FAMILY), No. 6, 109 P.W.R. 1916.

(94) S. 114. See RES JUDICATA, No. 12, (1916) 2 M.W.N. 133.

(94-a) S. 114. See No. 49, *supra*.

(95) S. 114, ill. (d)—Presumption of continuance of profligacy. See MAHOMEDAN LAW (GUARDIANSHIP), No. 1, 9 S.L.R. 196.

(96) Ss. 114, ill. (i)—*Bond in possession of executant—Presumption arising from possession—Obligation to prove discharge.*

Where a document is produced by the executant, the obligation to prove discharge of the document is not shifted thereby. S. 114 of the Evidence Act, ill. (i) refers to presumption that

Evidence Act—(Continued).

may be raised and such presumption is merely a piece of evidence in favour of the party and does not shift the burden of proof as in the case of an endorsement of discharge. *In re Para Thurunji*, 30 Ind. Cas. 258.

SESHAGIRI AIYAR, J.

References:—17 Ind. Cas. 296=12 M.L.T. 392=15 O.C. 278=34 A. 511=14 Bom. L.R. 1073=10 A.L.J. 873=17 C.W.N. 49=16 C.L.J. 629=(1912) M.W.N. 1052=39 I.A. 68=23 M.L.J. 741, F.

(97) S. 114, Ill. (i)—*Usufructuary mortgage bond, suit on—Plea of discharge—Bond produced by the defendant—Endorsement of discharge absent—Presumption—Onus of proof. In re Para Thurunji*, 2 L.W. 604=18 M.L.T. 94=(1915) M.W.N. 638=30 Ind. Cas. 258. See Final Part, 1916, Col. 689.

(98) S. 115—*Estoppel—Minor if may be estopped from repudiating contract induced by representation that he was sui juris—Misrepresentation, not fraudulent—Contract Act*, S. 10.

The law of estoppel must be read subject to other laws such as the Contract Act, and a minor cannot be made liable upon a contract by means of an estoppel under S. 115 of the Evidence Act. *Golam Abdin Sarkar v. Hem Chandra Majumdar*, 20 C.W.N. 418=32 Ind. Cas. 388.

N. R. CHATTERJEA and NEWBOULD, JJ.

References:—25 C. 616=2 C.W.N. 330, F.; 15 C.W.N. 239, D.

(99) S. 115—*Scope and application.*

Under S. 115 of the Evidence Act, an omission to give certain information may estop, but this can only be in cases where the party setting up estoppel had no information of the real facts; there can be no estoppel, if the party to whom the representation is made does not believe it to be true, for in such a case the resulting conduct is in no sense the effect of the preceding declaration. This section does not apply to cases where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. *Jagannath Prasad v. Jaitishun Prasad*, 1 Pat. L.J. 16=34 Ind. Cas. 375.

SHARFUDDIN and MULLICK, JJ.

References:—6 C.L.J. 601; 10 Adol and Ellis 90, R.

(100) S. 115—*Scope—Point of law—Estoppel—Hindu widow adopting an orphan and supporting the adoption whether estopped from pleading invalidity of the adoption.*

A person setting up an estoppel under S. 115 of the Act must be induced to believe in a fact and not in a proposition of law. So where a Hindu widow adopted an orphan and subsequently supported the adoption, her conduct, even if it can be regarded as equivalent to a representation that an orphan can be validly adopted, does not give rise to an estoppel. *Govind v. Mt. Chandrabhaga*, 12 N.L.R. 100.

DRAKE BROCKMAN, J.C. and PRIDEAUX, A.J.C.

Evidence Act—(Continued).

References:—30 A. 649; 34 A. 398; 21 A. 285; 35 A. 263; 46 P.R. 1912; 18 M. 53; 18 M. 58; 37 M. 529; 7 M. 3; 21 M.L.J. 500; 7 M.H.C. 250; 15 M. 486; 11 B.H.C. 190; 28 B. 399 (407); 7 C. 594; 19 C. 513; 11 B.L.R. 391; 20 C. 296 (313); 19 Q.B.D. 66 (70), R.

(101) S. 115—"Feeding the estoppel," meaning of—Applicability of the principle to transactions before this Act. See *ESTOPPEL*, No. 2, 23 C.L.J. 501.

(102) Ss. 115, 116, if exhaustive. See *LANDLORD AND TENANT*, No. 18, 24 C.L.J. 103.

(103) S. 116—*Tenant let into possession by landlord—Tenant, if can deny landlord's title—Estoppel, extent of—Landlord's right to dispose of land by will, if can be questioned—Estoppel, if extends in favour of executors under the landlord's will—Probate of will, effect of.*

A person who obtained possession of property from another is estopped from denying that others title to the property at the time he was so let into possession.

Where the defendant obtained possession of certain property under a rental agreement from one S who was the manager of certain charity to which the said property was attached.

Held that the defendant was not estopped from showing that S, although he was entitled to manage the property, was incapable of disposing of it by will and that therefore the executors appointed under the will had no title to the property.

Grant of probate of a will is not conclusive on the question whether the testator had power of disposition over the properties comprised therein. *R. Valthinada Iyer v. Subramania Iyer*, 4 L.W. 349.

ABDUR RAHIM, O.C.J.

(104) S. 116—Whether exhaustive of the law of estoppel. See *ESTOPPEL*, No. 1, (1916) M.W.N. 119.

(105) S. 116—"At the beginning of the tenancy" meaning of. See *LANDLORD AND TENANT*, No. 5, 14 A.L.J. 263.

(106) S. 116. See *LANDLORD AND TENANT*, No. 31, 31 M.L.J. 712.

(106-a) S. 116. See No. 102, *supra*.

(107) Ss. 124, 126—*Easements Act*, Ss. 4, 15—*Easement against Government—Period of user—User for sufficiently large number of years—Burden of proof, shifting of—"Communication in official confidence." meaning of—Report by one officer to another, admissibility of—Detrimental to public interest—Sufficient cause—Public officer in charge of record, opinion of, whether final—Presumption—Finding of fact—Second appeal. Nagaraja Pillai v. Secretary of State*, 26 Ind. Cas. 723=39 M. 304. See Final Part, 1915, Col. 691.

(107-a) S. 126. See No. 107, *supra*.

(108) S. 127—Purchaser of part of insolvent's property—Cross examination by such person—

Evidence Act—(Concluded).

Proceedings under ol. 18, Sch. II, Act III of 1909—Effect. See **INSOLVENCY**, No. 1, 24 O.L.J. 149.

(109) S. 145. See **HINDU LAW (JOINT FAMILY)**, No. 30, 32 Ind. Cas. 291..

(110) S. 145—Previous statements, when can be used as evidence. See **WILL**, No. 18, 32 Ind. Cas. 267.

(111) S. 159. See No. 7; *supra*.

Exaggerated Claim.

If ground for dismissing the suit. See **PLEADINGS**, No. 5, (1916) 2 M.W.N. 214.

Exchange.

(1) *Lands situated in the mofussil—Exchange effected before the Transfer of Property Act—Warranty of title—Breach—Damages.*

In an exchange of lands situated in the mofussil, effected before the Transfer of Property Act there is an implied covenant for title and therefore a party to the exchange losing the lands got under the exchange-deed on account of the defect in title is entitled to damages **Balusu Yeeraraghavalu v. Boppana Manikyam**, 31 M.L.J. 380=30 M.L.T. 329=35 Ind. Cas. 92.

SESHAGIRI AIYAR and BAKEWELL, JJ.

(2) *Registration—Exchange of plots—Unregistered document—Act and conduct of parties—Rights of parties—Transfer of Property Act, Ss. 51 and 118—Rule of estoppel and equities when applied. Ramanathan Chetty v. Ramasami Chetty*, (1915) M.W.N. 1043=30 M.L.J. 1=19 M.L.T. 114=32 Ind. Cas. 5. See Final Part, 1915, Col. 693.

(3) Setting aside deed of. See **CANCELLATION OF DEED**, No. 1, 33 Ind. Cas. 441.

Exche Act.

See **ACT XII OF 1896**.

Exclusion of Time.

(1) See **LIMITATION ACT (1908)**, No. 44, 36 Ind. Cas. 702=19 O.C. 367.

(2) Attachment of decree—, occupied by attachment—Civ. Pro. Code, O. XXI, r. 53. See **LIMITATION ACT (1908)**, No. 52, 30 Ind. Cas. 587:

Execution Application.

(1) For delivery of possession—Delivery effected—Subsequent application for the same relief See **CIV. PRO. CODE (1908)**, No. 271-a, 32 Ind. Cas. 46.

(2) Struck off—Restoration—Objection as to limitation—Jurisdiction. See **CIV. PRO. CODE (1908)**, No. 372, 35 Ind. Cas. 397.

Execution of Decree.

See **ARREST**.

See **ATTACHMENT**.

See **CIV. PRO. CODE (1908)**, Oo. XXI AND XXXVIII,

See **RES JUDICATA**.

See **SALE**.

(1) *Provincial Small Cause Courts Act (IX of 1887), S. 27—Small Cause Suit—Execution on Small Cause Side—Order—Appeal*

Execution of Decree—(Continued).

—Civ. Pro. Code (1908), S. 115—Revision, competency of, when there is no appeal—Limitation Act (1908), Art. 182—Batta Memorandum for issue of notice to judgment-debtor under S. 248, Civ. Pro. Code. (old Code)—Step-in-aid..

S. 27 of the Provincial Small Cause Courts Act bars an appeal against an order in execution passed by a Small Cause Court on its Small Cause Side (a).

A batta memorandum which mentions that batta is paid for the issue of notice to the judgment-debtor under S. 248 of the Civ. Pro. Code, 1882, is an application to take a step-in-aid of execution (b). **Alagamothu Pillai v. Devassagaya Fernandez**, 3 L.W. 34=19 M.L.T. 146=(1916) M.W.N. 78=32 Ind. Cas. 484.

SADASIVA AIYAR and NAPIER, JJ.

References:—(a) (1911) 2 M.W.N. 585, D.; 12 Ind. Cas. 169, R. (b) 28 M. 399; (1910) M.W.N. 713, F.

(2) *Decree passed in terms that the rights of prior mortgagees might not be prejudiced—Code of Civil Procedure (1908), O. XXXIV, r. 4—Decree capable of execution.*

Where a decree for sale was passed under O. XXXIV, r. 4, Civ. Pro. Code, in the terms that the rights of the prior mortgagees thereof should not be prejudiced, and the decree was made absolute, held, on an application by the decree-holder to execute the decree subject to the rights of the prior mortgagees, that the decree was capable of execution and was not vague. **Sahebzad Singh v. Lalsa Singh**, 14 A.L.J. 324=35 Ind. Cas. 152.

PIGGOTT and WALSH, JJ.

(3) *Security for performance of decree—Code of Civil Procedure (1908), Ss. 47, 145, O. XXXIV, r. 14—Method of enforcing security.*

In execution of a decree certain property belonging to the judgment-debtors was attached. One M.P. put forward a claim to the property. Thereupon a compromise was arrived at between the decree-holder, the judgment-debtors and M.P., as the result whereof a promissory note for a further sum was given, and it was covenanted that the rest of the decree-holders' claim would be satisfied by paying Rs. 350 in annual instalments. In respect of the payments by annual instalments, M.P. rendered himself liable as surety for the due performance thereof and he covenanted that in the event of failure by the judgment-debtor to pay two consecutive instalments he would pay the same from his own pocket. He further covenanted that should he fail to do so the decree-holder might proceed in execution against his person and property and he hypothecated certain property belonging to himself. Default having occurred on the part of the judgment-debtors and M.P. not having made good the default, as covenanted by him, the decree-holder applied to execute the decree by selling the hypothecated property:

Held, upon a construction of the compromise, that the application was to enforce the personal liability incurred by M.P. as surety under

Execution of Decree—(Continued).

S. 145 of the Code of Civil Procedure, and that O. XXXIV, r. 14, was not applicable, no decree having been obtained against M.P. Mukta Prasad v. Mahadeo Prasad, 14 A.L.J. 385=38 A. 327=33 Ind. Cas. 992.

PIGGOTT and WALSH, JJ.

- (4) *Small Cause Court decree—Transfer to Court of Munsif for execution—Order in execution—Appeal—Code of Civil Procedure (1908), S. 42—Limitation—Step in-aid of execution.*

A Small Cause Court decree was transferred for execution to the Court of a Munsif, and an order was passed by that Court. *Held* that an appeal lay to the Court of District Judge against the order (a).

Held also that an application to transfer a decree to another Court for execution is a step-in-aid of execution. *Laceti v. Hazari Lal*, 14 A.L.J. 415=33 Ind. Cas. 523.

RAFIQ, J.

References:—20 C.L.J. 129; 11 C.W.N. 861, F.

- (5) *Decree-holder, application by, to realize money deposited in Court—Limitation—Step in-aid of execution.*

Held, that an application made by a decree-holder for payment of money which had been realized in execution and deposited in Court was a step-in-aid of execution and an application for execution made within three years of the date of such application for payment was not barred by limitation. *Dharamraj Kuar (Thakurain) v. Lachman Bhuji*, 18 O.C. 389=33 Ind. Cas. 557.

PANDIT KANHAIYA LAL, A.J.C.

References:—6 A. 365; 17 M. 165; 22 B. 340, R.

- (6) *Time-barred decree, execution of—Requisites for the execution of a time-barred decree.*

Held that, in order to enable a decree to be executed in spite of the fact that execution is time-barred, it is necessary to establish that notice requiring the judgment-debtor to show cause why the decree should not be executed as against him has been served on him and that he has thus been in a position to raise the plea of limitation, that Court has expressly or impliedly decided by a final order the question of limitation in favour of the decree-holder and that there has been an effective order of adjudication. *Gouri Shankar v. Mussammat Lachmin Kunwar*, 18 O.C. 374=33 Ind. Cas. 663.

STUART, A.J.C.

- (7) *Decree, redemption suit—Limitation, application for execution—Time, if runs from date of decree or date of ascertainment of exact amount.*

Where, in a suit for redemption, a certain decree was passed on 27th July 1909 and it was directed therein "that it will be necessary to have fresh accounts taken to determine the amount due to the appellants," and the amount was not definitely ascertained till the 23rd February 1910 and the application for execution was filed on 29th January 1913:

Execution of Decree—(Continued).

Held, that the judgment of the District Judge, dated 27th July 1909, set forth clearly the exact method of ascertaining the sum to be paid in redemption and the calculation of that sum was a matter purely of office routine and that the application for execution was barred by limitation. *Babu Surajdeo Narayan Singh v. Musharao Raut*, 20 C.W.N. 950=34 Ind. Cas. 504.

ROE and JWAHA PRASAD, JJ.

Reference:—25 C. 109, F.

- (8) *Execution—Decree awarding personal remedy in case sale-proceeds of mortgaged property do not suffice—Interpretation of decree—Execution Court, duty of—Jurisdiction.*

In a suit on a mortgage a Court passed an order for a preliminary decree and decided *inter alia* that, in case sale of the property mortgaged should not suffice to liquidate the decretal debt with costs and interest, the defendants should be held personally liable for any deficiency. The decree drawn up, however, contained the words "shall be at liberty to apply for a personal decree:

Held, that the words in the decree must be interpreted in conformity with the judgment to mean "shall be at liberty to apply for execution of the decree against the defendants personally," and that the Court on the execution side had no power to go into the question whether the defendant was personally liable or not but was bound to execute the decree as it stood. *Madhoo Mal v. Muhammad Zakaria*, 75 P.W.R. 1916=32 Ind. Cas. 820.

JOHNSTONE, C.J.

- (9) *Power of execution Court to go behind decree.*

The plaintiffs obtained a decree for possession of certain specified plots of *shamlat* and amounting to about 3 *kanals* and 13 *marlas*.

The defendants subsequently sued for partition of the whole of the *shamlat*, but their suit was dismissed. They also failed to get the decree in respect of the specified fields set aside. It was found that the defendants had in their possession only 1 *kanal* 3 *marlas* more than their share. The lower Courts refused to execute the decree on the ground that the decree-holders were not entitled to the possession of the land claimed by them.

Held, that the Courts were bound to execute the decree and could not go behind it in the execution department. *Harnam Singh v. Bhagwan Singh*, 85 P.L.R. 1916=163 P.W.R. 1916=35 Ind. Cas. 867.

LE ROSSIGNOL, J.

- (10) *Step-in-aid of execution—Application by decree-holder for extension of time—Revisional jurisdiction of High Court—Provincial Small Cause Courts Act, S. 25.*

A *bona fide* application made by a decree-holder praying for extension of time for the purpose of ascertaining the whereabouts of his judgment-debtor is a step-in aid of execution and saves limitation. Where a Small Cause Court, without any materials on the record, gratuitously assumed that an application

Execution of Decree—(Continued).

presented by the decree-holder for extension of time was not *bona fide*, and thus held a subsequent application for the execution of the decree time-barred, *held*, that there was ground for interference by the High Court in revision. **Bhalron Prasad v. Amina Begam**, 14 A.L.J. 890=38 A. 690=35 Ind. Cas. 693.

PIGGOTT and WALSH, JJ.

(11) Interpretation—Assets that may be in the hands of the representative.

A decree in the terms "that the appellant shall be liable for the amount of the decree to the extent of the assets that may be in the appellant's hands" was held to mean such assets as might be in the appellant's hands on the date of execution (per **Sundar Lal, J., Walsh, J., dubitante**). **Collector of Jaunpur v. Champa Lal**, 14 A.L.J. 899=36 Ind. Cas. 901.

WALSH and SUNDAR LAL, JJ.

(12) Surety bond—Forfeiture of—Personal attendance of party—Service of summons.

The Court declared the bond of the sureties which they had given for the appearance in Court of the judgment-debtor to be forfeited. It appeared that no order had been passed for the personal appearance of the judgment-debtor but on the application of the plaintiff he was summoned to appear in Court to give evidence. This summons was not served on him, the summons was to be sent through his pleader but the pleader's agent returned it saying that he did not know where the judgment-debtor was.

Held, that the order directing forfeiture of the bond must be set aside, for no order was passed for personal attendance of the judgment-debtor.

Obiter dictum.—That the summons could not be said to have been served on the judgment-debtor under the circumstances of the case. **Mula Shah v. Hathbagwan**, 90 P.L.R. 1916=166 P.W.R. 1916=36 Ind. Cas. 73.

SCOTT-SMITH, J.

(13) Decree passed by Baroda Court—Execution proceedings transferred to British Court—Applications to execute the decree not made within the time prescribed by British law—Execution in British Courts barred—Lex fori governs execution proceedings.

The plaintiff obtained a money-decree against the defendant in 1909 in the Baroda Court. The first application to execute the decree was made in 1913, it being in time according to the law in Baroda. In 1915, the plaintiff applied to the Baroda Court to transfer the decree for execution to the Ahmedabad Court (British). The defendant contended that no application to execute the decree having been made, within three years of its date, the execution of the decree was barred by time.

Held, that the application was barred by time, because suits and applications must be brought within the period prescribed by the local law of the country within which the suit or the application was brought. **Nabibhai Yasirbhai v. Dayabhai Amulakh**, 18 Bom. L.R. 481=40 B. 504=36 Ind. Cas. 369.

BATCHELOR and SHAH, JJ.

Execution of Decree—(Continued).

References:—15 B. 28, D.; 12 Bom. L.R. 844, F.

(14) Power of Court executing decree—Civ. Pro. Code, O. XXI, r. 7—Order refusing execution of decree—Appeal.

A Court to which a decree is sent for execution cannot question the jurisdiction of the Court which passed the decree. (*Vide* Civ. Pro. Code, O. XXI, r. 7).

It appears clear that an order refusing to execute a decree is a decree within the meaning of S. 47 of the Code of Civil Procedure and an appeal from such an order lies (a). **Ma Me v. Maung Aung Min**, U.B.R. (1916), 2nd Cr., 119=36 Ind. Cas. 10.

SAUNDERS, J.

References:—(a) 28 B. 378; 38 B. 194; 38 C. 639 (668); 1 U.B.R. (1910) 13, 82, R.

(15) Decree—Execution—Effect of bringing one out of several representatives on the record.

A Hindu widow was in possession of a one-sixth share of her husband's estate upon a partition made among her sons. One of the sons lived jointly with her. She made a mortgage of her share to raise money to pay off debt legally binding upon the estate. The mortgagee brought a suit against her and obtained a decree nisi against her. She then died, and the son who was living jointly with her, alone out of her other sons, was brought on the record as her legal representative. The order absolute was obtained and the shares of the widow and the son who was joint with her were sold and purchased by plaintiffs. When they applied for mutation of names, they were opposed by the other sons. Consequently they commenced the present action for recovery of possession.

Held, that the order absolute having been obtained against one out of several heirs, there was not in existence any decree under which the interests of the other heirs could be sold, and consequently the plaintiffs could not obtain possession of their shares (a). **Kundan Singh v. Muammad Surja Kuar**, 14 A.L.J. 989=39 A. 67.

RICHARDS, C.J. and RAFIQ, J.

Reference:—(a) 25 B. 337, D.

(16) Decree, execution of—Decree, validity of, if can be raised in execution—Judgment against a lunatic—Lunatic not represented by a legal guardian—Right of suit to set aside decree.

Every order and judgment, however erroneous, is good, until discharged or declared inoperative and the execution Court cannot enquire into the validity or propriety of the decree (a).

A proceeding to enforce a judgment is collateral to the judgment, and, therefore, no enquiry into its regularity or validity can be permitted in such a proceeding. Hence a judgment against a person who was *non compos mentis* at the time of the trial, and yet was not represented by a legal guardian, is not to be impeached in execution, but should be reversed or annulled in some direct proceeding taken for that

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purpose (b). *Kallpada v. Hari Mohan*, 24 C. L.J. 375 = 35 Ind. Cas. 856.

MUKERJEE and CUMING, JJ.

References:—(a) (1846) 2 Phil. 113 (115); 1 C.P. Cooper, 338⁴ (349); R. (b) (1909) L.R. 96 I.A. 168; 31 A. 572, R.

(17) *Decree, execution of—Attachment of debt payable outside jurisdiction—Attachment, effect of—Money paid under an illegal order, where to be refunded.*

It is not competent to a Court, in execution of a decree for money, to attach, at the instance of the decree-holder, a debt payable to the judgment-debtor outside the jurisdiction by a person not resident within the jurisdiction of that Court.

When a Court has manifestly usurped jurisdiction and has illegally secured possession of a fund, which should not have come under its control, its orders must be discharged. Such illegal orders cannot stand on the plea that possibly similar orders would have been made by a Court of competent jurisdiction.

The money which has been paid out of Court under an illegal order made without jurisdiction, must be brought back into Court. *Surendra Nath Goswami v. Bangisbadan Goswami*, 24 C.L.J. 533 = 36 Ind. Cas. 457.

MOOKERJEE and CUMING, JJ.

(18) *Ejectment, decree for—Appellate decree—Merger of original decree—Appeal dismissed for default—Decree, which, to be executed—Civ. Pro. Code (Act V of 1908), O. XXI, r. 22—Omission to give notice, effect of—Conditional decree, execution of—Notice if necessary—Decree incapable of execution, objection as to—Events subsequent—Bengal Tenancy Act (VIII of 1885), s. 155—Tenancy continues how long—Time, extension of.*

The original decree is merged in the appellate decree whether the latter confirms, amends, or reverses the original decree, and it is the appellate decree alone which can be executed; 22 B. 500 (506) and 24 C.L.J. 517, referred to. But this doctrine cannot be applied where the appeal is dismissed for default.

Where an appeal against an original decree has been dismissed for default, the original decree is the decree to be executed.

The omission to give notice, as required by O. XXI, r. 22 of the Code of Civil Procedure, is not a mere irregularity which makes the proceeding voidable, but is a defect which goes to the root of the proceeding and renders it void for want of jurisdiction (a).

Such omission renders proceedings inoperative even though a stranger may have acquired title in course thereof.

Even where O. XXI, r. 22 of the Code of Civil Procedure does not apply, the Court should issue a notice on the judgment-debtor and hear his objection, if any, before it grants execution of a conditional decree on the *ex parte* statement of the decree-holder that the contingency contemplated has happened.

Where an *ex parte* order has been made to the prejudice of a litigant who has not been

Execution of Decree—(Continued).

afforded an opportunity to be heard, the order is subject to the implication that it may be revoked at the instance of the party affected thereby and the Court has inherent power to give such directions as the justice of the case may require.

An objection that a decree for ejectment previously obtained, has become incapable of execution by reason of events subsequent, can be properly taken in execution of the decree.

The tenancy continues in operation till the failure of the tenant to comply with the decree made under S. 155 of the Bengal Tenancy Act within the time prescribed thereby (b).

S. 155 of the Bengal Tenancy Act enables the Court to give the tenant relief on the footing that there shall be no forfeiture at all; when relief is granted, the forfeiture is stopped *in limine*, so that there is no question of any destruction of an interest which has to be called into existence again.

It is competent to the Court to entertain an application for enlargement of time after the expiry of the period prescribed in the decree under S. 155 of the Bengal Tenancy Act and even after the decree-holder has applied for execution (c).

Whether an order for extension of time should be made or not, depends upon the circumstances of the litigation, that is, upon the circumstances disclosed at the original trial and the events subsequent. *Syam Mandal v. Sati Nath Banerjee*, 24 C.L.J. 523.

MOOKERJEE and CUMING, JJ.

References:—(a) 20 C. 370; 21 C. 19; 32 B. 572, R. (b) (1910) 1 K.B. 263, R. (c) 16 C.L.J. 520, R.

(19) *Decree, execution of—Limitation Act (IX of 1908), Sch. 1, Art. 182—Step-in-aid of execution—Leave to bid—Acceptance of portion of decretal amount from several judgment-debtors, effect of—Uncertified payment—Execution Court, if can investigate fact of payment.*

An application was made by a decree-holder for leave to bid at the sale which had been advertised. In this application, which was granted by the Court, it was stated that when the properties would be put up for sale, it would be necessary for the decree-holder to make a purchase for the decretal amount, if no other purchaser offered any bid, and it was prayed that permission might be granted in that behalf.

Held, that the application was not an application to the proper Court to take a step-in-aid of execution of decree (a).

Where the decree-holder accepted sums tendered by the different judgment-debtors from time to time, and undertook not to proceed with execution against those judgment-debtors, but did not release them from liability under the decree:

Held, that the decree could be executed against all the judgment-debtors (b).

It is not open to an execution Court to investigate the fact of receipt of decretal amount by the decree-holder which was not certified to the

Execution of Decree—(Continued).

Court by the judgment-debtor within the prescribed time(c). *Jogendra Prosad Mitra v. Ashutosh Goswami*, 24 C.L.J. 467.

MOOKERJEE and BEACHROFT, JJ.

References:—(a) 18 A. 211; 22 A. 399; 21 B. 331, D.; 9 C. 730; 23 C. 690, F. (b) 37 C. 559, Dist. (c) 12 C.W.N. 485, Not F.

(20) *Instalment decree for money—Order directing delivery of possession of land on failure to pay two consecutive instalments—Application for delivery of possession presented more than 3 years from default—Bar of limitation—Right to recover money due for instalments within 3 years—No bar.*

A decree for money payable by instalments which was passed on the 26th August 1907, *inter alia* provided that "in case of default of two continuous instalments, the plaintiffs and defendant No. 2 are authorised to take possession of one-half of 973 *karals* and 8 *markas* of land in lieu of the outstanding decretal amount in execution of the decree." None of the instalments was paid and an application for execution was made on 31st July 1912 for delivery of possession of the land.

Held that the application, having been made more than three years after the judgment-debtor had made default in the payment of the first two consecutive instalments, the decree-holder was not entitled to possession and that his application was barred (a).

The option given by the decree must be exercised by him once and for all and if he does not exercise the option, according to the terms of the decree on the happening of the first default, he cannot revive it subsequently so as to be able to enforce the default clause.

Held further that the decree-holder is entitled to execute the decree as if it contained no default clause, and can recover by making a proper application for execution, such of the instalments specified in the decree as are not barred by limitation. *Musammam Kirpa Devi v. Dassundhi Ram*, 36 Ind. Cas. 978—8 P.R. 1917.

SHAH DIN, J.

References:—(a) 30 A. 123, *Ref. to*; 16 A. 237; 16 A. 371; 100 P.R. 1902 and 6 P.R. 1913, Dist.

(21) *Decree for mesne profits and costs—Separate applications for execution of said reliefs—Continuation of proceedings.*

A decree having been passed for mesne profits and costs, the decree-holder first applied for execution of the decree as to costs and then for mesne profits. *Held* that the second application for execution was not a continuation of the first execution and they were two distinct and separate applications for execution. *Kunj Behari Lal v. Ram Sahai*, 30 Ind. Cas. 213.

LIMDSAY, J.C.

(22) *Decree for possession—Duty of decree-holder to obtain possession through Court—Amicable delivery of possession.*

A decree-holder entitled to possession is not bound to obtain possession through Court, if the judgment-debtor gives up possession amicably. In that case the decree is satisfied and

Execution of Decree—(Continued).

there is no cause of action to take out execution proceedings in the suit. If the decree-holder is dispossessed afterwards his dispossession gives him a fresh cause of action and it is on that fresh cause of action that a suit has to be brought. *Idine Beary v. Ummathumma*, 30 Ind. Cas. 606.

SADASIWA AIYAR and NAPIER, JJ.

(23) *Right of assignee prior to decree to execute decree.*

Where, prior to the passing of a decree, the right sued upon was assigned to a third person, such assignee cannot execute the decree subsequently passed. *Peer Mahomed Rowthen v. Raruthan Ambalam*, 30 Ind. Cas. 831.

WALLIS, C.J. and SESHAGIRI AIYAR, J.

(24) *Execution of decree in suit valued at over Rs. 5,000 but decreed for less—Appeal—Act XII of 1887.*

An appeal from an order in proceedings in execution of decree in a suit valued at over Rs. 5,000 but decreed for less, lies to the High Court. *Kiwar Ali Khan v. Salim-un-Nissa* 31 Ind. Cas. 496.

BANERJEE, J.

(25) *Conditional decree, execution of—Costs—Procedure.*

Where a decree was drawn up in the following form:—"It will be established and declared that the sale-deed executed by defendants Nos. 2 and 3 in favour of defendant No. 1, is not binding upon the plaintiff; possession will be delivered to the plaintiff by dispossession of defendant No. 1 on condition of paying into Court Rs. 66 within one month; in case of default, the plaintiff's suit will stand dismissed," and was followed by a schedule of costs based on the assumption that the money would be paid in within the time specified. *Held* that if the money was not paid within time, the defendant under the decree, was not entitled to execution for costs. *Ram Nath Tewari v. Musammam Genda*, 31 Ind. Cas. 564.

RICHARDS, C.J.

(26) *Execution—Decree against one defendant—Attachment of share of profits—Execution sale—Purchase by decree-holder of unascertained share of profits—Suit for ascertainment and recovery of profits—Maintainability.*

M brought a suit against E, and the brothers and the nephews of E and obtained a decree against E. In execution of the decree, the profits from certain lands due to E by the other defendants were attached. The attachment was objected to by the other defendants and after an order passed in M's favour, the rents were put up for sale and M purchased the same but no amount was ascertained. M brought the present suit for profits at the rate of Rs. 20 per bigha. The claim was resisted on the ground that nothing was due to M because the property was managed and cultivated during his absence by the other defendants.

Held that E and the other defendants held the property as tenants-in-common, each having in law a right to a specific share in the profits

Execution of Decree—(Continued).

that during his absence, E would have been entitled to his share of those profits, after crediting the defendants a reasonable sum for the extra labour which had been expended by them by reason of E's absence and that M had the same rights as E had. **Mahmud Husain v. Esayet Husain**, 33 Ind. Cas. 83.

RICHARDS, C.J. and RAFIQUE, J.

- (27) *Execution—Decree against a female personally—Mahal lands assigned to females for enjoyment in common—Attachment of rents after judgment-debtor's death—Invalidity.*

Where, in execution of decree passed against a female personally, rents which accrued due after her death from mahal lands which were assigned to her for enjoyment along with other members of her family were attached in execution proceedings to which the immediate succeeding female was made a party. Held that, in the absence of proof that the judgment-debtor was sued as representing the mahal estate for a debt due by the estate, the attachment was illegal. **Narayanaswamy Naidu v. Mathuuri Rajal Ramakrishnamba Garu**, 33 Ind. Cas. 83.

SADASIVA AIYAR and MOORE, JJ.

- (28) *Powers of the executing Court—Construction of decree—Reference to the pleadings and the record in construing the decree—Decree of the appellate Court erroneous and dealing with a matter which had been withdrawn at the hearing.*

Where two portions of the decree of a lower Court were taken objection to by way of appeal but the appeal with regard to one portion had been withdrawn and nevertheless the decree of the Court below was set aside in regard to both matters held (per **Piggott, J., Walsh, J., dissenting**) that the executing Court must execute the decree of the appellate Court as it stands where there is no ambiguity in the terms of the decree and the decree itself is in strict accordance with the operative portion of the judgment, the executing Court is not to enter upon a detailed examination of the proceedings in the appellate Court in construing the decree and it cannot be asked to interpret it in the light of the pleadings and of the record generally so as to put a meaning upon it inconsistent with its plain terms.

Per **Walsh, J.**—The appellate Court had no jurisdiction to entertain an appeal which it has allowed to be withdrawn and since a decree on an appeal can only operate upon the subject-matter of the appeal, where the decree as drawn up deals with a matter which had been withdrawn, the executing Court is not to shut its eyes to such withdrawal. The method of construing blindly the precise words in a decree without reference to the subject-matter before the Court which passed the decree is a species of construction which does not serve the ends of justice but defeats them. The Court has also inherent powers to do what is necessary to correct the mistake, if there has been a mistake in order to do justice between the parties and to substitute the real decision for the mistaken

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decision though the matter does not come by way of a review petition but on an appeal from an order by the lower Court in execution of the decree of the appellate Court. **Muhammad Maruf v. Sultan Ahmad**, 34 Ind. Cas. 344.

PIGGOTT and WALSH, JJ.

Reference:—1 A. 139, R.

- (29) *Decree against legal heirs and representatives of deceased—Obtaining of Letters of Administration to deceased's estate by one of the defendants—Application for execution against administratrix—Prohibitory order—Court not competent to order payment into Court—Reference to Chief Court.*

Plaintiff obtained a decree against the respondent and her surviving brother and sister as heirs and legal representative of another brother who had died intestate. Subsequently the respondent obtained letters of administration to her deceased brother's estate and was paid the amount standing to his credit in a certain fund.

Plaintiff applied for the execution of the decree against the respondent, and asked for a prohibitory order ordering her to withhold and pay into Court a portion of the money received by her. An order was issued prohibiting all the defendants from receiving from her that portion of the money and restraining her from making payment of it to any person otherwise than into Court. She did not pay the amount into Court. This case was referred by the Small Cause Court to the Chief Court.

Held that as the respondent did not admit any debt and disputed her liability as administratrix or otherwise to devote any part of the sum received by her from the fund to paying the deceased's debts, she could not be ordered to pay any part of the amount into Court to satisfy the plaintiff's decree. **P. L. M. Firm v. Daisy M. Stacey**, 33 Ind. Cas. 169.

SIR CHARLES FOX, C.J. and PARLETT, J.

- (30) *Mesne profits ascertainment of—Deduction of cirar assessment paid by judgment-debtor—Destruction of decreed house through negligence of judgment-debtor—Decree-holder's claim against him for damages—Jurisdiction.*

In the ascertainment of mesne profits payable by a judgment-debtor to the decree-holder, the judgment-debtor should be given credit for the amount of cirar assessment paid by him (a).

A decree-holder's claim for damages for the judgment-debtor's negligence in having allowed the decreed house to be burnt down cannot be determined in execution proceedings (b). **Ramu Shettithi v. Manlappu Shettithi**, 33 Ind. Cas. 520.

SADASIVA AIYAR and MOORE, JJ.

References:—(a) 17 B. 35, F. (b) 5 O.L.R. 522, F.

- (31) *Practice—Execution of decree—Transfer of decree by unrecognized transferee.*

Courts seldom object in practice to recognize a transferee of a decree from an unrecognized transferee. **Mian Saib Laryal v. Gopaller**, 33 Ind. Cas. 558.

SADASIVA AIYAR and MOORE, JJ.

Execution of Decree—(Continued).

References:—2 M. 216, D.; 9 A. 46; 1 L.W. 206—23 Ind. Cas. 351—24 Ind. Cas. 766, F.

(32) Execution—Ambiguous decree—Court's power of construction.

It is settled law that it is open to a Court executing a decree to construe it in the light of the plaint and the judgment if there is any ambiguity. *Rangachariar v. Sourl Battachariar*, 33 Ind. Cas. 561.

SADASIVA AIYAR and MOORE, JJ.

References:—31 Ind. Cas. 478 = (1915) M.W. N. 914, F.

(33) Execution—Sale in execution of money decree—Purchase from Official Assignee—Prior sale in execution of a satisfied mortgage-decree—Official Assignee not made a party—Effect.

Where the plaintiff sued to recover certain property from the defendant on the strength of his purchase from the Official Assignee of Madras who was in possession of the properties of the judgment-debtor and the purchase was in execution of a money decree made in 1907 and the defendant purported to be another purchaser of the same property in 1904 in execution of a mortgage decree dated 1898 and the judgment-debtor was adjudged an insolvent in 1902 and the Official Assignee was not made a party to the proceedings in execution and it appeared that the purchase of the defendant was not a *bona fide* one and that the mortgage decree was satisfied at the time of the said purchase; *Held* that the purchase gave no title to the defendant.

Held also that as the judgment-debtor was adjudged an insolvent, all his rights in the properties became vested in the Official Assignee and it was the duty of the decree-holder, whether of a money decree or mortgage decree, proceeding in execution against any property which belonged to the insolvent, to bring on record the Official Assignee, who was the person in whom all the rights of the properties had become vested and the result of his failure to bring on record the Official Assignee must be taken to be that the sale in execution could not bind him (a). *Devaraja Aiyangar v. Thirumalasawmi Naidu*, 32 Ind. Cas. 489.

AYLING and ABDUR RAHIM, JJ.

References:—(a) 24 Ind. Cas. 304 = 27 M.L.J. 150 = 18 C.W.N. 1058 = 1 L.W. 567 = 16 M.L.T. 353 = (1914) M.W.N. 147 = 16 Bom. L.R. 814 = 20 C.L.J. 555 = 13 A.L.J. 154 = 42 C. 72 (P.C.), R.

(34) Execution—Compromise decree—Instalment decree—Default—Remedy.

Where in a partition suit the parties entered into a compromise and the decree which embodies the terms of the compromise provides that the judgment-debtor should pay a certain sum by instalments, and there is no specific provision in the decree in respect of the result of non-payment of instalments, the remedy of the decree-holder is not to bring a suit to recover the amount, but each instalment is recoverable by execution as soon as it falls due. *Mustafa Begam v. Siraj-ul-nissa*, 32 Ind. Cas. 693.

BANERJI, J.

Execution of Decree—(Continued).**(34-a) Decree—Date—Execution of decree—Erroneous order—Notice—Limitation Act, 1908, Art. 182, cl. 4.**

A decree has to bear the same date as that of the order making it.

An erroneous order for execution of a decree passed after notice to judgment-debtor cannot, although unrevoked, be treated as binding on him, if notice has not been properly served in accordance with law (a).

Where a decree was amended after execution has been barred by limitation, such amendment cannot give a fresh start to limitation from the date of amendment. *Anandram v. Nityananda Barham*, 32 Ind. Cas. 744.

SHARFUDDIN and TEUNON, JJ.

References:—(a) 8 C. 51 (P.C.) = 11 C.L.R. 113 = 8 I.A. 123 = 4 Sar. P.C.J. 229 (P.C.), D.

(34-b) Whether can be barred by limitation in part—Execution sale set aside—Result.

There is no authority for saying that the execution of a decree can be barred by limitation in part (a).

On a sale in execution of a decree for money wherein only a part of the decretal amount was realised, being subsequently set aside, the decree-holder could by an application for re-sale realise not only the sum which was the price obtained at the previous sale but also the balance of his decree, though an application to execute it for the balance would have been barred by limitation. *Krishna Prasad Singh v. Mati Chand*, 32 Ind. Cas. 699.

CHAPMAN and MALLIK, JJ.

Reference:—(a) 17 C. 268, D.

(34-c) Decree—Execution of, application for, new, revival or continuation of old one.

The question whether an application for execution of a decree is a new application or revival or continuation of an old one is a simple question of fact. It is also a question of substance and not of form. *Sant Lal v. Sri Newas Das*, 32 Ind. Cas. 1005.

PIGGOTT and WALSH, JJ.

References:—24 A. 282; 18 A. 482, R.

(34-d) Execution of decree, power of Court dealing with—Adding premia paid by decree-holder for insurance of mortgaged property subsequent to decree—Judgment-debtor's objections in execution department—*Estoppel* and *res judicata*.

It is a well known principle governing proceedings in execution that no addition can be made by a Court executing a decree beyond such as the decree directs, other than the costs arising out of the execution proceeding.

A decree absolute determines the amount which is recoverable from the mortgaged property and no execution can be granted for any sum not covered by that decree or incidental to its execution.

So the premia paid by a decree-holder on account of insurance of mortgaged property subsequent to the decree which did not contain any authority for adding such premia, cannot be recovered in execution.

A judgment-debtor who puts forward objections in the execution department is not always

Execution of Decree—(Continued).

bound to put forward all possible objections once and for all. If he omits any, the matters which he omits and which were never raised or decided cannot always be treated as *res judicata* against him (a). *Dahli and London Bank, Ltd. v. Ram Ratan*, 32 Ind. Cas. 754.

KANHAIYA LAL, A.J.C.

Reference:—13 A.L.J. 162, R.

(35) *Limitation—Application for execution consigned to record room—Decree-holder not at fault—Second application—Revival of first.* *Yakub Ali v. Durga Prasad*, 13 A.L.J. 760 = 37 A. 518 = 30 Ind. Cas. 877. See Final Part, 1915, Col. 696.

(36) *Decree passed against heirs of debtor—Attachment—Objection by judgment-debtor—Possession in lieu of dower—Lien.* *Jhabban Lal v. Musammat Safdri Begam*, 187 P.L.R. 1915 = 80 P.R. 1915 = 125 P.W.R. 1915 = 31 Ind. Cas. 722. See Final Part, 1915, Col. 697.

(37) *Decree, execution of—Representatives of parties—Decree against ostensible representatives—Execution, if can be had against real representatives—Suit on judgment, maintainability of.* *Kali Charan Nath v. Sukkada Sundari Debi*, 22 C.L.J. 272 = 20 C.W.N. 58 = 30 Ind. Cas. 824. See Final Part, 1915, Col. 698.

(38) *Execution—Money decree—Attachment before judgment—Deposit in Court—Decree in favour of 3rd parties against judgment-debtor—Subsequent decree-holders, whether can attach money deposited in Court—First decree-holder's lien.* *Miss Hamilton v. Shankar Das*, 120 P.W.R. 1915 = 29 Ind. Cas. 791 = 36 P.L.R. 1916. See Final Part, 1915, Col. 699.

(39) *Execution application—Limitation Act—Art. 182, Cls. 5 and 6—Construction—New remedy by new statute—Same remedy under old statute denied—Res judicata—Principles.* *Varadareja Mudali v. Murugesam Pillai*, (1915) M.W.N. 769 = 18 M.L.T. 313 = 20 M.L.J. 460 = 30 Ind. Cas. 707 = 39 M. 923. See Final Part, 1915, Col. 699.

(40) *Execution application—Limitation—Return of application for amendment, but not represented—Sufficient to give.* *Narayana-swami Naidu v. Gantayya*, (1915) M.W.N. 865 = 32 Ind. Cas. 691. See Final Part, 1915, Col. 699.

(41) *Decree, execution of—Joint decree—Two-fold decree—Decree against consenting party and against contesting defendant—No specification of share—Limitation Act (1908), Sch. I, Art. 182, cl. (2)—Order of the appellate Court.* *Loke Nath Singh v. Gaju Singh*, 22 C.L.J. 333 = 20 C.W.N. 178 = 31 Ind. Cas. 426. See Final Part, 1915, Col. 700.

(42) *Application for transfer of decree—Can the validity of the decree be impeached in such proceedings? In re Hajee Mahomed Hady v. M. Joakim*, 8 Bur. L.T. 216 = 32 Ind. Cas. 492. See Final Part, 1915, Col. 700.

(43) *Execution Court if can vary terms of decree—Consent decrees.* *Prasanna Kumari Debi v. Sri Chandra Majumdar*, 22 C.L.J. 561 = 33 Ind. Cas. 344. See Final Part, 1915, Col. 790.

Execution of Decree—(Continued).

(44) *Judgment-debtor, adjudicated insolvent in High Court subsequent to decree of Presidency Small Cause Court—Application for execution by arrest in the Presidency Small Cause Court—Leave of the High Court, necessary.* See ACT III OF 1909 (PRESIDENCY TOWNS INSOLVENCY), No. 7, 39 M. 689.

(45) See BEN. ACT VIII OF 1885 (TENANCY), No. 33, 34 Ind. Cas. 905.

(46) *Suit brought and decree obtained against ward—Against Collector—Substitution of Collector for ward.* See U.P. ACT III OF 1899 (COURT OF WARDS), No. 1, 30 Ind. Cas. 768.

(47) See ADMINISTRATION SUIT, No. 1, 8 L.B.R. 398.

(48) *Rent suit not exceeding Rs. 100 in value—Decree, execution of—Order passed in execution proceedings by the District Judge, if appealable.* See APPEAL (GENERAL), No. 11, 24 C.L.J. 331.

(49) *Facts taking place before decree—Whether can be pleaded in bar of execution.* See AWARD, No. 3, (1916) M.W.N. 203.

(50) *Payment into Court by strangers—Decree whether satisfied—Sale proclamation mentioning more money than is due—Sale whether valid.* See CIV. PRO. CODE (1882), No. 11, (1916) M.W.N. 195.

(51) *Decree passed ex parte by foreign Court—Executing Court can go into the question whether the foreign Court had jurisdiction.* See CIV. PRO. CODE (1903), No. 83, 18 Bom. L.R. 486.

(52) *Partners holding a joint decree—Payment to two out of three partners when valid—Definiteness of shares in decree debt—Effect.* See CIV. PRO. CODE (1908), No. 420, 3 L.W. 579.

(53) *Payment under protest to avoid illegal attachment—Application under O. XXI, r. 58, Civ. Pro. Code, for refund not maintainable—Remedy of applicant by suit.* See CIV. PRO. CODE (1908), No. 472, 9 S.L.R. 213.

(54) *Temporary Court without assignment of definite local jurisdiction—Execution of decree of such Court—Attachment of immovable property in places not assigned to its local jurisdiction—Validity—Decree-holder's remedy—Jurisdiction of such Court within the compound of its own Court house.* See CIV. PRO. CODE (1908), No. 70, 31 M.L.J. 22.

(55) *Minor defendant—Appellant—Death of guardian ad litem during pendency of appeal—Appeal disposed of without fresh guardian—Fresh guardian appointed in execution proceedings—Minor's property sold without objection—Minor whether can sue for declaration that decree and execution sale were invalid.* See CIV. PRO. CODE (1908), No. 589, 31 M.L.J. 39.

(56) *Decree—Execution—Assignment benami for one of the judgment-debtors—Executability of decree—Adjustment.* See CIV. PRO. CODE (1908), No. 426, 4 L.W. 534.

(57) *Payment out of Court to decree-holder—Payment not certified to the Court—Application*

Execution of Decree—(Continued).

to execute the decree—False averment in the application that no payment received under the decree—Fraud upon the Court—Execution cannot proceed. See CIV. PRO. CODE (1908), No. 419, 18 Bom. L.R. 22.

(58) Objections to decree raised and decided against in execution—Separate suit if barred. See CIV. PRO. CODE (1908), No. 88, 30 M.L.J. 238.

(59) Uncertified adjustment—Transfer *benami* to one of the judgment-debtors—Executability of decree. See CIV. PRO. CODE (1908), No. 427, 3 L.W. 186.

(60) Questions relating to possession of property after sale—Whether relate to execution—Decree-holder auction-purchaser—Suit for possession—Maintainability. See CIV. PRO. CODE (1908), No. 111, 18 O.C. 345.

(61) Attachment by precept—Objection to execution based on want of transfer, if can be taken during the hearing of an appeal—Simultaneous execution against property, if permissible—Extension of time, petition for, presented before expiry of two months—Order passed after expiry of the said period—Attachment, if ceases to be effective. See CIV. PRO. CODE (1908), No. 84, 3 L.W. 336.

(62) Joint and several decrees in favour of A against B and C for Rs. 1,200—Decrees for costs in favour of B against A for Rs. 400 and C against A for Rs. 1,000—Execution by A against B for Rs. 800—Legality—'Two parties' meaning of—Difference between the old and new Codes—Procedure to be followed, if C executes his decree against A. See CIV. PRO. CODE (1908), No. 443, 3 L.W. 267.

(63) Property of deceased zemindar whether assets in the hands of his legal representative—Decree against a party as the legal representative of a deceased person—Extent of his liability—Liability to account for profits also—Burden of proof. See CIV. PRO. CODE (1908), No. 122, 30 M.L.J. 391.

(64) Money-decrees against the same judgment debtor in two suits by two separate creditors—Execution sale in one suit and attachment of immoveable properties in the second—Auction-purchaser in the first suit claiming properties attached in second suit—Purchaser whether legal representative of judgment-debtor—Appeal—Second appeal. See CIV. PRO. CODE (1908), No. 87, 3 L.W. 377.

(65) Assignee's application for execution opposed by attaching creditor of decree—Matter if appealable. See CIV. PRO. CODE (1908), No. 117, 20 C.W.N. 679.

(66) Party if can apply in execution for amending or correcting judgment and decree. See CIV. PRO. CODE (1908), No. 288, 3 L.W. 499.

(67) Proceedings in connection with sale proclamation—Objection of judgment-debtor rejected—Question whether market value of property is correct relates to execution—Appeal. See CIV. PRO. CODE (1908), No. 104, 14 A.L.J. 363.

Execution of Decree—(Continued).

(68) Order for examination of judgment-debtor under O. XXI, r. 41, Civ. Pro. Code, when may be made—Such order when may be set aside. See CIV. PRO. CODE (1908), No. 455, 43 O. 385.

(69) Notice issued under O. XXI, r. 22, Civ. Pro. Code—If regular or defective notice—Effect—Limitation. See CIV. PRO. CODE (1908), No. 445, 19 O.C. 17.

(70) Execution—Limitation—Application to attach immoveable property—Property not properly described—Amendment of application—Application in accordance with law. See CIV. PRO. CODE (1908), No. 437, 65 P.L.R. 1916.

(71) Mortgage-decrees passed when the Civ. Pro. Code of 1882 was in force—S. 49 of the Civ. Pro. Code of 1908 if would govern applications for execution of such decrees. See CIV. PRO. CODE (1908), No. 118, 20 C.W.N. 952.

(72) Mortgage decrees on consent—Preliminary decree—Final decree—Running of time—S. 48, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 121, 23 C.L.J. 573.

(73) Property to which title is made out by gift—Whether ancestral. See CIV. PRO. CODE (1908), No. 494, 14 A.L.J. 669.

(74) Meaning of "show cause" in O. XXI, r. 2 (2), Civ. Pro. Code—Application by judgment-debtor to record satisfaction of decree—Enquiry into questions of fact—One of the judgment-debtors a minor—Validity of compromise—Court's duty—Compromise after decree—Applicability of O. XXXII, r. 7, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 429, 31 M.L.J. 207.

(75) Decree for delivery of property, mesne profits and costs—Transfer of jurisdiction—Execution application to what Court to be made—Application not presented to "proper Court"—Whether a step-in-aid of execution and saves limitation. See CIV. PRO. CODE (1908), No. 77, 31 M.L.J. 90.

(76) Execution application, not giving dates of prior applications—Return for amendment—Re-presentation not made—Step-in-aid of execution—Limitation Act (1908), Art. 182—'Applying in accordance with law,' construction of, if affected by O. XXI, r. 17, Civ. Pro. Code—Practice. See CIV. PRO. CODE (1908), No. 441, 4 L.W. 103.

(77) Suits for partition—Decrees passed—Prior execution application dismissed on one ground—Implied adjudication, as to another ground, whether can be inferred—Certain items of property left undivided—Subsequent execution application for division of same—*Res-judicata*, if a bar. See CIV. PRO. CODE (1908), No. 37, 4 L.W. 101.

(78) Decree whether binding on person not represented in the suit—Death of defendant pending suit—Person having no interest in deceased's estate added as representative—Decree and execution proceedings whether binding on true heir—Decree legally obtained against proper person—Execution proceedings against wrong

Execution of Decree—(Continued).

representative—*Bona fides*—Effect. See CIV. PRO. CODE (1908), No. 7, 31 M.L.J. 222.

(79) Payment made out of Court, not certified—Non recognisability by executing Court. See CIV. PRO. CODE (1908), No. 100, 35 Ind. Cas. 71.

(80) See CIV. PRO. CODE (1908), No. 72, 35, Ind. Cas. 296.

(81) Decree amended—Limitation. See CIV. PRO. CODE (1908), No. 120, 34 Ind. Cas. 393.

(82) Property described in decree amplified in execution—Sale proclamation. See CIV. PRO. CODE (1908), No. 434, 35 Ind. Cas. 368.

(83) See CIV. PRO. CODE (1908), No. 722, 35 Ind. Cas. 761.

(84) Penalty in compromise decree—Power of executing Court to interfere. See CONTRACT ACT, No. 94, 32 Ind. Cas. 697.

(85) Assault on process server. See CRIM. PRO. CODE, No. 8, 19 O.C. 91.

(86) Execution of *ex parte* decree—Attachment and sale of property—Effect of decree passed subsequently on merits—Application made 3 years after—Effect—Limitation. See EX PARTE DECREE, No. 3, 78 P.W.R. 1916.

(87) Decree directing execution of sale-deed—Time fixed extended—Non-payment, of amount in time—Right of decree-holder. See EXTENSION OF TIME, No. 2, 31 Ind. Cas. 457.

(88) Executing Court whether can enquire into binding nature of a foreign decree. See FOREIGN COURT, No. 1, 3 L.W. 90.

(89) See FRAUD, No. 4, 34 Ind. Cas. 911.

(90) See GHATWALI TENURE, No. 2, 1 Pat. L.J. 601.

(91) Sale of widow's right, title and interest in her husband's properties—Test to determine the interest sold—Decree for mesne profits. See HINDU LAW (WIDOW), No. 33, 32 Ind. Cas. 587.

(92) Tenure held by widow—Rent-decree against the widow—Execution against the holding in the hands of the reversioners. See HINDU LAW (WIDOW), No. 29, 34 Ind. Cas. 581.

(93) Decree for rent—Mode of execution—Power of Court. See LANDLORD AND TENANT, No. 21, 1 Pat. L.J. 138.

(94) Application for—Date from which limitation begins to run. See LIMITATION, No. 1, 1 Pat. L.J. 359.

(95) Execution—Attachment—Sale proceeding—Application by a mortgagee for holding the sale subject to his mortgage—Dismissal of the application—Suit to establish lien—Limitation. See LIMITATION ACT (1877), No. 3, 18 Bom. L.R. 782.

(96) Execution of amended decree—Date of order of amendment—Starting point of limitation. See LIMITATION ACT (1908), No. 290, 36 Ind. Cas. 533.

(97) Petition praying for relief not granted by decree—If saves limitation—Civ. Pro. Code, S. 52. See LIMITATION ACT (1908), No. 287, (1916) 2 M.W.N. 128.

(98) Suit for money taken in compensation

Execution of Decree—(Continued).

—Money had and received—Limitation. See LIMITATION ACT (1908), No. 106, 14 A.L.J. 728.

(99) Assignee not recognized by Court—Right of decree-holder to execute decree. See LIMITATION ACT (1908), No. 284, 3 L.W. 521.

(100) Excessive execution—Application by judgment-debtor for recovering the excess—Procedure—Limitation. See LIMITATION ACT (1908), No. 274, 14 A.L.J. 401.

(101) Application for—Limitation—Step-in-aid of—Application by decree-holder certifying payment of portion with a prayer to strike off execution on satisfaction—Effect—Execution application represented after the time allowed by Court—Applicability of S. 148, Civ. Pro. Code (1908). See LIMITATION ACT (1908), No. 296, 20 C.W.N. 615.

(102) Execution opposed by judgment-debtor alleging payment and asking for certification thereof—Plea successful in first Court, but reversed on appeal—Second appeal by judgment-debtor—Limitation, if suspended during pendency of second appeal. See LIMITATION ACT (1908), No. 283, 20 C.W.N. 686.

(103) Application for transmission of decree and order permitting same, if revivor—Issue of notice under S. 244, Civ. Pro. Code (1882), if proper—Application for execution if to follow or precede transmission and to be made to which Court—Question whether decree capable of execution if may be determined on application for transmission—Order, if quasi-judicial and may be delegated to Registrar—Civ. Pro. Code (1889), S. 637. See LIMITATION ACT (1908), No. 304, 20 C.W.N. 889.

(104) First execution application in 1907—Dismissal for non-payment of batta—Claim petition to property attached under first application—Claim rejected—Suit by claimant also rejected on appeal—Second application in 1912, if can be treated as a continuation of the first—Application, if barred by limitation. See LIMITATION ACT (1908), No. 286, 4 L.W. 112.

(105) Attachment of decree—Exclusion of time occupied by attachment—Civ. Pro. Code, O. XXI, r. 53. See LIMITATION ACT (1908), No. 52, 30 Ind. Cas. 587.

(106) Application for—Proof of duration of order staying execution. See LIMITATION ACT (1908), No. 53, 36 Ind. Cas. 939.

(107) See MESNE PROFITS, No. 1, 1 Pat. L.J. 427.

(108) Decree for sale with provision for recovery of balance of decree amount from the other properties of the mortgagor—if sale proceeds are insufficient—Execution—Starting point of limitation. See MORTGAGE (GENERAL), No. 24, 31 M.L.J. 513.

(109) Suit by prior mortgagee—Puisne mortgagee a party—Mortgage amount not proved—Duty of executing Court. See MORTGAGE (GENERAL), No. 12, (1916) M.W.N. 323.

(110) Mortgage—Decree for redemption—Omission of puisne mortgagee's name in execution proceedings—Effect—Mere irregularity.

Execution of Decree—(Concluded).

See MORTGAGE (REDEMPTION), No. 11, 1 Pat.L.J. 261.

(111) Mortgages purchasing property in execution of his decree on simple mortgage. See MORTGAGE—USUFRUCTUARY, No. 3, 31 Ind. Cas. 891.

(112) Occupancy holding, if may be sold in execution of a money-decree against the *raiyat* with landlord's consent. See OCCUPANCY RIGHTS, No. 1, 36 Ind. Cas. 803; 21 C.W.N. 400.

(113) Decree for ejectment—Decree not executed for three years—Possession over property obtained—Subsequent suit for possession if maintainable. See POSSESSION, No. 2, 14 A.L.J. 709.

(114) Decree against executor legatee in his personal capacity—Attachment of money due to judgment-debtor as executor. See REFERENCE, No. 1, 9 Bur. L.T. 226.

(115) See RES JUDICATA, No. 24, 14 A.L.J. 1171.

(116) Sale of lands in—Subsequent suit by a party for setting aside the sale as illegal the lands being occupancy lands—Khoti Act (Bom. Act I of 1880), S. 9. See RES JUDICATA, No. 18, 18 Bom. L.R. 786.

(117) Application to execute decree as assignee granted—No objection thereto—Notice issued to judgment-debtor—Objection raised subsequently whether barred. See RES JUDICATA, No. 6, 14 A.L.J. 370.

(118) Court auction—Sale—Irregularity in the conduct of—*Bona fide* purchaser not protected—Major judgment debtor—Treated as minor—Vitiates sale—Notice—Execution. See SETTING ASIDE SALE, No. 1, 20 M.L.T. 479.

Execution of Document.

(1) Document proved to have been executed in the presence of one attesting witness who was examined—Whether execution valid. See EVIDENCE ACT, No. 40, 14 A.L.J. 1041.

(2) Registrar—Admission *re* signing of blank sheets only—Effect. See MORTGAGE—GENERAL, No. 49, 35 Ind. Cas. 56.

Execution Proceedings.

See EXECUTION OF DECREE.

(1) Objection based on document of title, dismissal of—Suit for declaration of title—Burden of proof as to whether document represents bona fide transaction.

Where a person intervening unsuccessfully as an objector in execution proceedings on the strength of a document of title is obliged to bring a suit to establish his title, *held*, that he must give *prima facie* evidence that the document represents a bona fide transaction in order to get rid of the order which has been passed against him. *Kalka Prasad v. Sitla Bakhsh*, 19 O.C. 64=85 Ind. Cas. 427.

STUART, A.J.O.

References:—12 B. 270; 18 A. 369; 30 A. 321; 19 O.C. 74, R.

(2) Application to enforce order of Privy

Execution Proceedings—(Concluded).

Council—Limitation—Meaning of 'revivor.' See LIMITATION ACT (1908), No. 301, 20 C.W. N. 1051.

(3) Application of doctrine of, *Lis pendens*—Effect of attachment and sale during pendency of suit. See LIS PENDENS, No. 2, 30 Ind. Cas. 218.

(4) See PLEADER AND CLIENT, No. 6, 35 Ind. Cas. 205.

(5) *Ex parte* order in execution if constitutes *res judicata*—Test—Execution petition, dismissal for default of, if affects prior order in execution which has become *res judicata*. See RES JUDICATA, No. 5, 3 L.W. 339.

Execution Sale.

(1) Execution sale of lunatic's properties—Lunatic not represented by a guardian—Validity of sale—Setting aside of sale, if necessary—Defendant, if can plead invalidity of sale in a suit for possession.

An execution sale of immoveable properties belonging to a lunatic, without his being properly represented by a guardian, is void and confers no title on the purchaser, and it is open to the defendant, without instituting a suit for setting aside the sale, to plead the invalidity of the purchaser's title, in a suit by the latter for possession. *Moothetuth Kanari v. Hari Shenoy*, 3 L.W. 301=19 M.L.T. 245 = (1916) M.W.N. 273=34 Ind. Cas. 428.

COUTTS-TROTTER and SESHAGIRI AIYAR, JJ.

(2) Contract Act, Ss. 196, 216—Principal and Agent—Mortgage decree—Execution sale—Purchase by agent on his own account—Ratification by Principal—Bona fide purchaser—Whether notice of appeal negatives bona fides.

Where an agent purchased, on his own account and without professing to act on behalf of his principal, property in execution of a mortgage decree obtained by his principal, *held*, the principal could not take the benefit of the purchase by subsequently ratifying it.

A sale in execution of a decree in force at the time cannot be set aside as against a bona fide purchaser not a party to the decree, on the subsequent reversal of the decree in appeal.

A purchaser in Court auction is none the less a bona fide purchaser that he had notice of the pendency of the appeal. *R. Ragavachari v. M.A. Pakkiri Mahomed Rowther*, 30 M.L.J. 497=19 M.L.T. 381=(1916) 2 M.W.N. 73=34 Ind. Cas. 760.

SADASIVA AIYAR and MOORE, JJ.

(3) Execution sale if void or voidable when decree fraudulent—Suit to set aside decree barred by limitation—Sale if may be vacated.

A sale in execution of a fraudulent decree is not a void but a voidable sale; till vacated by an appropriate proceeding, the rights created thereby are effective.

Such a sale cannot be set aside without setting aside the decree; consequently where the right to have the decree set aside as fraudulent has become barred by limitation, no decree-

Execution Sale—(Continued).

can be made setting aside the sale only as made in execution of a fraudulent decree. **Raj Kumar Sarkel v. Raj Kumar Mall**, 20 C.W. N. 659=33 Ind. Cas. 767.

MOOKERJEE and RICHARDSON, JJ.

Reference:—27 C. 197, D.

(4) *Purchase by decree-holder—Civ. Pro. Code (1908), O. XXI, r. 95—Delivery of possession—Order, whether appealable—S. 47, Civ. Pro. Code, whether applicable.*

Where, on a decree-holder auction-purchaser applying for delivery of possession of the properties purchased and obtaining possession by order of Court notwithstanding the objection by the judgment-debtor that the properties did not pass by the sale, the judgment-debtor preferred an appeal:

Held, on a review of the authorities of all the Indian High Courts (which are conflicting), that the Patna High Court should not without very good reason depart from a long course of decisions in the Calcutta High Court, where the balance of opinion has been since 1883 strongly in favour of the view that an appeal does not lie. **Hazi Abdul Gani v. Raja Ram**, 20 C.W.N. 829; 1 Pat. L.J. 232=35 Ind. Cas. 468.

CHAMIER, C. J., SHARFUDDIN and ATKINSON, JJ.

(5) *Purchase by three persons—Sale set aside by first Court—Appeal by one auction-purchaser—Effect.*

Where in execution of a decree the property was knocked down to three individuals, and the sale was set aside by the first Court and on an appeal by one of auction purchasers the District Judge set aside the order of the first Court, the sale stands good even as against the other two auction purchasers who did not appeal. It is impossible to make a division in the sale with regard to a portion of the property and to allow the sale to stand with regard to the other portion. **Tulsi Raut v. Nabl Bux**, 32 Ind. Cas. 193.

SHARFUDDIN and CHAPMAN, JJ.

(6) *Auction sale held at a time and date other than those proclaimed—Sale voidable.* **Safdar Ali v. Fazal**, 156 P.L.R. 1915=143 P.W.R. 1915=30 Ind. Cas. 524. See Final Part, 1915, Col. 711.

(7) *Sale when becomes absolute—Confirmation of sale—Effect—Confirmation whether can be inferred—Sale certificate—Necessity and its evidentiary value—Ss. 256 to 259, Civ. Pro. Code (1859)—Ss. 311, 314, Civ. Pro. Code (1882)—O. XXI, rr. 92, 94, Civ. Pro. Code (1908).* **Sawan Mai v. Shih Dyal**, 81 P.R. 1915=178 P.W.R. 1915=31 Ind. Cas. 254. See Final Part, 1915, Col. 712.

(8) *Purchase by decree-holder—Decree, ex parte, subsequently set aside—Sale how affected.* **Appa Row Bahadur v. Seeta Ramiah**, 2 L.W. 1066=31 Ind. Cas. 305. See Final Part, 1915, Col. 713.

(9) *Execution of decrees—Sale of semindari*

Execution Sale—(Continued).

rights—Buildings appurtenant to semindari. **Sakhawat Ali Shah v. Muhammad Abdul Karim Khan**, 18 A.L.J. 1098=38 A. 59=31 Ind. Cas. 809. See Final Part, 1915, Col. 713.

(10) *Ex parte decree, setting aside of—Decree-holder auction purchaser—Purchaser from auction-purchaser—Plea of purchase for value without notice.* **Satis Chandra Ghose v. Rameswari Das**, 22 O.L.J. 409=20 C.W.N. 665=31 Ind. Cas. 894. See Final Part, 1915, Col. 714.

(11) *Altered condition, affording relief on—Setting aside execution sale on ground not mentioned in the application—Ex parte decree, setting aside of, effect of—Assignee of decree-holder auction-purchaser—Fresh decree subsequently made, effect of.* **Abdul Rahman v. Sarfat Ali**, 22 C.L.J. 412=20 O.W.N. 667=31 Ind. Cas. 896. See Final Part, 1915, Col. 714.

(12) *Attachment in execution of two decrees of two Courts—Sale by lower Court—Rights of purchaser—Bona fides—Notice—Burden of proof—Irrregularity.* See CIV. PRO. CODE (1882), No. 17-a, 32 Ind. Cas. 41.

(13) *Sale proclamation mentioning more money than is due—Sale whether valid.* See CIV. PRO. CODE (1882), No. 11, (1916) M.W.N. 195.

(14) *Sale set aside—Order to refund purchase money to purchaser—Appealability—Order to refund poundage to purchaser—Legality—Interference in revision.* See CIV. PRO. CODE (1908), No. 97, 3 L.W. 105.

(15) *Sale without attachment, validity of.* See CIV. PRO. CODE (1908), No. 456, 36 Ind. Cas. 292.

(16) *Mere payment without application to set aside sale—Application if to be in writing—Amendment of petition—Revision.* See CIV. PRO. CODE (1908), No. 255-a, 32 Ind. Cas. 45.

(17) *Application to set aside the sale—Deposit—Power of Court to extend time.* See CIV. PRO. CODE (1908), No. 290, 19 M.L.T. 192.

(18) *If can be set aside without oral or written application.* See CIV. PRO. CODE (1908), No. 504, 3 L.W. 174.

(19) *Order of sale not in accordance with decree—Effect—Sale when to be set aside.* See CIV. PRO. CODE (1908), No. 106, (1916) M.W.N. 256.

(20) *Failure of purchaser to deposit—Delay in re-sale—Defaulting purchaser whether liable for loss on re-sale.* See CIV. PRO. CODE (1908), No. 499, 45 P.W.R. 1916.

(21) *Insolvency—Sale after adjudication—Receiver not a party—Application to set aside the sale—Whether second appeal lies against the order thereon—Rights of bona fide purchaser.* See CIV. PRO. CODE (1908), No. 107, 19 M.L.T. 357.

(21-a) *Execution sale under Small Cause Court decree, suit to set aside, dismissed—Second appeal.* See CIV. PRO. CODE (1908), No. 194-a, 32 Ind. Cas. 712.

Execution Sale—(Continued).

(92) *SS. 144, 47, Civ. Pro. Code—Scope of S. 144—Ex parte decree—Sale in execution—Purchase by decree-holder—Crops taken by purchaser while in possession—Ex parte decree set aside—Suit for value of crops—Maintainability—Plaint treated as execution application under S. 47, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 271, 1 Pat. L.J. 43.*

(23) Application by judgment-debtor under O. XXI, r. 90, Civ. Pro. Code, to set aside sale—Dismissal for default—Application for restoration rejected—Order if appealable—Application to set aside sale if 'suit.' See CIV. PRO. CODE (1908), No. 380, 20 C.W.N. 1203.

(24) Application by third party to set aside sale dismissed—Fresh suit by him not barred. See CIV. PRO. CODE (1908), No. 105, 104 P.L.R. 1916.

(25) Judgment-debtor selling the property after the—Application by him to set aside the—Maintainability See CIV. PRO. CODE (1908), No. 505, 18 Bom. L.R. 571.

(26) Suit against order on claim petition—Plaintiff's right to declaration and consequential relief—Sale of property before order on the claim petition—Limitation. See CIV. PRO. CODE (1908), No. 486, (1916) 2 M.W.N. 207.

(27) Refund of purchase-money—Right of suit by auction-purchaser—Act XIV of 1882, S. 315. See CIV. PRO. CODE (1908), No. 521, 14 A.L.J. 1216.

(28) Combination among bidders at auction, effect of. See CIV. PRO. CODE (1908), No. 519, 10 S.L.R. 53.

(29) Sale in execution—Material irregularities in proclamation of sale. See CIV. PRO. CODE (1908), No. 516, 33 Ind. Cas. 946.

(30) Purchase by manager of infant with infant's money—Plea of section to defraud said infant. See CIV. PRO. CODE (1908), No. 147, 30 Ind. Cas. 212.

(31) Setting aside of—Material irregularity. See CIV. PRO. CODE (1908), No. 514, 35 Ind. Cas. 411.

(32) Objection by judgment-debtor and by third party—Order—Appellability. See CIV. PRO. CODE (1908), No. 113, 31 Ind. Cas. 102.

(33) Auctioneer nominee of parties—Purchase money received by auctioneer whether "receipt of assets"—Rateable distribution. See CIV. PRO. CODE (1908), No. 154, 35 Ind. Cas. 850.

(33-a) Execution sale—Irregularity in proclamation—Application to set aside sale—Points to be proved. See CIV. PRO. CODE (1908), No. 497-a, 32 Ind. Cas. 990.

(34) Objections to—Compromise—Consideration. See CONTRACT, No. 9, 3 L.W. 435.

(34-a) Execution-sale set aside—Result. See EXECUTION OF DECREE, No. 34-b, 32 Ind. Cas. 699.

(35) Suit to set aside sale on ground of suppression of processes if maintainable. See FRAUD, No. 2, 20 C.W.N. 819.

Execution Sale—(Concluded).

(86) Decree-holder purchaser—Application for delivery 6 years after sale made absolute—Limitation. See LIMITATION ACT (1908), No. 279, 3 L.W. 191.

Executive Authorities.

Legislature, delegation by, to executive. See BEN. ACT V OF 1911 (CALCUTTA IMPROVEMENT), No. 1, 24 C.L.J. 246.

Executive Government.

Presumption re acts of. See U. P. ACT III OF 1899 (COURT OF WARDS), No. 3, 35 Ind. Cas. 634.

Executor.

See ACT X OF 1865.

See ACT V OF 1851.

See HINDU LAW (WILL).

See MAHOMEDAN LAW (WILL).

See PROBATE.

See WILL.

(1) Contract—Specific performance—Executor who having a beneficial interest transfers the whole property conveys in his capacity as executor and not his personal interest only. *Gangabal v. Sonabai*, 17 Bom. L.R. 303=28 Ind. Cas. 544=49 B. 69. See Final Part, 1915, Col. 717.

(2) Locus standi of his heirs to enforce an agreement entered into by him as such. *Ditta Ram v. Rup Chand*, 152 P.W.R. 1915=31 Ind. Cas. 802. See Final Part, 1915, Col. 717.

(3) No power to demand submission of yearly accounts from executor—Legatee's right to inspect the accounts—Legatee when may file administration suit. See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 19, 9 S.L.R. 134.

(4) Grant of letters to guardian of minor not being, or residuary legatee—Grant of letters for moveable property. See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 1-a, 36 Ind. Cas. 266.

(5) Suit by one executor against another to take account—Jurisdiction. See CIV. PRO. CODE (1908), No. 164, 18 Bom. L.R. 335.

(6) Estoppel, if extends in favour of executors under the landlord's will—Probate of will, effect of. See EVIDENCE ACT, No. 103, 4 L.W. 349.

(7) Who has not renounced must, when cited in Court, take out probate—Letters of administration can issue, if he fails, to be a competent applicant. See PROBATE, No. 4, 18 Bom. L.R. 766.

(8) Decree against, legatee in his personal capacity—Attachment of money due to judgment-debtor as executor. See REFERENCE, No. 1, 9 Bur. L.T. 226.

(9) See SPECIFIC RELIEF ACT, No. 1, 35 Ind. Cas. 792.

(10) Suit by executor on cause of action accruing after testator's death—Limitation if

Executor—(Concluded).

begins to run after probate granted—One of joint executors if may sue—Effect of renunciation. See STRAITS SETTLEMENTS LIMITATION ORDINANCE, No. 1, 20 C.W.N. 893.

(11) Successive.—Non-liability of second executor for his predecessor's account—Estate in embarrassment—Size of property by executor. See WILL, No. 18, 32 Ind. Cas. 267.

Ex parte Decree.

See DECREE.

See EVIDENCE.

(1) Application to set it aside refused—Suit to set aside decree on ground of fraud, if lies.

A suit by the defendant to set aside an *ex parte* decree as fraudulent does not lie after an infructuous application to set it aside under S. 108 of the Civ. Pro. Code of 1882, if the fraud in respect of which the decree is sought to be set aside was properly in issue in the application under S. 109 and was determined upon such application. *Khlrode Chandra Roy v. Srimati Ahtullabu*, 20 C.W.N. 845 = 35 Ind. Cas. 557.

CHITTY and WALMSLEY, JJ.

References:—29 C. 475 = 5 C.W.N. 756; 29 C. 395 = 6 C.W.N. 473; 15 C.L.J. 446, 448; 10 C.L.J. 428; 29 A. 212; 29 A. 608, R.

(2) Suit to set aside a fraudulent *ex parte* decree—Maintainability—O. IX, r. 13, Civ. Pro. Code.

A suit will lie to set aside an *ex parte* fraudulent decree, although no endeavour has been made to get the decree set aside and the suit revived under O. IX, r. 13, Civ. Pro. Code. *Nga Yeln v. Nga So*, U.B.R. (1916) 1st Qr. 106 = 10 Bur. L.T. 10 = 34 Ind. Cas. 264.

SAUNDERS, J.C.

References:—21 C. 605, F.; 21 C. 546; 21 C. 437; 11 B. 6; 38 M. 203; 16 C.W.N. 1002; C.R. No. 28 of 1914, R.

(3) Limitation—Execution of *ex parte* decree—Attachment and sale of property—Effect of the decree passed subsequently on merits—Application made 3 years after it—Steps in aid of execution.

Held, that, where an *ex parte* decree is set aside, all previous applications, attachment, sale and other proceedings taken by way of execution of the *ex parte* decree become null and void and are not revived when the decree on the merits is passed:

Therefore an application for execution made three years after the regular decree is barred by limitation and is not kept alive by steps taken in aid of execution on the basis of the *ex parte* decree. *Nathu Mal v. Pala Mal*, 78 P.W.R. 1916 = 103 P.R. 1916 = 133 P.L.R. 1916 = 35 Ind. Cas. 110.

RATTIGAN, J.

Reference:—29 M. 175, R.

(4) Date not fixed for hearing of case—Limitation Act (IX of 1908), Sch. I, Art. 164—Application to set aside *ex parte* decree—Commencement of period of limitation—Adjournment.

The defendants wanted stay of the case and they were ordered to produce copy of a certain

Ex parte Decree—(Continued).

order on a date fixed by the Court. On that date *ex parte* decree was passed. An application to set aside *ex parte* decree was dismissed as barred by limitation.

Held, that the Court was not competent to pass *ex parte* decree when no order was passed that the case would be heard on merits on the date fixed.

That the application was not barred, having been made within limitation period from the date on which defendants were informed that *ex parte* decree had been passed against them. *Raghib Brothers v. Daulat Ram*, 111 P.L.R. 1916 = 137 P.W.R. 1916 = 36 Ind. Cas. 32.

SCOTT-SMITH, J.

(5) Defence case part heard—Defendant absent at adjourned hearing—Decision of the case—Remedy—Civ. Pro. Code, O. IX, r. 13 and O. XVII, r. 3.

Where after a portion of the defence evidence is recorded, the case is adjourned to another date for further evidence, and on the non-appearance of the defendant on that date, the Court pronounces judgment against the defendant, the remedy of the defendant is by way of appeal against the decree so passed and not by an application to set aside the *ex parte* decree under O. IX, r. 13, Civ. Pro. Code. *Blamella Beg v. Azam Ali Beg*, 34 Ind. Cas. 865.

LINDSAY, J.C.

(5-a) Purchaser from decree-holder auction purchaser—Bona fide purchase for value, plea of—Judgment-debtor's name forged in solenamah and consent decree obtained—Setting aside of decree if necessary—Evidence Act, 1872, S. 44.

The purchasers from decree-holders auction-purchasers in execution of an *ex parte* decree cannot avail themselves of the plea of *bona fide* purchaser's for value. (a)

Suit for possession on declaration of plaintiff's right as auction-purchaser in execution of rent-decree. It was found there that in execution of a mortgage-decree by consent on a solenamah executed by the mortgagors and mortgagees, the same property was purchased by the mortgagee-decree-holder and sold to the 1st defendant. It was further found that the plaintiff though made a party to the mortgage suit was no party to the consent decree, the said decree having been obtained by forging his signature in the solenamah. Held that the plaintiff was in a stronger position than a mere *ex parte* judgment-debtor. Held also that the plaintiff being no party to the consent decree could attack it by virtue of S. 44 of the Evidence Act and did not require to have it set aside (b).

A consent decree differs from a decree of Court, in this, that no one is a party to the decree who has not willingly contracted to govern himself by the decree *ad sui juris* and if he is not, the Court must have declared the decree contracted for him by his guardian to be for his benefit. *Abdul Hakim Gazi v. Pan-Fanchi Daul*, 32 Ind. Cas. 849.

HOLMWOOD and IMAM, JJ.

References:—(a) 22 C.L.J. 409 F. (b) 27 C. 11, F.; 10 C.L.J. 420; 11 C.L.J. 846, D.

Ex parte Decree—(Continued).

(6) See ARBITRATION, No. 7, 33 Ind. Cas. 467.

(7) Against pardanashin lady—Suit to set aside decree on ground of fraud. See BURDEN OF PROOF, No. 6, 36 Ind. Cas. 596.

(8) Appeal—Omission to specify date of hearing in notice of appeal—Right of re-hearing. See CIV. PRO. CODE (1908), No. 649, 36 Ind. Cas. 624.

(9) Order refusing to set aside *ex parte* decree—Appeal—Sufficiency of substituted service. See CIV. PRO. CODE (1908), No. 349, 20 C.W. N. 173.

(10) Application for setting aside of—Time allowed to pay the decree amount—Order whether operates as a stay of execution of. See CIV. PRO. CODE (1908), No. 1-a, 3 L.W. 35.

(11) Application to set aside—Dismissal of application for default—Appeal. See CIV. PRO. CODE (1908), No. 888, 36 Ind. Cas. 798.

(12) Order setting aside *ex parte* decree—Whether appeal lies. See CIV. PRO. CODE (1908), No. 208, 40 P.R. 1916.

(13) Ss. 144, 47, Civ. Pro. Code—Scope of S. 144—*Ex parte* decree—Sale in execution—Purchase by decree-holder—Crops taken by purchaser while in possession—*Ex parte* decree set aside—Suit for value of crops—Maintainability—Plaint treated as execution application under S. 47, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 271, 1 Pat. L.J. 43.

(14) *Ex parte* decree against some of the defendants—Appeal by other defendants dismissed—Jurisdiction of original Court to set aside *ex parte* decree. See CIV. PRO. CODE (1908), No. 382, 14 A.L.J. 253.

(15) Application to set aside, on ground of fraud dismissed—Subsequent suit to set aside decree on same ground whether maintainable. See CIV. PRO. CODE (1908), No. 383, 3 L.W. 572.

(16) Appeal—Power of appellate Court to direct production of additional evidence wrongly excluded by lower Court. See CIV. PRO. CODE (1908), No. 184, 9 S.L.R. 191.

(17) Decree *ex parte*—Application for re-hearing rejected—No appeal preferred—Appeal against decree. See CIV. PRO. CODE (1908), No. 390, 14 A.L.J. 1226.

(18) Payment of decree amount on compromise—Order setting aside said decree after disposal of appeal by other judgment-debtors. See CIV. PRO. CODE (1908), No. 384, 30 Ind. Cas. 247.

(19) Examination of process-server before passing. See CIV. PRO. CODE (1908), No. 35, 31 Ind. Cas. 479.

(20) Order setting aside—Appealability. See CIV. PRO. CODE (1908), No. 204, 34 Ind. Cas. 718.

(21) Pendency of appeal against an order refusing to set aside—Stay of proceedings⁶ in execution—Discretion of Court. See CIV. PRO. CODE (1908), No. 498, 35 Ind. Cas. 443.

Ex parte Decree—(Concluded).

(22) Suit for declaration that certain is invalid. See COURT FEE, No. 3, 35 Ind. Cas. 797.

(23) Transfer to another Court for execution—Arrest of defendant—Suit by latter to set aside an *ex parte* decree on the ground of fraud—Decree *ex parte* set aside—Application for sanction to prosecute. See CRIM. PRO. CODE, No. 10, 1 Pat. L.J. 586.

(24) Suit to set aside *ex parte* decree on ground of suppression of processes if maintainable. See FRAUD, No. 2, 20 C.W.N. 819.

(25) Widow—Effect—How far binding on reversioners—Onus of proof. See HINDU LAW—WIDOW, No. 27, 33 Ind. Cas. 446.

(26) Minor—Decree against minor, grounds for setting aside of—Decree binding upon minor unless grounds exist for setting it aside against minor. See MINOR, No. 6, 19 O.C. 119.

Ex parte Order.

See EX PARTE DECREE.

Liable to be set aside at instance of party prejudiced.

Where an *ex parte* order has been made to the prejudice of a litigant who has not been afforded an opportunity to be heard, the order is subject to the implication that it may be revoked at the instance of the party affected thereby and the Court has inherent power to give such directions as the justice of the case may require. *Syam Mandal v. Sati Nath Banerjee*, 24 O.L.J. 523.

MOOKERJEE and CUMING, JJ.

Ex-proprietary Rights.

(1) *Ex proprietary rights in Oudh, special rule of succession applicable to—Personal law—Ex-proprietary right acquired by sale on the basis of mortgage made by a widow—Self acquired property or Stridhan, what constitutes.*

Held, that there is no special rule of succession applicable to ex-proprietary rights in Oudh and they are governed by the personal law of succession applicable to the person possessing such rights.

Where a Hindu widow made a mortgage of her husband's property and on a sale made on the basis of that mortgage acquired ex-proprietary rights, *held* that the ex-proprietary rights could not be regarded as her self-acquired property or *stridhan* and the heir who would succeed to such rights on her death would not be her heir but the heir of her deceased husband. *Genda Singh v. Fateh Singh*, 18 O.C. 377=33 Ind. Cas. 258.

STUART, A.J.C.

(2) *Relinquishment unaccompanied by surrender of possession, effect of.*

Where the relinquishment of an ex-proprietary right is not accompanied by the surrender of possession it is not effective and the party making the relinquishment still continues to be the ex-proprietary tenant. *Gaya Singh v. Ragha*, 80 Ind. Cas. 792.

BAILLIE, S.M.

Ex-proprietary Rights—(Concluded).

(3) *Ex-proprietary holding—Exchange—Suit for possession of property transferred when sale declared illegal—Maintainability of.* *Lachman Das v. Muhammad Yusuf Khan*, 13 A.L.J. 789—30 Ind. Cas. 192. See Final Part, 1916, Col. 721.

(4) *Sir land—Sale of—Suit for specific performance of contract of sale—Right of vendor.* See U. P. ACT II OF 1901 (AGRA TENANCY), No. 21, 30 Ind. Cas. 811.

(5) See U. P. ACT II OF 1901 (AGRA TENANCY), No. 23, 31 Ind. Cas. 893.

(6) *Two persons acquiring jointly ex-proprietary rights—One dying without heirs—Succession by survivorship.* See U. P. ACT II OF 1901 (AGRA TENANCY), No. 16, 31 Ind. Cas. 864.

(7) See U. P. ACT II OF 1901 (AGRA TENANCY), No. 32-a, 36 Ind. Cas. 1007.

(8) *Suit to establish—Adverse possession.* See MORTGAGE—GENERAL, No. 43, 32 Ind. Cas. 493.

(9) *Ex-proprietary holding—Trees—Saleability.* See TREES, No. 1, 14 A.L.J. 244.

Ex-proprietary Tenancy.

See LANDLORD AND TENANT.

(1) See PROPRIETARY RIGHT, No. 1, 36 Ind. Cas. 262.

(2) See WILL, No. 19, 32 Ind. Cas. 364.

Ex-proprietary Tenant.

See LANDLORD AND TENANT.

See U. P. ACT II OF 1901 (AGRA TENANCY), No. 12-i, 32 Ind. Cas. 857.

Extension of Time.

(1) *Whether an order for extension of time should be made or not, depends upon the circumstances of the litigation, that is, upon the circumstances disclosed at the original trial and the events subsequent.* *Syam Mandal v. Satil Nath Banerjee*, 24 C.L.J. 523.

MOOKERJEE and CUMING, JJ.

(3) *Decree directing execution of sale-deed—Time fixed extended—Non-payment of amount in time—Right of decree-holder.*

A decree directed the 1st defendant to execute a sale-deed to the plaintiff on receiving the balance of purchase-money within one month from the date of decree. The plaintiff having failed to pay the amount applied for extension of time and got it. He again failed to make the payment. Subsequent to this he applied to the Court to direct the 1st defendant to execute the sale-deed. *Held* that an application made after the period allowed by the Court was ineffective and that the 1st defendant was quite within his right to refuse to execute the conveyance. *Shunmugam Asari v. Seyed Nathadu Sahib*, 31 Ind. Cas. 457.

ABDUR RAHIM and SPENCER, JJ.

*Reference:—*31 M. 28, 7.

(3) *Application to set aside sale—Non-payment by judgment-debtor within time agreed upon—Power of Court to extend time—Appeal.* See CIV. PRO. CODE (1909), No. 519, 36 Ind. Cas. 809.

Extension of Time—(Concluded).

(4) *Power to Court to give, for paying Court Fees.* See CIV. PRO. CODE (1908), No. 690, 31 M.L.J. 269.

(5) *Inherent powers of Court—Time fixed for deposit of money—, on application after expiry of time fixed.* See CIV. PRO. CODE (1908), No. 282, 9 Bur. L.T. 88.

(6) *Power of officer conducting sale to extend time for deposit of purchase-money—Failure to make deposit within time, effect of.* See CIV. PRO. CODE (1908), No. 501, 30 Ind. Cas. 230.

(7) *Time for appeal—Amendment of decree—Whether time for appeal extended by such amendment.* See LIMITATION ACT (1908), No. 11, 34 Ind. Cas. 556.

(8) *Sanction to prosecute—Expiry of time—Power of High Court to extend time.* See SANCTION TO PROSECUTE, No. 4, 18 Bom. L.R. 686.

Family Arrangement.

(1) *Mutation proceedings, registration of petitions of compromise filed in—Revenue Court, mutation proceedings in—Registration Act, S. 17—"Declare," meaning of.*

Held, that transactions in the nature of family arrangements or settlements are binding on the parties and must be enforced.

Held further, that in order to constitute a binding family arrangement it is not necessary that there should be any formal contract between the parties.

In order to decide whether a petition by way of compromise presented to a Revenue Court in the course of mutation proceedings requires registration or not, one must consider the situation of the parties at the time when the document was presented and deduce from surrounding circumstances what the parties intended by laying the petition before the Court.

If it purports to be nothing more than an admission or acknowledgment of title already in existence, it does not require registration. On the other hand, if it amounts to a declaration of an agreement which was to regulate the respective interests of the parties in the property not merely in present, but in futuro, then the document is one, registration of which is compulsory under S. 17, Registration Act.

Held also, that the word "declare," as used in S. 17, Registration Act, implies a declaration of will and not of a mere statement of fact. *Setrohan Lal v. Nageshwar Prasad*, 19 O.C. 75—35 Ind. Cas. 770.

LINDSAY and STUART, JJ.

(2) *Widow at the time of adopting an adult boy making a contemporaneous document giving certain property to her grand-daughter—Validity of the gift.* See HINDU LAW (ADOPTION), No. 9, 18 Bom. L.R. 740.

(3) *Malabar Law—Tarwad—Partition, right to—Karar—Junior members, when bound by acts of Karavan—Minor member, right of, to impeach karar.* See MALABAR LAW—PARTITION, No. 1, 31 M.L.J. 879.

Family Custom.

See BURDEN OF PROOF.

See CUSTOM.

Family Custom—(Concluded).

See HINDU LAW (CUSTOM).

See HINDU LAW (JOINT FAMILY), No. 30, 32 Ind. Cas. 291.

Family House.

(1) Chinese Buddhist Law—Inheritance—Adoption. See BUDDHIST LAW (INHERITANCE) No. 5, 8 L.B.R. 404.

(2) Widow's right to maintenance. See BUDDHIST LAW (MAINTENANCE), No. 1, 8 L.B.R. 404.

Family Necessity.

(1) Joint Hindu family—Mortgage by a member at a high rate of interest, power of Court to vary the rate—Creditor's duty to establish—Justifying the high rate—Second appeal. See HINDU LAW (JOINT FAMILY), No. 10, 19 O.C. 159.

(2) Money borrowed for marriage of daughter of a deceased member. See HINDU LAW (JOINT FAMILY), No. 9, 19 O.C. 113.

Family Repute.

Evidence of sonship or heirship.

Statements of members of the family touching the sonship and heirship of a person are good evidence of the family repute concerning him. *Mirza Sadik Husain Khan v. Nawab Salyed Hashim Ali Khan*, 31 M. L. J. 607 = 19 O.C. 192 = (1916) 2 M.W.N. 577 = 18 Bom. L.R. 1037 = 21 C.W.N. 130 = 14 A.L.J. 1248 = 21 M.L.T. 40 = 25 O.L.J. 363 = 38 A. 627 = 36 Ind. Cas. 104 (P.C.).

LORD ATKINSON, LORD PARKER OF WADDINGTON, SIR JOHN EDGE and MR. AMEER ALI.

Family Settlements.

(1) *Family settlement, nature of—Giving up of property under threat of litigation—Effect of.*

In order to be operative as a family settlement, there must be a *bona fide* dispute which is *bona fide* settled by the members of the family. There is a difference between a settlement in consideration of the settlement of family disputes or even of the screening of family scandals, and yielding up property on a threat of litigation. It is reasonable that the former should bind the members of the family even though they may have been minors at the time. A transaction of the other kind can at best only bind the parties to it. Hence where the defendant put forward a baseless claim to property to which he could not be rightfully entitled and the persons legally entitled thereto gave it up in order to avoid being forced to litigation, *held* that there was no family settlement, and the plaintiffs, who were the reversionary heirs and no party to the settlement, were not bound thereby. *Himmat Bahadur v. Dhanpat Rai*, 14 A.L.J. 840 = 38 A. 335 = 35 Ind. Cas. 148.

RICHARDS, C.J. and RAFIQ, J.

(2) Principle of, if applicable to partitions—Limits to the rule. See HINDU LAW (PARTITION), No. 2, 30 M.L.J. 368.

Family Settlements—(Concluded).

(3) When not binding on minors—Tests. See MAHOMEDAN LAW (GUARDIANSHIP), No. 3, 3 L.W. 379.

(4) Validity and effect of. See PROBATE, No. 1, 23 C.L.J. 82.

(5) Document connected with a—Whether requires registration. See REGISTRATION ACT (1908), No. 22, 14 A.L.J. 449.

Family Trade.

Joint Hindu family—Business started by father alone—Whether son can be adjudicated insolvent for father's debts—Contract Act, S. 248. See INSOLVENCY, No. 3, 20 M.L.T. 565.

Fard Hissa Kashi Baghat.

(1) Admissibility of such document in evidence. See EVIDENCE, No. 3, 19 O.C. 363.

Father and Son.

(1) Purchase money paid by father—Sale-deed in name of son—Intention. See BENAMI TRANSACTIONS, No. 3, 77 P.W.R. 1916.

(2) Joint Hindu family—Business started by father alone—Whether son can be adjudicated insolvent for father's debts—Contract Act, S. 248. See INSOLVENCY, No. 3, 20 M.L.T. 565.

(3) Balance struck by—Their respective liability. See LIMITATION ACT (1908), No. 131, 148 P.W.R. 1916.

Female.

See PARDANASHIN WOMAN.

(1) Execution—Decree against a female personally—Mahal lands assigned to, for enjoyment in common—Attachment of rents after judgment-debtor's death—Invalidity. See EXECUTION OF DECREES, No. 26, 33 Ind. Cas. 83.

(2) Hereditary religious offices—Right of females to inherit and perform duties by proxy—Onus. See HINDU LAW (RELIGIOUS OFFICES), No. 1, 30 M.L.J. 222.

Female Heir.

Decree against female heir, when binds the estate—Test. *Pundit Narayan Singh v. Rajkumari Godabari Koeri*, 22 O.L.J. 400 = 32 Ind. Cas. 580. See Final Part, 1916, Col. 722.

Ferries Act.

See BEN. ACT I OF 1885.

Ferry.

See BEN. ACT III OF 1884 (MUNICIPAL), No. 3, 35 Ind. Cas. 782.

Fiduciary Relationship.

See TRUST.

Fraud by fiduciary, whether may be condoned—Purdanashin woman—Person trusted by her as manager and managing her properties, but acting adversely to her interests—Acts of such person if bind her. See PARDANASHIN LADIES, No. 1, 20 C.W.N. 957.

Final Decree.

- (1) *Decree—When decision becomes final—Appeal—Expiry of time for filing the same.*

A decision cannot be said to become final until the time for the last appeal allowed has expired or if appealed it has become final by the decree of the High Court: *Ram Autar Shukul v. Bhagelu Sahai*, 31 Ind. Cas. 204.

WALSH, J.

References:—1 A. 192, F.; A.W.N. (1881) 165; A.W.N. (1888) 4, D.

- (2) *Preliminary decree—Combined appeal against both—Legality.* See CIV. PRO. CODE (1908), No. 186, 33 Ind. Cas. 137.

(3) *Code of Civil Procedure (V of 1908), O. XXXIV, rr. 3 and 5—Application to make final a conditional decree for sale of mortgaged properties.* See LIMITATION ACT (1908), No. 280, 1 Pat. L.J. 364.

- (4) *Transfers of preliminary and, for foreclosure to different persons—Substitution of names.* See TRANSFER OF PROPERTY, No. 1, 9 Bur. L.T. 121.

Finding.

Not forming basis of decree. See CIV. PRO. CODE (1908), No. 23, 33 Ind. Cas. 620.

Findings of Fact.

See PRACTICE AND PROCEDURE.

- (1) *See APPEAL (SECOND APPEAL)*, No. 11, 30 Ind. Cas. 380.

(2) *Right to question—Finding not supported by evidence on record.* See APPEAL (SECOND APPEAL), No. 10, 30 Ind. Cas. 375.

(3) *Judgment of appellate Court, contents of—Second appeal, grounds of—Findings of fact—Consideration of evidence on record.* See CIV. PRO. CODE (1908), No. 672, 108 P.L.R. 1916.

(4) *See CIV. PRO. CODE (1908), No. 66, 112 P.R. 1916.*

(5) *Error of law as to jurisdiction depending on—Documentary evidence—Misconstruction—Revision.* See CIV. PRO. CODE (1908), No. 233, 31 Ind. Cas. 209.

(5-a) *See CIV. PRO. CODE (1908), No. 192-a, 36 Ind. Cas. 996.*

(6) *Practice—Appellate Court—Judgment—Contents of—Second appeal—Interference.* See EVIDENCE, No. 5, 34 Ind. Cas. 942.

(7) *See HINDU LAW (JOINT FAMILY)*, No. 29, 35 Ind. Cas. 655.

(8) *Trial Judge's finding on question of fact, value of.* See HINDU LAW (RELIGIOUS ENDOWMENTS), No. 1, 20 C.W.N. 802.

(9) *Disturb appellate Court—Not competent to disturb the same on remand to it.* See LIMITATION ACT (1908), No. 105, 31 M.L.J. 257.

(10) *See RES JUDICATA*, No. 27, 31 Ind. Cas. 269.

Fine.

Non-production of documents—Fine when may be imposed. See CIV. PRO. CODE (1908), No. 394, 20 C.W.N. 511.

Fishery.

- (1) *Fishery right—River, changing its course—Fishery, owner of—New channel, fishery right in, belonging to another—Owner of the fishery, if entitled to follow the river.*

The owner of the fishery of a river which has taken a new course and flows through a channel in which another has a right of fishery cannot share in the fishery in the united waters (a).

The solution of the question as to whether the owner of the fishery of a river is entitled to follow the river when it has changed its course lies mainly in the answer that can be given to the question whether or not the invading river has lost its identity. *Saroda Prasad Roy Chaudhuri v. Khaja Mahammad Yusaf*, 24 C.L.J. 158=34 Ind. Cas. 278.

D. CHATTERJEE and BEACHCROFT, JJ.
References:—(a) 6 W.R. 17, R.; 20 C.L.J. 385=42 C. 489, D.

(2) *Right of—Small Cause suit—Second appeal.* See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 28, 31 Ind. Cas. 797.

Fishery Right.

See BEN. ACT VIII OF 1886 (TENANCY), No. 94, 33 Ind. Cas. 110.

Fixtures.

Compensation for removal of, by Calcutta Municipal authority—Whether payment of compensation is a condition precedent to such removal. See BEN. ACT III OF 1899 (CALCUTTA MUNICIPAL), No. 3, 18 Bom. L.R. 878.

Floating Security.

Nature of. See COMPANIES ACT (1882), No. 2, 32 Ind. Cas. 91.

Foreign Court.

- (1) *Foreign Court, suit in—Defendant native of British India—Appearance to avoid apprehended arrest—Jurisdiction, objection to—Pleading also on merits—Submission to jurisdiction, whether voluntary.*

In a suit instituted in a Court in Cochin, the defendant, a permanent resident of British India, appeared before the Court and objected to its jurisdiction but, at the same time, also pleaded on the merits. It was found that the appearance was due to a desire to avoid an apprehended arrest in case a decree had been passed against him, and he subsequently visited Cochin territory either on business or to see his relations.

Held, that the submission to the jurisdiction was voluntary and that, as he contested the suit on the merits and taken the chance of a judgment in his favour, it was not competent to him at any subsequent stage to question the jurisdiction of the Court (a).

Per Wallis, C.J. and Seshagiri Iyer, J.—The binding nature of a foreign decree can be enforced into by any Court in British India where the said decree is sought to be executed (b). *Rama Aiyar v. Krishna Patter*, 3 L.W. 90

Foreign Court—(Concluded).

—19 M.L.T. 68—80 M.L.J. 148—(1916) M.W.N. 83—82 Ind. Cas. 597—89 M. 738 (F.B.).

WALLIS, C. J., SHESHAGIRI AIYAR and PHILLIPS, JJ.

References:—(a) 2 M. 407, overruled. (b) 1 L.W. 877, F.

- (2) *Foreign Court, suit in, on cause of action tried, and determined between the parties in a British Indian Court—Latter Court if may issue perpetual injunction to restrain proceeding in Foreign Court—Res judicata—Civ. Pro. Code (1908), Ss. 11, 13—Specific Relief Act, S. 66 (B).*

A A, a Mahomedan, died leaving estates situate partly within British India and partly within the Ceded District of the Feudatory State of Rampur, and leaving him surviving a widow, a daughter and her children. The daughter and her children, alleging that A A was a Shia and that therefore the daughter excluded the residuary heirs from inheritance, instituted a suit against the latter in a British Indian Court, (viz., the Court of the Subordinate Judge at Bareilly), where their claim was opposed by the residuaries, and finally obtained an *ex parte* decree upholding their claim, the defendants having failed to obtain an adjournment which they said was necessary to enable them to call witnesses. This decree was affirmed by the High Court at Allahabad. Meanwhile the residuaries instituted against the daughter and her children a suit in a Court of the Rampur State for possession of a moiety of the estate of A A situate in the Ceded District of Rampur State, claiming, as they had done in their defence in the other suit, that A A was a Sunni. The daughter and children thereupon instituted another suit in the Court of the Subordinate Judge at Bareilly praying for a declaration that the previous decree of that Court was binding between the parties and operated as *res judicata* and that the defendants (the residuaries) be restrained by a perpetual injunction from continuing their suit in the Court of the Rampur State. The Subordinate Judge as well as the High Court at Allahabad on appeal having held that they had no jurisdiction to grant the injunction and dismissed the suit, the Privy Council on the appeal of the plaintiffs affirmed that decision and dismissed their appeal. *Musammatt Maqbul Fatima v. Amir Hasan Khan*, 20 C. W.N. 1213—(1916) 2 M.W.N. 163—86 Ind. Cas. 710 (P.C.).

LORD ATKINSON, LORD PARKER OF WADDINGTON, SIR JOHN EDGE and MR. AMEER ALI.

Reference:—37 A. 1, affirmed.

Foreign Decrees.

(1) Decree passed *ex-parte* by foreign Court—Executing Court can go into the question whether the foreign Court had jurisdiction—Decree passed by foreign Court *in absentem* in a personal action is a nullity. See CIV. PRO. CODE (1908), No. 89, 18 Bom. L.R. 486.

Foreign Decrees—(Concluded).

(2) Decree passed by Baroda Court—Execution proceedings transferred to British Court—Applications to execute the decree not made within the time prescribed by British Law—Execution in British Courts barred—*Lex fori* governs execution proceedings. See EXECUTION OF DECREE, No. 18, 18 Bom. L.R. 481.

Foreign Judgment.

- (1) *Suit on foreign judgment—Civ. Pro. Code (Act V of 1908), S.13—Jurisdiction—Limitation Act (IX of 1908), S. 11.*

The law of limitation is *lex fori*, not *lex loci contractus*, and a foreign rule of limitation is no defence to a suit instituted in British India on a contract entered into in a foreign country unless such rule not only bars the remedy, but also extinguishes the right.

A foreign judgment is conclusive as to any matter thereby directly adjudicated upon, except in the cases provided for in S. 13 of the Code of Civil Procedure.

A claim that would be time-barred in British India cannot be said to be a claim founded on a breach of any law in force in British India. *S. King v. D. J. Buchanan*, 9 Bur. L.T. 106—35 Ind. Cas. 741.

• ROBINSON, J

(2) *Suit on a, brought in British India—Incompetency of British Courts to go into merits—Points worth considering. See CIV. PRO. CODE (1908), No. 42, 13 P.W.R. 1916.*

Forest Act.

See ACT VII OF 1878.

See MAD. ACT V OF 1882.

Forest Officer.

Madras Forest Act (V of 1882)—Afforestation, notification of, objection to—Trial before Forest Officer—Appeal to District Court—Decision of District Court, if final—Limitation of ordinary incidents of litigation to be express. See LIMITATION ACT (1908), No. 269, 31 M. L.J. 324.

Forfeiture.

(1) *Right of suit—Order of forfeiture passed by Magistrate—Crim. Pro. Code, Ss. 523, 524—Sale proceeds of the property forfeited—Suit to recover the proceeds from Government. Wasappa Timappa Sonagar v. The Secretary of State for India*, 17 Bom. L.R. 979—40 B. 200—31 Ind. Cas. 498. See Final Part, 1915, Col. 724.

(2) *Deposit by purchaser—Stipulation as to forfeiture if purchaser makes default—Relief against. See CONTRACT ACT, No 91, 12 N. L.R. 177.*

(3) *Deposit not a penalty—Of deposit—Right of defaulter to claim credit in mitigation of damages. See CONTRACT ACT, No. 87, 10 S. L.R. 4.*

(4) See EXECUTION OF DECREE, No. 18, 24 C.L.J. 523.

Forfeiture—(Concluded).

(5) Days of grace allowed—Power of Court to relieve. See **LANDLORD AND TENANT**, No. 87, 82 Ind. Cas. 526.

(6) Lease in perpetuity if forfeitable—Forfeiture when takes place—Effect of forfeiture on under-lease. See **LANDLORD AND TENANT**, No. 22, 24 C.L.J. 40.

(7) Mining lease—Penal provisions, strict construction of—Relief against forfeiture—Covenants in a mining lease, exception to rule. See **LEASE**, No. 7, 39 M. 1049.

(8) Lease, provision in, for, on alienation—Usufructuary mortgage by lessee without divesting himself of possession. See **TRANSFER OF PROPERTY ACT**, No. 143, 31 Ind. Cas. 454.

(9) Sale, agreement for—Installment at specified dates—On default—Action for specific performance—If maintainable. See **VENDOR AND PURCHASER**, No. 3, 33 Ind. Cas. 323.

Forgery.

(1) Suit by reversioner for setting aside will as, and for declaration of invalidity of widow's alienation—Nature of suit—Limitation Act, Art. 93. See **HINDU LAW (WIDOW)**, No. 16, (1916) 2 M.W.N. 325.

(2) S. 42, proviso—Suit for declaration that an endorsement of a document is a. See **SPECIFIC RELIEF ACT**, No. 44, 14 A.L.J. 980.

Forma Pauperis.

(1) Leave to sue as pauper—Duty of Court. See **PUN. ACT I OF 1912 (COURTS AMENDMENT)**, No. 1, 25 P.L.R. 1916.

(2) Pauper suit—Decree for less amount than claimed—Apportionment of Court-fees and costs. See **CIV. PRO. CODE (1909)**, No. 594, 14 A.L.J. 657.

Fraud.

(1) *Pardanashin lady, document executed by—Suit for cancellation on the ground of fraud—Fraud different from that alleged in plaint if can be relied on—Duty of plaintiff to state facts constituting alleged fraud—Document bearing genuine signature—Burden on signatory to prove falsity of recitals.*

The plaintiff, a *pardanashin lady*, executed a conveyance in favour of the defendant, the consideration for which consisted of money due on a mortgage bond previously given by her to the purchaser and an additional sum paid at the time of sale. It appeared that on the mortgage bond she wrote with her own hand "this bond executed by me is correct" and then signed her name. Similarly on the conveyance she wrote "this deed of sale which I have executed is true and correct and is admitted and ratified by me," and then affixed her signature. She brought a suit for cancellation of the conveyance on the ground of fraud. In the plaint it was alleged that the defendants who were agents of the plaintiff got the mortgage bond and the deed of sale signed by her without the document being read out and explained to her,

Fraud—(Continued).

that she did not get any independent legal advice in connection with the document and did not get any consideration for them. In her deposition the plaintiff stated that she had put her signature on the blank sheets, which had subsequently been filled up without her knowledge or consent by the defendant and turned into the mortgage bond and the sale-deed.

Held that, as the documents undoubtedly bore the plaintiff's signature, the burden was upon her to establish that the recitals contained therein were untrue.

That, when a plaintiff impeaches a transaction on the ground of fraud, the facts which constitute the alleged fraud must be distinctly, specifically and accurately stated.

That a charge of fraud must be substantially proved or laid and when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it.

That the rule that the Court will grant only such relief as the plaintiff is entitled to upon the case made by his pleadings is strictly enforced when the plaintiff relies on fraud.

That, when a party seeks to avoid the Statute of Limitation on the ground of fraud, the statement of claim should set forth specifically the particular acts which constitute the fraud as well as the time when it was discovered in order to enable the defendant to meet the fraud and the alleged time of its discovery, so that the Court may see whether by the exercise of ordinary diligence the discovery might not have been made before. **Banshlram v. Panchanan Dasl**, 20 O.W.N. 638=35 Ind. Cas. 284.

MOOKERJEE and BEACHCROFT, JJ.

(2) *Ex parte decree and sale thereunder—Suit to set aside decree and sale on the ground that processes in suit and execution suppressed in collusion with officers of Court—Suit if maintainable—Case of fraud, pleading and proof in—Purchaser at certificate sale, suit for rent by, after registration under Land Registration Act—Decree obtained therein, sale in execution of—Purchase by decree-holder—Certificate sale subsequently cancelled—Rent-decree and sale, if thereby reversed.*

Where the plaintiff in a suit to set aside an *ex parte* rent-decree and sale held thereunder alleged that the defendants had, in collusion with the officers of the Court, caused a suppression of the processes in the suit as also in the execution proceedings.

Held—that, if this allegation had been established, the plaintiff would have been entitled to succeed.

The mere circumstance that a defendant has failed to have an *ex parte* decree set aside under S. 108, Civ. Pro. Code (of 1882) or to have a sale set aside on the ground of material irregularity does not debar him from seeking relief in a suit properly framed for the purpose on the ground that the suit itself was a fraudulent suit and that the proceedings therein were vitiated by fraud. But to enable the plaintiff to succeed in a suit so framed, he must specifically allege

Fraud—(Continued).

the circumstances of fraud and he must prove the fraud as laid in the plaint.

Fraud how to be pleaded and in what manner established, discussed.

A, having purchased property at a sale under the Public Demands Recovery Act, on 7th September 1908, sold it to B who duly obtained a sale-certificate from the Revenue authorities, was placed in possession and had his name registered under the Land Registration Act. B then sued the tenant on the property for rent and obtained an *ex parte* decree, in execution whereof the tenure was sold and purchased by the decree-holder himself on 20th November, 1909. The sale under the Public Demands Recovery Act was cancelled on 29th March, 1910, on the ground that no notice had been served under S. 109 of the Act and that the proceedings were invalid and inoperative in consequence.

Held—That the rent-decree and sale thereunder which were duly and regularly had at the instance of a stranger who had no concern with the irregularities in connection with the certificate sale were not affected by the reversal of the certificate sale. **Nagendra Nath Bose v. Parbati Charan**, 20 C.W.N. 819=35 Ind. Cas. 389.

MOOKERJEE and BEACHCROFT, JJ.

(3) *Execution of document to defraud creditors—Right of executant to have document set aside.*

A plaintiff is entitled to ask a Court of Justice to give him a decree declaring that a deed of release executed by him was a colourable transaction entered into to defraud his creditors and for enforcing the rights which he possessed prior to that deed, provided the purpose of the fraud has not been accomplished. If the intended fraud had been carried into execution the Court should not relieve the plaintiff from the consequences of the deed executed by him with intent to commit fraud. **Ram Lal v. Firm of Arur Chand Jiwan Das**, 30 Ind. Cas. 492.

SHADI LAL, J.

References :—38 P.R. 1892; 25 P.R. 1905=65 P.L.R. 1905, F.

(4) *Fraud—Execution of decrees—Court auction-purchaser's suit for possession—Decree and sale attached as fraudulent—Onus—Civ. Pro. Code, S. 47—Purchaser's suit for possession—Maintainability of.*

Where a person attacks a decree of Court and the proceedings founded thereon as fraudulent, the onus is upon him to prove affirmatively such fraud.

Quere, whether a separate suit for possession of lands purchased in Court-auction in execution of a decree is not barred by the provisions of S. 47, Civ. Pro. Code. **Jiwach Raut v. Sumran Manwar**, 34 Ind. Cas. 911.

MULLICK, J.

(5) *Fraudulent motive—Pleadings and proof.* Where fraudulent motive is relied on in a case, it should be clearly alleged, pleaded and

Fraud—(Continued).

proved. **Byramjee Gowanjee v. Yera Bompal Motibhai**, 36 Ind. Cas. 965.

FOX, C.J. and TWOMEY, J.

Reference :—(1912) 29 R.P.C. 465, R.

(6) A person who acts in such a way as would make it fraudulent for him to set up his legal rights will not be allowed to set up those rights. **Mohammad Hafizullah Khan v. Chithru Khan**, 36 Ind. Cas. 1001.

LINDSAY, J.

(7) *Fraud—Suit to set aside decrees—Grounds of—Perjured evidence—Maintainability of suit—Res judicata.* **Janki Kuar v. Lachmi Narain**, 13 A.L.J. 759=37 A. 635=30 Ind. Cas. 789. See Final Part, 1915, Col. 725.

(8) *Suit to set aside decree on the ground of—Maintainability of—Suit for sale on mortgage—Claim for personal decree negatived—Application for decree under Transfer of Property Act, S. 90—Notice served on judgment-debtors—Application granted without opposition by judgment-debtors.* **Ramratan Lal v. Bhuri Begam**, 13 A.L.J. 901=38 A. 7=30 Ind. Cas. 792. See Final Part, 1915, Col. 727.

(9) *Fraudulent transaction—Party pleading his own fraud, effect of—Acts of party to a fraud.* **Sagup Narain Babu v. Madho Singh**, 18 O.C. 131=30 Ind. Cas. 253. See Final Part, 1915, Col. 727.

(10) *Fraud—Declaratory suit—Document executed to defraud creditors—Fraud accomplished—Suit not maintainable—In pari delicto potior est conditio possidentis.* **Ram Lal v. The Firm of Arur Chand**, 175 P.L.R. 1915=115 P.W.R. 1915=30 Ind. Cas. 492. See Final Part, 1915, Col. 727.

(11) *Suit for redemption of mortgage—Relief sought being setting aside of a consent decree between the parties and a prior sale-deed as fraudulent.* See BOM. ACT XVII OF 1879 (DEKHAN AGRICULTURIST'S RELIEF), No. 2, 18 Bom. L.R. 708.

(12) *Deposit by client—Proof of handing money to cashier in the Bank premises—Sufficiency—Liability of Bank—Cashier—His position—On the part of Bank official—Necessity to prove.* See BANK, No. 1, 34 Ind. Cas. 176.

(13) *Ex parte decree against pardanashin lady—Suit to set aside decree on ground of.* See BURDEN OF PROOF, No. 6, 36 Ind. Cas. 596.

(14) *Undue influence whether a branch of fraud in equity.* See CIV. PRO. CODE (1908), No. 654, 18 Bom. L.R. 27.

(15) See CIV. PRO. CODE (1908), No. 110, 35 Ind. Cas. 473.

(16) In pleading how to be stated. See CIV. PRO. CODE (1908), No. 352, 35 Ind. Cas. 352.

(17) *Purchase by manager of infant with infant's money—Plea of section to defraud said infant.* See CIV. PRO. CODE (1908), No. 447, 30 Ind. Cas. 212.

Fraud—(Continued).

(18) Re-opening of suit for accounts—Evidence. See CIV. PRO. CODE (1908), No. 358, 35 Ind. Cas. 603.

(19) Allegations of—Specific charge and strict proof, necessity of. See CONTRACT ACT, No. 2, 24 C.L.J. 395.

(20) *Ex parte* decree—Transfer to another Court for execution—Arrest of defendant—Suit by latter to set aside an *ex parte* decree on the ground of—Decree *ex parte* set aside—Application for sanction to prosecute. See CRIM. PRO. CODE, No. 10, 1 Pat. L.J. 586.

(21) Decree obtained by B against N—Decree afterwards set aside on ground of fraud in another suit by N—Effect of subsequent decree. See DECREE, No. 1, 32 P.W.R. 1916.

(22) Deposit of money in a bank—Proof of payment—Burden of proof. See DEPOSIT, No. 1, 9 Bur. L.T. 160.

(23) Compromise decree—Right of party to prove that his consent was obtained by misrepresentation and—Necessity for suit to set aside decree. See EVIDENCE ACT, No. 25, 30 Ind. Cas. 639.

(24) Decree fraudulent—Execution sale if void or voidable—Suit to set aside decree barred by limitation—Sale if may be vacated. See EXECUTION SALE, No. 8, 20 C.W.N. 659.

(25) *Ex parte* decree—Application to set it aside refused—Suit to set aside decree on ground of fraud if lies. See EX PARTE DECREE, No. 1, 20 C.W.N. 845.

(26) Suit to set aside a fraudulent *ex parte* decree—Maintainability—O. IX, r. 13, Civ. Pro. Code. See EX PARTE DECREE, No. 2, U.B.R. (1916), 1st Qr., 106.

(27) See HINDU LAW (WIDOW), No. 30, 35 Ind. Cas. 49.

(28) See LANDLORD AND TENANT, No. 31, 81 M.L.J. 712.

(29) Fraud how and when to be alleged. See LEASE, No. 1, (1916) M.W.N. 180.

(30) Fraudulent nature of decree, it can be pleaded in defence. See LIMITATION ACT (1908), No. 242, 34 Ind. Cas. 897.

(31) Minor—Sale of minor's property by guardian—Of minor—Suit to set aside sale barred—Right to recovery of possession of property sold—Extinction of right. See LIMITATION ACT (1908), No. 118, 34 Ind. Cas. 188.

(32) Mortgage with possession—Suit for refund of money advanced by mortgagee. See LIMITATION ACT (1908), No. 168, 106 P.L.R. 1916.

(33) What constitutes. See LIMITATION ACT (1908), No. 169, 9 Bur. L.T. 190.

(34) Suit to set aside sale-deed giving no present interest in property, on ground of. See LIMITATION ACT (1908), No. 160, 31 Ind. Cas. 106.

(35) Decrees obtained by. See RES JUDICATA, No. 19, 19 O.C. 384.

Fraud—(Concluded).

(36) Registration of sale-deed—No taint of—Consideration not paid—Title passing notwithstanding—Stranger alleging fraud—Burden of proof. See SALE, No. 12, 34 Ind. Cas. 125.

(37) Incorrect allegations in plaint—Setting aside decree—Suit against minor—Proper person to be appointed guardian *ad litem*—Cross negligence of guardian. See SETTING ASIDE DECREE, No. 2, 33 Ind. Cas. 431.

(38) Suit to set aside decree on ground of—Evidence—Proof. See SETTING ASIDE DECREE, No. 3, 35 Ind. Cas. 847.

(39) Property acquired by fraud—Suit for recovery when lies. See TRANSFER OF PROPERTY ACT, No. 93, 19 M.L.T. 210.

(40) Mortgage by agent under power of attorney—Act done by agent fraudulently—Liability of principal—Burden of proving good faith. See TRANSFER OF PROPERTY ACT, No. 42, 36 Ind. Cas. 968.

Fraudulent Decree.

Effect of fraudulent decree as between parties thereto—Decree not a nullity.

A decree of Court, though obtained by collusion in order to carry out a scheme of fraud, cannot be treated as nullity as between the parties to the decree, and the Court ought not to permit any of the parties to such fraud and collusion to show that the transaction upheld by the decree was not really what it purported to be and did not, therefore, bind him (a). *Idina Beary v. Ummathumma*, 30 Ind. Cas. 606.

SADASIVA AIYAR and NAPIER, JJ.

References:—(a) 18 M. 378; 31 M. 485=4 M. L.T. 331=18 M.L.J. 576, F.; A.W.N. (1904) 25=26 A. 272, D.

Fraudulent Preference.

(1) *Transfer in fraud of creditors—Sale by debtor for consideration—Preference given to some creditors over others—Validity of sale.*

A sale of land by a debtor for proper consideration, made with a view to give preference to some creditors over other creditors, and to prevent the latter from getting along with the former a proportionate share of the sums due to them from the debtor is not invalid against them. *Pellur Masten Reddi v. Kunamreddi Malakonda Reddi*, 33 Ind. Cas. 695.

SADASIVA AIYAR and MOORE, JJ.

References:—34 C. 999=11 C.W.N. 889=6 C.L.J. 410, F.

(2) What amounts to. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 48, 20 C.W.N. 420.

(3) See ACT III OF 1909 (PRESIDENCY TOWNS INSOLVENCY), No. 15-a, 34 Ind. Cas. 795.

Fraudulent Transfers.

(1) *Fraudulent transfer—Test—Execution of fraud—Carrying it out in a material part—Release-deed—Relinquishment of rights*

Fraudulent Transfers—(Continued).

in favour of father and uncles—Creditor prevented from executing decrees against property relinquished—Illegal object—Effect—Suit by party to fraud to avoid the transfer—No relief—Trusts Act, S. 84—Penal Code, S. 266—Transfer of Property Act, S. 58.

In a case of fraudulent transfer, the question for the Court to determine is whether the contemplated fraud has been carried out to an extent which disentitled the plaintiff to the relief sought. The main rule in cases of this kind is that a man cannot set up an illegal or fraudulent act of his own in order to avoid his own deed. An exception to this general rule is that mere intention to defraud, if not carried into effect, affords a *locus penitentie*, to the fraudulent transferor, sufficient to justify being given relief. (*Vide* S. 84, Trusts Act).

It is not necessary that the whole fraud contemplated should be carried into effect, but it is sufficient if the illegal purpose has been carried into effect in a material part, or if there has been part-performance of a substantial character (a).

An illegal purpose is one which is prohibited by law, and S. 266, Penal Code, penalises any fraudulent transfer of property to another with the intention of thereby preventing such property (among other things) being taken in execution of a decree or order which has been made, or which the transferor knows to be likely to be made, by a Court of justice in a civil suit.

Where the plaintiff executed, in favour of his father and uncles, a release-deed by which he relinquished in their favour his rights in certain immovable properties belonging to the family, and his creditors have been thereby prevented from obtaining satisfaction of their dues for over five years. *Held*, that the illegal purpose has been substantially put into execution and that the plaintiff cannot claim the benefit of the exception contained in S. 84 of the Trusts Act. *Hirji v. Goverdhandas*, 9 S.L.R. 108 = 32 Ind. Cas. 530.

FAWCETT, A.J.C.

*References:—*5 S.L.R. 240 (241); 33 C. 967 (979); 35 C. 551; 18 M. 389; 29 M. 72, R.

(2) Declaratory suit by defeated claimant against attaching decree-holders—Plea that sale was fraudulent under S. 53, Transfer of Property Act—Validity—Scope of S. 53, Transfer of Property Act—Remedy of person aggrieved—Representative action whether necessary—Difference between judgment-creditors and ordinary creditors—English and Indian Law. See CIV. PRO. CODE (1908), No. 485, 30 M.L.J. 565.

(3) Transactions when amount to. See TRANSFER OF PROPERTY ACT, No. 45, 30 M.L.J. 116.

(4) Land granted by Deputy Commissioner transferred to another person with permission

Fraudulent Transfers—(Concluded).

of Deputy Commissioner at a time when transferor was involved in debts—Transfer whether void. See TRANSFER OF PROPERTY ACT, No. 45, 8 L.B.R. 233.

Free-hold Estate.

Conversion of *inam* into. See INAM ESTATE, No. 1, 12 N.L.R. 150.

Further Enquiry.

Complaint under Copyright Act—Discharge of accused—Power of High Court to direct. See LETTERS PATENT (MADRAS), No. 6, 30 Ind. Cas. 721.

Gambling.

(1) See CIV. PRO. CODE (1908), No. 592, 9 Bur. L.T. 228.

Gaming.

(1) See CIV. PRO. CODE (1908), No. 592, 9 Bur. L.T. 228.

Gaming Act.

See ACT XXI OF 1848.

Gaontia.

(1) Gaontia—'Protected' gaontia—Power to relinquish—Surrender of tenure to *samin-dar*—Validity—Gaontia not empowered to grant permanent rights—Adverse possession—If possible against *samin-dar*—Central Provinces Land Revenue Act, 1881, S. 65.

In 1845, an ancestor of the plaintiff-zamin-dar, leased the village in question in *gaontia* tenure to one D. Fresh leases were given in succession to D's son G and grandson K. K who 'protected' *gaontia* under S. 65-A of the Central Provinces Land Revenue Act, 1881, died in 1900 leaving three sons of whom M was the eldest. M who would have succeeded to the position of *gaontia*, resigned the position in favour of the second son A. In 1907, A surrendered the tenure to the zamindar. Three persons who were close relations of A and belonged to his family which held the land in *gaontia* held three plots of land which formed portions of the *bhogra* land of the village. When in 1907 A surrendered the *gaontia* to the zamindar, the latter obtained possession of the *bhogra* plots held by other members of the family except the above said three persons who refused to give up plots held by them. Plaintiff instituted in 1911 three different suits against the said three persons for recovery of possession of *bhogra* lands in their possession.

Held that a 'protected' *gaontia* could not create in the village any tenure of a permanent character which would hold good after his lease came to an end.

There is nothing in the incidents of a 'protected' *gaontia* as set out in S. 65-A of the Central Provinces Land Revenue Act which in any way suggests that a *gaontia* is not entitled to relinquish his rights.

Held, further that the possession of the defendants did not become adverse to the plaintiff till the tenure was relinquished in 1907 and

Gaontia—(Concluded).

that the suit instituted in 1911 was not barred by limitation.

Possession cannot be adverse to a person who is not himself entitled to claim present possession; so long as the *gaontia* tenure subsisted, the zamindar was not entitled to actual possession of any portion of the village. *Lal Narupraja Singh v. Shabani Tell*, 1 Pat. L. J. 293.

CHAMIER, C.J. and SHARFUDDIN, J.

Gazetteer.

Reference to District Gazetteer in the absence of findings by lower Courts—Validity. See BEN, ACT VI OF 1870 (CHAUKIDARI), No. 2, 20 C.W.N. 404.

General Clauses Act.

See ACT I OF 1868.

See ACT X OF 1897.

See C.P. ACT I OF 1914.

Ghatwali Land.

See CIV. PRO. CODE (1903), No. 299, 35 Ind. Cas. 788.

Ghatwali Tenure.

(1) *Ghatwali tenures in Santhal Parganas—Liability to sale in execution—Deputy Commissioners and local Rajas—Power to sell lands of Ghatwalis—Reg. XXIX of 1814—S. 4, Reg. XIV of 1910.*

Ghatwalis known as *Khargpur Ghatwalis* can be sold by the landlord in execution of a decree for rent. (a)

The contention that no *Ghatwali* tenure can be sold in execution is not a sound contention.

Under S. 4, Reg. XIV of 1910, the only *Ghatwalis* over whom the Deputy Commissioner of *Santhal Parganas* has jurisdiction are those who are subject to the provisions of the Bengal *Ghatwali Lands Reg. (XXIX of 1814)*; and in the Reg. of 1814 the Deputy Commissioner has power to put up such *Ghatwali* lands for sale for arrears of revenue.

Where the *ghatwal* is liable to render service to the Deputy Commissioner and derives his appointment from the Deputy Commissioner, his lands can only be sold with the consent of the Deputy Commissioner. Where the *ghatwal* is appointed by the Raja and is not shown to be liable to render service to any body but the Raja, his *ghatwali* lands may be sold by the Raja. *Lakshmi Narain Mahto v. Satya Narain Chakravarty*, 1 Pat. L.J. 197.

• SHARFUDDIN and ROE, JJ.

Reference:—(a) 9 C. 183, F.

(2) *Right to nominate ghatwal—Vesting in the Government—Decree for rent—Tenure not saleable in execution thereof—Chota Nagpur Tenancy Act (VI of 1908), Ss. 77, 208.*

A *ghatwali* tenure is not saleable in execution for a decree for arrears of rent where the right of nomination of the *ghatwal* rests not with

Ghatwali Tenure—(Concluded).

the Raja but with the Government (a). *Midnapore Zamindari Co., Ltd. v. Ajambar Singh Mura*, 1 Pat. L.J. 601=36 Ind. Cas. 968.

MULLICK and ATKINSON, JJ.

References:—(a) 9 C. 208; 1 Pat. L.J. 197, F.; 6 I.A. 101; W.R. (S.N.) 249; 7 W.R. 178; 10 W.R. 255, *Ref. to.*

Gift.

(1) *Gift—Society formed for the purpose of spreading Sanskrit learning—Society not registered—Gift of property to such society prior to registration void.*

Where certain property was made a gift of to a society known as the *Dharam Samaj*, (formed for the purpose of spreading Sanskrit learning), prior to its registration, held, that the gift was void inasmuch as at the date of the gift there was no person in existence which could hold the property. *Mathura Kuer v. Dharam Samaj*, 14 A.L.J. 1038.

RICHARDS, C.J., and RAFIQ, J.

(2) *Gift of undivided share of Zamindari village—What constitutes delivery.*

Where the subject-matter of a gift is an undivided share in a Zamindari village the receipt of the appropriate portion of the rent would often be the only form in which delivery could take place. *Mirza Sadik Husain Khan v. Nawab Saïyed Hashim Ali Khan*, 31 M.L. J. 607=19 O.C. 192=18 Bom. L.R. 1037=21 C.W.N. 130=(1916) 2 M.W.N. 577=14 A.L.J. 1248=21 M.L.T. 40=38 A. 627=25 C.L.J. 363=38 A. 627 (P.C.).

LORD ATKINSON, LORD PARKER OF WADDINGTON, SIR JOHN EDGE and MR. AMEER ALI.

(3) *Mutation—Duty of mutation officer to attest deed of gift—Power of such officer to enquire into intricate questions.*

Where a deed of gift is executed mutation should be effected in accordance with the gift, if the actuality of which transaction is properly attested, whether the donee is the legitimate or illegitimate son of the donor or a stranger, and the mutation officer is not concerned with intricate questions of religion and customary law in dealing with mutation proceedings. So long as the deed of gift is not set aside by a Civil Court it must be treated by the mutation officer as, a valid one. *Lal Singh alias Lal Din v. Malik Singh*, 30 Ind. Cas. 899.

FENTON, F.C.

(4) *Gift by old lady to her children—Undue influence—Presumption of domination or confidential relationship. Maung Pu v. Lucy Mow,* 26 Ind. Cas. 39=8 Bur. L.T. 75=8 L.B.R. 235. See Final Part, 1915, Col. 731.

(5) *Transfer of Property Act, S. 130—Actionable claim of, whether governed by S. 129. See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), No. 1, 4 L.W. 389.*

(6) *By way of trust. See OUDH ACT XVIII OF 1876 (OUDH LAWS), No. 3, 81 M.L.J. 607,*

Gift—(Concluded).

(7) Nature of gift, when transferred by, to one not a co-sharer. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 6, 31 Ind. Cas. 906.

(8) Widows having absolute interest in property giving it away to daughter as stridhanam—Transfer of registry effected in Collector's office—Possession of donee subsequently acknowledged in widow's will—Gift not proved—Possession of donee whether adverse to widows. See ADVERSE POSSESSION, No. 1, (1916) M.W.N. 26.

(9) Contract to settle property in consideration of donee coming and living with donor—Validity—Contract if requires writing—Specific performance. See CONTRACT, No. 13, 20 C.W. N. 1054.

(10) Family arrangement—Widow at the time of adopting an adult boy making a contemporaneous document giving certain property to her grand-daughter—Validity of the. See HINDU LAW (ADOPTION), No. 9, 18 Bom. L. R. 740.

(11) Adoption of daughter's son by widow under authority of husband—Of immovable property by widow in favour of daughter after adoption is invalid—Mesne profits. See HINDU LAW—ADOPTION, No. 11, 152 P.W.R. 1916.

(12) By widow—Gift with power of alienation—Construction of document—Intentions of parties. See HINDU LAW (WIDOW), No. 28, 34 Ind. Cas. 596.

(13) Construction of deed of. See MALABAR LAW (GIFT), No. 1, 34 Ind. Cas. 107.

(14) Pardanashin lady, transaction with, deed—Undue influence—Bona fides—Onus—Maintainability of declaratory suit, when possession not delivered. See PARDANASHIN WOMAN, No. 1, 35 Ind. Cas. 395.

(15) Construction—Gift deed—Transaction really a sale—Evidence. See PRE-EMPTION, No. 7, 70 P.R. 1918.

(16) Oral gift—Possession not given to donee—Subsequent registered instrument—Priority. See REGISTRATION ACT (1908), No. 37, 30 P. R. 1916.

(17) Registration of deed of—Death of donor—Execution admitted by donee—Registration if proper. See REGISTRATION ACT (1908), No. 38, 20 C.W.N. 1345.

(18) Gift, deed of—Attestation by two witnesses—One of them described as 'scribe'—Effect—Validity of attestation. See REGISTRATION ACT (1908), No. 32, 33 Ind. Cas. 33.

(19) Deed of—Requirements of—Donor's death after execution—Compulsory registration at the donee's instance—Gift, if complete and valid. See TRANSFER OF PROPERTY ACT, No. 147, 31 M.L.J. 690.

(20) Proof of deed of—Writer signing merely as writer—Evidence to show that writer signed as attesting witness. See TRANSFER OF PROPERTY ACT, No. 148, 36 Ind. Cas. 275.

(21) Gifts for religious purpose—Dedication to thakur—Absence of registered deed—Validity of. See TRANSFER OF PROPERTY ACT, No. 149, 36 Ind. Cas. 289.

Goldsmith.

Gold deposited with goldsmith to be made into ornaments—Suit to recover—Limitation. See LIMITATION ACT (1908), No. 129, 20 C.W. N. 232.

Good Faith.

(1) Burden of proof of. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 43, 14 A.L.J. 1188.

(2) See LIMITATION ACT (1908), No. 44, 36 Ind. Cas. 702—19 O.C. 367.

Goods.

Contract—Sale of produce—Sample—Tender of goods—Proper time. See CONTRACT ACT, No. 39, 9 S.L.R. 160.

Government.

(1) Senate and the Syndicate, functions of—Regulation 64, *ultra vires* of the Senate—Power of Senate to impose veto of, on matters reserved for itself by Statute. See ACT VIII OF 1904 (UNIVERSITY), No. 1, 31 M.L.J. 634.

(2) Government revenue—Nature of Government's right for revenue—Jodi—Assignment—Rights of assignee. See MAD. ACT II OF 1864 (REVENUE RECOVERY), No. 1, 3 L. W. 273.

(3) Position of the Inamdar same as zamindar—Under permanent settlement—Inamdar not to permanent lessee under. See CROWN GRANTS, No. 1, 31 M.L.J. 483.

(4) Seigniorage—Right of the, to levy. See CROWN GRANTS, No. 1, 31 M.L.J. 483.

(5) Water course—Easement as against, when and how acquired. See EASEMENTS ACT, No. 7, 31 Ind. Cas. 982.

(6) Duty of, to ascertain and obey law. See INJUNCTION, No. 1, 20 C.W.N. 457.

Government Lands.

(1) Under ryotwari tenure, purchased by zamindar—Jurisdiction of Civil Courts. See MAD. ACT I OF 1908 (ESTATES LAND), No. 17, 39 M. 944.

Government Rules, U.P.

Rules 30, 32. See CIV. PRO. CODE (1908), No. 110, 35 Ind. Cas. 473.

Government Securities.

'Pledge' of goods—Nature of transaction—How effected—Necessity for endorsement in case of—Rights of pawnee. See CONTRACT ACT, No. 139, 33 Ind. Cas. 891.

Government Solicitor.

Bill of costs by—Taxation. See COSTS, No. 8, 18 Bom. L.R. 118.

Grain Rent.

See LANDLORD AND TENANT, No. 52, 33 Ind. Cas. 419.

Grant.

(1) Construction of grant—Grant burdened with service and grant in lieu of wages—Distinction—Grant when resumable.

Grant—(Continued).

The grant in this case was made to Nakesh (decorator) M. The deed recited (1) that the donee had rendered services in the past; (2) that the said services were acceptable to the donor; (3) that the lands were granted as service Inam; (4) that the grantee was to pay a fixed Kattubadi; (5) that he was, in future, to render services which would deserve the approbation of the diwanum; and (6) that the lands were to be enjoyed from son to grandson.

It was found that the Kattubadi was never enhanced during the 45 years that the defendants (grantees) were in possession of the land, that the lands had descended in the lineal line for three generations; and that the defendants were always willing and ready to render the service.

Held per Seshagiri Aiyar and Phillips, JJ. (Wallis, C.J., contra).—The grant was burdened with service and was not resumable so long as the grantee was able and willing to perform the service.

Per Wallis, C.J.—Service Inams are admittedly resumable where Government is the grantor and in the case of *darmilla* inams, i.e., Inams granted by Zamindars since the date of the Permanent Settlement, where they are service inams granted for services of a personal nature, the balance of authority in the Madras Presidency is in favour of their being resumable.

Per Seshagiri Aiyar, J.—The presumption in Government grants, no doubt, is that the lands granted as service Inam are resumable. The same considerations do not necessarily apply to grants by 'Zemindars. It is well settled that service grants by Zemindars are not always resumable.

No general rule can be laid down, apart from other circumstances, that a grant for personal or menial services is liable to resumption.

Cl. (5), *supra* in the deed of grant is suggestive only of the vain gloriousness of the grantor and not of any intention to cut down the effect of the grant. *Kamarayudu Mrutyunjayadu v. Raja Sahab Maharban Dostan Sri Raja Rayu Venkatakurumara Mahipati Sriya Rao Bahadur Sardar, Rajahmundry Sircar, Rajah of Pittapuram*, 30 M.L.J. 192=(1916) M.W.N. 279=33 Ind. Cas. 901.

WALLIS, C.J., SESHAGIRI AIYAR and PHILLIPS, JJ.

References :—13 M.I.A. 466; 19 M.I.A. 498; (1911) 2 M.W.N. 406; 19 M.L.T. 209; 14 M.L.T. 562=(1914) M.W.N. 179; 29 M. 52; 18 M.L.T. 142; (1910) M.W.N. 436; 17 M. 268; 14 M. 365; 9 M. 308; 19 M. 100; 17 Bom. L.R. 181; 13 B.L.R. 124; I.A. Sup. Vol. 181, R.

(2) Grant, construction of—Grant of land bounded by stream.

Where land is granted which is bounded by a stream, the grantee is entitled to the bed of the stream up to the middle point. The grant however, may contain reservations. This rule of construction applies to a grant in partition just as to any other grant.

Grant—(Continued).

It is a well-recognised rule of construction that a grant is construed in favour of the grantee rather than of the grantor.

Hence, where an agreement for partition was entered into between owners of lands bounded by a stream, and the plaintiff claimed thereunder all the land which abutted the river on the south side and the bed of the river up to the middle point together with the exclusive right of fishing at those points, and the only reservation which the agreement showed related to the "use of wells, tanks and water courses," *held* that the plaintiff or his predecessors-in-title were not prevented by the terms of the deed from acquiring the bed of the river up to the middle point together with the right of fishing. *James E. Powell v. L.B. Powell*, 14 A.L.J. 684=36 Ind. Cas. 567.

RICHARDS, C.J. and SUNDAR LAL, J.

(3) Grant whether to temple or Archakas—Construction—S. 92, Civ. Pro. Code (1908)—Scheme

In this case it was found that the Inams in question were granted for the benefit and support of the temple and constituted absolute dedications to the God as trust-property and were not granted for the limited purpose of the performance of the *archaka's* duties alone. There was no usage proved or recognizable in law as regards the application of the income to this limited purpose alone and there was no question of any prescriptive right in the *Archakas* in the matter of the user of these trust-properties and their right was merely to be maintained out of the income so long as they did or were allowed to do the *archaka* service. *Held* that the gift was to the God, and the *Archakas* were not entitled to proprietary right in the lands, and the fact that the *Archakas* had been misappropriating the income during the past few years merely evidence a breach of trust no usage. *Deerl Narasimhacharyulu v. Chalasani Subbayya*, 31 M.L.J. 202=36 Ind. Cas. 270.

COUTTS-TROTTER and SRINIVASA AIYANGAR, JJ.

(4) Grant of dasabandham rights—Mortgage of such rights by grantees—Rights of mortgages—"Son to grandson," meaning—Custom.

A mortgagee of *dasabandham* rights (granted by the Zamindar to the ladies of his house), from such grantees can enforce his rights under the mortgage against his subsequent purchaser of the right of the Zamindar with notice of the obligation.

Tyabji, J.—The words "son to grandson" used in such grants appear to have been used clearly as words of limitation and not of purchase.

A custom prevalent in a zamindari laying down a particular rule of inheritance with regard to property held by the ladies of the zamindar's family and derived from the zamindar in the first instance for the purpose of maintenance is neither uncertain nor opposed to public policy, and is valid (a). *Bangaru*

Grant—(Continued).

Muthu Venkatappa Nayaniwaru v. Golla.
Chinnabba Naidu, 81 Ind. Cas. 585.

AYLING and TYABJI, JJ.

Reference:—(a) 27 M.L.J. 156, F.

(5) **Government grant—Right to user—Effect of non-user—Maintainability of an action for an injunction.** **Anantha Desikachariar v. Yiswanatha Mudaly**, 18 M.L.T. 515=30 Ind. Cas. 989. See Final Part, 1915, Col. 735.

(6) **Jagir granted by the King of Oudh—Sanad granted by the British Government—Grant in perpetuity so long as there are lineal heirs, right conferred by—Grant, construction of—Act XXIII of 1871—Grant of villages revenue free not a pension—Document not enforceable as a mortgage, whether admissible for collateral purpose—De facto guardian, effect of his dealings on minor—Alienation of a Mahomedan minor's property by an unauthorised guardian, effect of—Mahomedan Law—Continuing obligation, ratification of.** **Wala Qadar Hussain Ali Mirza (Nawab) v. Muhammad Azim Khan**, 18 O.C. 168=31 Ind. Cas. 728. See Final Part, 1915, Col. 737.

(7) **To Brahmin before Permanent Settlement for subsistence—Onus—Suit for commutation of rent.** See MAD. ACT I OF 1908 (ESTATES LAND), No. 4 a, 32 Ind. Cas. 229.

(8) **Grants by the Maharaja of Chota Nagpur—Impartibility—Custom of primogeniture—Meaning of "Putra poutradi."** See CUSTOM (GENERAL), No. 1, 20 C.W.N. 876.

(9) **Grant presumed from acknowledgment by Talukdar.** See DHIDAR, No. 1, 19 O.C. 27.

(10) **Grantee of land as long as he holds religious office—Power to alienate or set up title inconsistent with that of grantor—Grantee's alienance how far estopped.** See ESTOPPEL, No. 1, (1916) M.W.N. 119.

(11) **Joint family—Grant of confiscated property to one member—Effect—Right of succession.** See HINDU LAW (IMPARTIBLE ESTATES), No. 1, 14 A.L.J. 913.

(12) **Will—Construction—Properties left for charity—Surplus income secured to the family—Whether grant is personal or dedication to charity—Prohibition as to alienation, effect of—Presumption in cases of charitable bequests by Hindu testators.** See HINDU LAW (WILL), No. 4, 4 L.W. 104.

(13) **By way of maintenance—Presumption as to duration.** See MAINTENANCE, No. 1, 35 Ind. Cas. 764.

(14) **Sunnad granted to zemindar—Permanent Settlement of revenue—Certain inams not specially reserved—Right of Government to resume or assess such lands to public revenue—Grant—Construction—Grant whether ultra vires.** See REG. XXV OF 1802 (MADRAS PERMANENT SETTLEMENT), No. 1, 31 M.L.J. 97.

(15) **Of land for services of a Huddar—Right to resume land when service not required—Right depending on the terms of the grant and character of services—Presumption—Burden of**

Grant—(Concluded).

proof. See SERVICE TENURE, No. 1, 18 Bom. L.R. 695.

Grant Tenure.

See LANDLORD AND TENANT, No. 53, 33 Ind. Cas. 420.

Grave-yard.

Land dedicated as—Reservation of produce thereon—Legality. See MAHOMEDAN LAW—WAKF, No. 11, 33 Ind. Cas. 91.

Grazing Rights.

Claim to grazing rights under village custom—Claim to interest in immoveable property—Not of Small Cause nature—Second appeal lies. See LANDLORD AND TENANT, No. 20, 12 N.L.R. 83.

Ground Rent.

Due to Government, nature of. See PAUPER APPEAL, No. 1, 9 Bur. L.T. 69.

Grove.

(1) **Grove, when ceases to retain its character as such—Portion not occupied by trees—Resumption by piecemeal.**

There is no criterion laid down by law for judging when a grove ceases to retain its character as such. The question is more or less one of inference to be drawn from the surrounding circumstances.

The mere fact that a portion of the grove has become devoid of trees would not entitle the landholder to resume that portion of it. The plot must be taken to have been granted as a whole and the tenure must stand or fall in its entirety.

Piecemeal resumption of a grove is not permissible. The question is not so much of customary law as of the terms of the contract between the grantor and the grantee, and in the absence of proof of an agreement or a custom authorizing the landholder to take possession of such portion as has become devoid of trees, it must be held that the grantee has a right to occupy the whole plot so long as it retains the character of a grove(a). **Har Sahai v. Dhanpal Singh**, 32 Ind. Cas. 368.

KANHAIYA LAL, A.J.C.

References:—(a) 2 O.C. 73 and 9 O.C. 109, R.

(2) **Ejectment in respect of.** See U. P. ACT II OF 1901 (AGRA TENANCY), No. 30, 31 Ind. Cas. 498.

(3) See U.P. ACT II OF 1901 (AGRA TENANCY), No. 21-b, 32 Ind. Cas. 395.

(4) **Landlord taking forcible possession of—Grove-holder's remedy.** See U.P. ACT II OF 1901 (AGRA TENANCY), No. 32, 31 Ind. Cas. 453.

(5) See OUDH ACT XXII OF 1886 (RENT), No. 27, 33 Ind. Cas. 137.

(6) **Re-sale of—Vendee whether liable to ejectment.** See CUSTOM—GENERAL, No. 2, 31 Ind. Cas. 979.

(7) See LANDLORD AND TENANT, No. 36, 33 Ind. Cas. 147.

Grove-holders.

Grove-holders — Cultivation of land after cutting of groves—Right over such land—Partition of that land between co-sharers of village—Wajib-ul-arz, entry in.

Grove-holder, who has been cultivating the land after the cutting of the groves, are under-proprietors of the land according to the entry in the *wajib-ul-arz* and the partition proceedings between the co-sharers of the village cannot affect their (grove-holders') status. *Jamil-ud-din Ahmed v. Tawakkul Hussain*, 33 Ind. Cas. 237.

CAMPBELL, J.M.

Grove Land.

Granted in grove tenure—Trees cut and land cultivated—Acquisition of cultivating rights—Right to hold in under-proprietary tenure—Date of commencement of tenure. See *LANDLORD AND TENANT*, No. 36, 33 Ind. Cas. 147.

Guarantee.

Absence of consideration — Effect. See *CONTRACT ACT*, No. 1, 33 Ind. Cas. 732.

Guardian.

(1) *Appointment — Removal — Notice — Guardians and Wards Act (VIII) of 1890*, Ss. 34 (c), (d), 45, sub-S. (1) cl. (b).

No person should be appointed guardian of the person or property of an infant, without some enquiry about his fitness for the office.

No order for removal of a guardian of a minor should be made till he has been apprised of the charges brought against him and has been allowed reasonable opportunity to explain and if possible to defend his conduct.

S. 35, sub-S (1), cl. (b) of the *Guardians and Wards Act*, authorises the Court to impose a fine on the guardian, if the guardian fails to pay into Court the balance due from him on the accounts exhibited by him in compliance with a requisition under S. 34 (c). The payment contemplated, has to be made in compliance with a requisition under S. 34 (d). If the requisition be not in conformity with S. 34 (d), no fine can validly be imposed on the guardians for failure to comply therewith. *Jagannath v. Mahesh*, 36 Ind. Cas. 286 = 25 C.L.J. 149.

MOOKERJEE and CUMING, JJ.

(2) Grant of letters to, of minor not being executor or residuary legatee—Grant of letters for moveable property. See *ACT V OF 1881 (PROBATE AND ADMINISTRATION)*, No. 1-a, 36 Ind. Cas. 266.

(3) Appointment of, of lunatic — Whether wife may be appointed. See *ACT IV OF 1912 (LUNACY)*, No. 3, 36 Ind. Cas. 983 = 15 A.L.J. 10.

(4) See *U.P. ACT III of 1901 (LAND REVENUE)*, No. 10, 34 Ind. Cas. 689.

(5) Compromise by next friend or, when binding on minor—Leave of Court. See *CIV. PRO. CODE (1908)*, No. 585, 35 Ind. Cas. 675.

(6) Minor represented by, not formally appointed—Effect. See *CIV. PRO. CODE (1908)*, No. 190, 33 Ind. Cas. 341 = 9 Bur. L.T. 158.

(7) Contract for sale—Purchaser, a minor—

Guardian—(Concluded).

Sale by *de facto*, when valid. See *CONTRACT ACT*, No. 8, 32 Ind. Cas. 658.

(8) Minor, appointment of, without notice—Decree not binding on minor. See *EVIDENCE*, No. 6, 32 Ind. Cas. 380.

(9) Minor—Sale of minor's property by—Fraud of minor—Suit to set aside sale barred—Right to recovery of possession of property sold—Extinction of right. See *LIMITATION ACT (1908)*, No. 118, 34 Ind. Cas. 188.

(10) Of minor, gross negligence of. See *MINOR*, No. 6, 19 O.C. 119.

(11) Of an incapacitated defendant, if can be appointed Receiver. See *RECEIVER*, No. 5, 4 L.W. 285.

(12) See *U.P. ACT II OF 1901 (AGRA TENANCY)*, No. 17-c, 32 Ind. Cas. 916.

Guardian ad litem.

(1) *Guardian ad litem—Suit on mortgage against father and sons—Father appointed—Allegations of immorality against father—Interest adverse to minors—Subsequent suit by sons.*

A suit for sale on a mortgage executed by the father of a joint family governed by the *Mita-kshara* was instituted against the father, an adult son and his other minor sons. The father was appointed guardian *ad litem* of the minors. The appointment was made without taking the father's consent. No appearance was entered and an *ex parte* decree was passed in execution whereof the family property was sold. On attaining majority the minor sons brought a suit for possession of their shares in the property. They impugned the debt and alleged that the father was a man of bad character and they had not been represented at all in the previous suit:

Held, that there was a serious irregularity in the appointment of the father to act as guardian of his minor sons and *qua* the question sought to be put in issue in the suit by the sons, he was not a fit and proper person to be appointed as guardian. *Bajjnath Rai v. Dharam Deo Tewari*, 14 A.L.J. 363 = 38 A. 315 = 35 Ind. Cas. 707.

PIGGOTT and WALSH, JJ.

(2) Irregular appointment of—Question of prejudice to minor—Suit otherwise fully contested—Effect upon minor. See *CIV. PRO. CODE (1908)*, No. 581, 14 A.L.J. 589.

(3) Minor defendant—Appellant—Death of guardian *ad litem* during pendency of appeal—Appeal disposed of without fresh guardian—Fresh guardian appointed in execution proceedings—Minor's property sold without objection—Minor whether can sue for declaration that decree and execution sale were invalid. See *CIV. PRO. CODE (1908)*, No. 589, 31 M.L.J. 89.

(4) See *LIMITATION ACT (1908)*, No. 38, 35 Ind. Cas. 868 = 1 Pat. L.J. 578.

(5) Not properly appointed in suit against minor—Effect—Decree against minor—Setting aside decree—Revival of suit. See *MINOR*, No. 4, 14 A.L.J. 815.

Guardian ad Item—(Concluded).

(6) See MORTGAGE (REDEMPTION), No. 38, 35 Ind. Cas. 404.

(7) Fraud—Incorrect allegations in plaint—Setting aside decree—Suit against minor—Proper person to be appointed—Gross negligence of guardian. See SETTING ASIDE DECREE, No. 2, 38 Ind. Cas. 481.

Guardian and Minor.

(1) Mother of infants charged with bad character and found to have expressed intention to become and make her boys Christians—Bad character not proved—Undertaking not to baptise children—Associating Hindu uncle in guardianship. See HINDU LAW (GUARDIANSHIP), No. 1, 20 O.W.N. 608.

(2) Mahomedan Law—Major brother not guardian of minor brother's property—Alienation by major brother—Validity—Suit by minors to recover their shares—Limitation—Position of *de facto* guardian. See LIMITATION ACT (1908), No. 128, 83 P.R. 1916.

(3) Release by *de facto* guardian when to be upheld and when to be set aside. See MAHOMEDAN LAW (GUARDIANSHIP), No. 3, 3 L.W. 379.

(4) Mahomedan Law—Mortgage by *de facto* guardian for minor's benefit—Validity. See MORTGAGE (GENERAL), No. 1, 14 A.L.J. 18.

(5) Contract by guardian—Not specifically enforceable where not beneficial to minor. See SPECIFIC PERFORMANCE, No. 3, 14 A.L.J. 645.

Guardian and Ward.

(1) Res judicata—Gross negligence of guardian—Confession of judgment by guardian—Suit merely for a declaration to set aside decree by minor after attaining majority—Form of decree.

The present suit was filed by a minor after attaining majority for a mere declaration that a decree passed against him was not binding on him. He alleged gross negligence on the part of his guardian who had conducted the case on his behalf and confessed judgment. The claim was to set aside certain alienations in favour of ancestor of the minor.

Held, that the suit was not competent, for the plaintiff could ask for other consequential relief. On appeal the claim was decreed and declaration prayed for was granted.

Since no objection as to form of the suit was preferred on second appeal the Chief Court did not take this matter up, and found that the plaintiff had *prima facie* good pleas against the claim and came to the conclusion that owing to gross negligence of the guardian in not resisting the previous claim the consent decree was not binding on the plaintiff, and held that the validity of the pleas shall have to be decided in a suit which might be brought subsequently for possession of the property. *Mohan Lal v. Neki*, 117 P.L.R. 1916.

JOHNSTONE, C.J.

(2) Unregistered sale by guardian of minor—Suit by minor after attaining majority against purchaser—Limitation—Limitation

Guardian and Ward—(Concluded).

Act (IX of 1908), Sch. I, Art. 48, inapplicable.

Where a purported sale by the guardian of a minor was not registered as required by law, and no title passed under it, the minor on attaining his majority is entitled to bring his action for trespass in ejectment as against the trespasser against the alleged purchaser; and Art. 44, Sch. I of the Limitation Act (IX of 1908), does not apply as it is applicable only when the sale is enforceable, that is, a sale which if not set aside will give a right to the property. *Sani Kommu Velligondareddi v. Andra Narayya*, 38 Ind. Cas. 436.

COUTTS-TROTTER and SESHAGIRI IYER, JJ.

(3) *Guardian and Ward—Employment of ward's moneys in guardian's own trade—His liability—Indian Trust Act (1882), S. 23.*

Under S. 23 (6) of the Indian Trusts Act a guardian using his ward's moneys in his own business is liable either to account with compound interest at six per cent. with half yearly rests or to account for the net profits made by the employment of the minor's moneys.

The fact that he has admitted his liability to pay interest at 7½ per cent. is no ground for not applying the statutory provision as to the rate of interest payable in case of a breach of trust. *Ylwanathan v. Brahmanadhan*, 34 Ind. Cas. 300.

WALLIS, C.J. and PHILLIPS, J.

(4) *Agreement by guardian to pay rent at enhanced rate, of rent whether binding on minor.*

The mere fact that infant tenants would avoid litigation with landlord is not by itself sufficient to entitle a guardian to enter into a fresh lease, on behalf of the infants to pay double rent. *Danpat Mahto v. Midnapore Zamindari Co. Ltd.*, 35 Ind. Cas. 582.

FLETCHER and TEUNON, JJ.

(5) Suit against a Government ward as trustee of a public trust—Notice of suit to guardian of the ward whether necessary—Guardian not named in the suit—Effect. See BOM. ACT I OF 1905 (COURT OF WARDS), No. 1, 18 Bom.L.R. 563.

(6) Purchase by manager of infant with infant's money—Plea of action to defraud said infant. See CIV. PRO. CODE (1908), No. 147, 30 Ind. Cas. 212.

(7) Mortgage by certificated guardian—Sanction to raise loan granted by District Judge but subsequently revoked—Money lent without notice of revocation and applied by guardian for minor's benefit—Effect of the revocation of sanction of the mortgage—Rate of interest. See MORTGAGE—GENERAL, No. 28, 21 O.W.N. 63.

Guardians and Wards Act.

(1) *Custody of son—Application by father for custody—Regular suit for custody.*

A father who has never had the care or custody of his infant child cannot successfully call upon the Court by an application under

Guardians and Wards Act—(Continued).

the Guardian and Wards Act, 1890, for an order upon the person in whose custody the infant is to hand him over. He can, however, file a regular suit for the custody of his son. *Achralal Jekisodas v. Chimanlal Parbhudas*, 18 Bom. L.R. 582=40 B. 600.

SCOTT, C.J. and HEATON, J.

(2) *Guardians and Wards Act—Suit for custody of child—Can it be brought otherwise than under the Guardians and Wards Act.* *Arunachellam Pillay v. Iyama*, 8 Bur. L.T. 128=29 Ind. Cas. 768=8 L.B.R. 211. See Final Part, 1915, Col. 64.

(3) *S. 7—Minor—Application for appointment of guardian—Interference by Court—Test.*

On an application under the Guardians and Wards Act for the appointment by the Court of a guardian of the person of a minor, the Court should not interfere unless it is satisfied that it is for the welfare of the minor that an order should be made appointing a guardian of the minor's person under the Act. *Dargamma v. Lingappa*, 19 M.L.T. 294=33 Ind. Cas. 77.

SADASIVA AIYAR and MOORE, JJ.

(4) *S. 7—Proceedings under the section are summary—Elaborate inquiries not permissible—Appointment of guardian.*

S. 7 of the Guardians and Wards Act contemplates only a summary inquiry followed by an order made for the welfare of the minor. It does not contemplate elaborate inquiries whether the property left by the deceased was his separate or joint family property. When an application is made on the footing and with the claim that the minor is separately entitled to separate property, the Court ought to appoint a proper person as guardian of the property of the minor, leaving it to the guardian to institute suits for the recovery of the property which he claims. *Guruppa Shivgenappa Putti v. Tayawa Shidappa*, 18 Bom. L.R. 348=40 B. 613=35 Ind. Cas. 16.

BATCHELOR and SHAH, JJ.

(5) *Ss. 7, 8—Application made for guardianship—Duty of Court—Assumption of jurisdiction in other matters.* *Mussanmat Mahan Debi v. Madho*, 84 P.R. 1915=176 P.W.R. 1915=31 Ind. Cas. 237. See Final Part, 1915, Col. 65.

(6) *Ss. 7, 10, 39. See HINDU LAW (GUARDIANSHIP), No. 2, 30 M.L.J. 504.*

(7) *Ss. 7, 34 (a), 39 (e), 47 (a), 50 (b), and (d)—Order accepting security furnished by guardian whether appealable—Rules 240, 241, 242 and Forms 92, 94 of the Civil Rules of Practice whether ultra vires.*

Questions relating to the furnishing of security by a guardian come under S. 34 (a) of the Guardians and Wards Act, and no appeal lies under S. 47 of the Act against acts done by the Court under S. 34 of the Act (a).

Per *Sadasiva Aiyar, J.*—It is only after the appointment that the person appointed can be required under the Act to give security under S. 34 (a). If he contumaciously fails to give security, S. 39, cl. (e), empowers the Court to remove him from the guardianship.

Guardians and Wards Act—(Continued).

Therefore *rr. 240, 241 and 242 and Forms 92 and 94 of the Civil Rules of Practice*, so far as they require the security to be furnished and approved of before the appointment of guardian is made, seem to be *ultra vires*.

Per *Moore, J. (Contra)*:—The above rules framed by the High Court are not *ultra vires*. The appointment is made conditional on security being furnished, and the procedure followed in the *mofussil* is correct and does not contravene any express provisions in the Act. *Gopamma v. V. Srinivasa Aiyangar*, 30 M. L.J. 508=34 Ind. Cas. 432.

SADASIVA AIYAR and MOORE, JJ.

Reference:—(a) 28 M.L.J. 96, F.

(7-a) S. 8. See No. 5, *supra*.

(7-b) S. 10. See No. 6, *supra*.

(7-c) S. 12. See No. 12, *infra*.

(7-d) S. 17. See No. 11, *infra*.

(8) *S. 17 (3)—Duty of Court in making orders under — Minor — Age limit for forming "intelligent preference."*

It may now be taken as settled law in India that a boy of 14 and a girl of 16 years of age have a right to a consideration under the above section of their preference as to where they will live, and in this respect the civil law has adopted the age limits for kidnapping from lawful guardianship enacted by the Indian Penal Code.

Act VIII of 1890 makes the selection by a minor 'old enough to form an intelligent preference' a matter for consideration by the Court and not a matter of right in the minor.

In passing orders under the Act for the custody of a minor, the Court must be guided by what, consistently with the law to which the minor is subject, it considers under the circumstances to be most conducive to the welfare of the minor. *Battoolal v. Mrs. Ekstrand*, 12 N.L.R. 35=32 Ind. Cas. 977.

STANYON, A.J.C.

References:—12 A. 213; 16 B. 307; 23 O. 290; 25 C. 881; 22 M.L.J. 247, F.; 9 M. 391, Diss.

(9) *S. 19 (a)—Minor child, presumption as to the religion of—Duty of guardian—Marriage of Christian minor with Chamar whether valid—Christian Marriage Act (XV of 1872), S. 4—Right to be appointed guardian.*

Held, that a child in India must, under ordinary circumstances, be presumed to have his father's religion and his corresponding civil and social status, and it is, therefore, ordinarily the duty of a guardian to train his infant ward in such religion (a).

An Indian Christian who was originally a Chamar died leaving behind his wife and a minor daughter. Shortly after this the wife was received back into the Chamar brotherhood and immediately afterwards she married the minor girl to a Chamar to whom she had been already betrothed by her father. On an application for the appointment of a guardian to the person of the minor:

Guardians and Wards Act—(Continued).

Held, (1) that the mere fact that the Indian Christian betrothed his daughter to a *Chamar* did not warrant the inference that he renounced the Christian religion ;

(2) that inasmuch as the father of the girl was, and died, a Christian, the girl must be presumed to be a Christian and the alleged marriage was, therefore, invalid ;

(3) that the mother of the girl having renounced the Christian religion was not a fit person to have charge of the girl, who must be brought up as a Christian until she reached years of discretion when she could choose for herself. *Canon S. S. Allunt v. Mussammat Badamo*, 46 P.W.R. 1916=32 Ind. Cas. 897.

SCOTT SMITH, J.

References :—(a) 11 W.R. 77 (P.O.)=10 B.L.R. 125=14 M.L.A. 309=2 Suth. P.C.J. 521=3 Sar. P.C.J. 34=20 E.R. 802, F.

(10) S. 19 (b)—*Father, the father of legitimate child—Interpretation of Statutes.*

It cannot be said that the word "father" in cl. (b) of S. 19 of the Guardians and Wards Act includes the natural father of an illegitimate child as well as the father of a child born in wedlock. The said word applies only to the father of a child born in wedlock (a). *Ma Myo v. Maung Kyan*, 8 L.B.R. 415=9 Bur. L.T. 205=36 Ind. Cas. 646

FOX, C.J. and TWOMEY, J.

References :—(a) 2 U.B.R. 1891=1896, 413, Diss.

(11) S. 19, 17—*Father marrying a second wife—Whether sufficient to deprive him of guardianship of minor children—Difference between rights of husband and father and those of other relations—Likelihood of minor being happier with other relations, immaterial. Andlappa Pillai v. Nallendran Pillai*, 28-M.L.J. 442=(1915) M.W.N. 330=17 M.L.T. 389=29 Ind. Cas. 4=39 M. 473. See Final Part, 1915, Col. 69.

(11-a) S. 21. See No. 12, *infra*.

(11-b) S. 24. See No. 12, *infra*.

(12) Ss. 25, 21, 24, 12—*Child not previously in father's possession—Father's right to custody of the child—Minor wishes whether conclusive—Majority under Mahomedan Law—Effect of Majority Act—Hindu Law—Minor whether can be Manager of Hindu family or guardian of person or property of his minor wife or children.*

A Mahomedan father applied to the District Court under S. 25 of the Guardians and Wards Act for the custody of his minor son between 15 and 16 years old. The minor was in his mother's custody during her lifetime and after her death had passed into the custody of his maternal grandmother (mother's mother) at the time of the application by the father. It was contended that S. 25 of the Act did not apply to the case and that the boy being 16 he had a discretion in law to reside with his mother and in her absence with his grandmother.

Held that the wishes of the minor, who was over 14, should, no doubt, be consulted, not as

Guardians and Wards Act—(Continued).

conclusive on the matter of his welfare, but as an important factor to be taken into account in arriving at a conclusion.

Held also that S. 25 of the Act would apply to all cases where the guardian applied for the custody of the minor, whether the minor had ever before been in his custody or not (a).

Under the Majority Act, a Mussalman boy is bound to remain in the custody of his guardian till he attains 18, notwithstanding that, under the Shafi Law to which he is subject, his personal emancipation would have taken place when he attained the age of 15 (b).

Per *Sadasiva Aiyar, J.*—It is very doubtful whether a minor can at all be the managing member of a Hindu family though he is the senior male member, or whether he can be the guardian of the person or property of his minor wife or children.

The amendment of S. 21 of the Act suggested.

Per *Napier, J.*—The large rights given by S. 25 of the Act include lesser rights not specifically provided for. The object of Ss. 24 and 25 is to declare the right of the guardian of the person of the minor to the continuous custody of his person and to provide a machinery for enforcing it (c). *Mohideen Ibrahim Nachi v. L. Mahomed Ibrahim Sahib*, 30 M.L.J. 21=39 M. 608=33 Ind. Cas. 894.

SADASIVA IYER and NAPIER, JJ.

References :—(a) 37 A. 515, F.; 27 M.L.J. 30; 24 M. 284; 26 A. 594, R. (b) 9 M. 391, R. (c) 16 B. 307, D.

(13) Ss. 27 and 25. See MORTGAGE—GENERAL, No. 32, 1 Pat. L.J. 563.

(13-a) S. 29. See No. 13, *supra*.

(14) Ss. 29, 31—*Permission to guardian to sell ward's property—Power of Court to stop sale if detrimental to ward—Specific Relief Act, Ss. 38, 41—Plaintiff repudiating transaction must restore benefits received only if other party acted in good faith—Defendant not to restore benefits. Sultan Singh v. Hashmat Ullah*, 119 P.W.R. 1915=29 Ind. Cas. 804=109 P.R. 1915=38 P.L.R. 1916. See Final Part, 1915, Col. 71.

(15) S. 30—*Alienation by guardian—Sanction of District Court—Agreement to pay interest not sanctioned—Right to reasonable interest—Sust by minors to avoid the alienation—Duty of minors.*

A deed on a mortgage executed by B on behalf of herself and as guardian of her two sons, and a decree was passed for principal, interest at 9 p.c. and costs against the defendants and the property under mortgage. The two sons appealed on the ground (1) that the District Judge did not in express terms sanction the agreement by B to pay interest at 9 p.c. on the principal amount, and (2) that in any event the mortgage was merely for a period of 4 years and that consequently no interest can be claimed after that period.

It was proved that the guardian could not have succeeded in borrowing money unless she agreed to pay interest, and that the loan was for the benefit of the minors.

Guardians and Wards Act—(Continued).

Held, that the agreement to pay interest and to make that interest a charge on the property, though not sanctioned by the Court, was, under S. 30 of the Guardians and Wards Act, merely voidable at the instance of the minors, and that the minors' prayer can be granted only on the condition that they on their part must restore all benefits which they have received under their guardian's contract, i.e., they must repay the principal and the reasonable interest of 9 p.c. thereon.

As regards the claim for interest after 4 years, **held** that the Court is entitled to award interest by way of compensation or damages for at least 6 years after the termination of the mortgage, and thus at such rate as the Court may think reasonable, and that the rate of 9 p.c. agreed upon in this case was both reasonable and equitable. (a). **Muhammad Imaul v. Gauji Parshad**, 24 P.R. 1916=34 Ind. Cas. 916.

RATTIGAN and LE ROSSIGNOL, JJ.

Reference—(a) 19 A. 39 (P.C.), *F*.

(15-a) S. 31. See No. 14, *supra*.

(15-b) S. 34. See No. 7, *supra*.

(16) Ss. 34 (c), (d) and 45, sub S (1). See **GUARDIAN**, No. 1, 36 Ind. Cas. 286=25 C.L.J. 149.

(17) Ss. 34 (d), 45 (b)—*Guardian failing to pay full amount of purchase money of property sold with permission, because purchaser retained a portion in discharge of old debt—Daily fine, order to pay, if legal.*

Where a certificate of guardian of minors obtained permission to sell a portion of their estate on the representation that the money (about Rs. 3,000) was wanted to repair their house and submitted accounts showing that out of Rs. 5,000 obtained by the sale, Rs. 4,000 had been retained by the purchaser in payment of a sum of Rs. 4,000 which the guardian had borrowed from her to give the minors in marriage, and the Judge thereupon called upon the guardian to pay the said amount of Rs. 4,000 in Court within a specified time and directed that on failure to do so the guardian was to pay a fine of Rs. 5 per diem.

Held, that the amount the guardian was called upon to pay was not an amount of balance due from the guardian as the same had not been paid to her, nor was it a balance due on accounts filed in compliance with a requisition under cl. (d) of S. 34 of the Guardians and Wards Act and the order imposing a daily fine was *ultra vires*. *In re Nikhranessa Bibi*, 20 C.W.N. 663=39 Ind. Cas. 918.

D CHATTERJEE and CHAPMAN, JJ

(17 a) S. 39. See Nos. 6, 7, *supra*.

(17 b) S. 45. See Nos. 16, 17, *supra*.

(17-c) S. 47. See No. 17, *supra*.

(18) S. 47, cl. (g)—*Appeal—Joint guardians—Removal of one of the guardians for indefinite period—Application for letters of administration by one of the guardians, if and when ground for removal—Order made without enquiry, if valid* **Kamaksha Basini Chowdhurani v. Jagat Sundari Chowdhurani**, 22 C.L.J. 70=30 Ind. Cas. 675. See Final Part, 1916, Col. 72.

Guardians and Wards Act—(Continued).

(19) S. 48—*Second appeal—Finding of fact without any legal evidence—Admission of person in his own favour—Suit to contest the order of the District Court passed under Act VIII of 1890 barred by S. 48 of the Act—S. 41 of Act III of 1914—S. 21 of Act I of 1872.*

1. A finding of fact based on no legal evidence cannot be accepted and consequently is liable to be set aside even in second appeal.

2. A statement of a person in his own favour is inadmissible in evidence on his behalf.

3. A regular suit practically to contest the finding of the District Court under the Guardians and Wards Act (VIII of 1890) to the effect that the plaintiff is not father of the minor and consequently he is incompetent to claim the guardianship of the minor's person is barred by the provision of S. 48 of the Act. **Nagina Singh v. Sunder**, 24 P.W.R. 1916=33 Ind. Cas. 987.

SHADI LAL, J

(20) S. 60. See No. 7, *supra*.

Guardianship.

Father's right of, if can be taken away—Divorce suit—Appeal by wife—Adultery admitted—Costs of appeal. See **HUSBAND AND WIFE**, No. 1, 24 C.L.J. 226.

Guzerat Talukdar's Act

See **BOM. ACT VI OF 1888.**

Halabadi Chittas.

Appeal (second appeal)—Question of giving undue preference to thak map, question of fact—Halabadi chittas—Question left to executing Court.

The question that the lower Court gave undue preference to a thak map involves a pure question of fact and as such cannot be raised in second appeal.

Halabadi chittas cannot be called documents of title. What effect is to be given to them in evidence is not a question of law which can be raised in second appeal. A question not essential to be decided in suit may be left to be decided in execution proceedings. **Bharat Chandra Das v. Ramananda Deb**, 32 Ind. Cas. 862.

CHATTERJEE and BEACHCROFT, JJ.

Handwriting

Document 30 years old, copy of—Presumption as to stamp. See **EVIDENCE ACT**, No. 49, 81 Ind. Cas. 579.

Hatchita.

Suit on—No mention of rate of interest—Evidence, as to interest, admissibility of. See **EVIDENCE ACT**, No. 74, 86 Ind. Cas. 612.

Hathrakhidar.

Position of, taluqdar and taraddakhar. See **WASTE LANDS**, No. 1, 36 Ind. Cas. 684=2 P. R. 1917.

Hearing.

Notice of—Burden of proof. See **EVIDENCE ACT**, No. 84, 4 L.W. 611.

Hearsay Evidence.

See EVIDENCE.

Legal evidence—Objection to admission of—Hearsay statements recorded by Commissioner, if should be allowed to be read in Court. See **MAHOMEDAN LAW—MARRIAGE**, No. 3, 36 Ind. Cas. 20=21 C.W.N. 315.

Heir.

English law as to several 'heirs' of a deceased owner taking as one "heir" not followed in Hindu or Mahomedan Law. See **CO-OWNERS**, No. 3, 3 L.W. 542.

Heirship.

Evidence of sonship or. See **FAMILY REPUTE**, No. 1, 31 M.L.J. 607.

Hereditary lessees.

(1) Suit for possession or damages against perpetual. See **JURISDICTION OF CIVIL COURTS**, No. 5, 19 O.C. 339.

Hereditary Offices Act.

See **BOM. ACT III OF 1874**.

Hereditary Village Officers Act.

See **MAD. ACT III OF 1895**.

Hiba-bil-ewaz.

Gift in lieu of dower. See **MAHOMEDAN LAW—GIFT**, No. 2, 32 Ind. Cas. 516.

High Court.

(1) High Court's power of interference in revision—S. 25, Act IX of 1887—S. 115, Civ. Pro. Code—S. 107, Government of India Act. See **ACT IX OF 1887 (PROV. S.O. COURTS)**, No. 7, 20 C.W.N. 1080.

(2) Order of remand by the Agent—If open to revision by the. See **AGENCY RULES**, No. 4, (1916) 2 M.W.N. 269.

(3) Decrees of Division Bench of two Judges of High Court—Jurisdiction of single Judge to amend decrees. See **CIV. PRO. CODE (1908)**, No. 710, 20 C.W.N. 1165.

(4) Order by Judge on the original side refusing to restore case dismissed for default, if a judgment and if appealable—O. XLIII, r. 1, Civ. Pro. Code, if applies to appeal from one Judge of the High Court to others. See **LETTERS PATENT (CALCUTTA)**, No. 3, 20 C.W.N. 594.

(5) Letters Patent appeal—Judgment of reversal passed by single Judge of High Court cancelled—Effect—Position of Judge sitting alone—Whether his decision can be revised under S. 115, Civ. Pro. Code—Leave to appeal to Privy Council. See **LETTERS PATENT (CALCUTTA)**, No. 8, 43 C. 90.

(6) Decision of Calcutta High Court whether binds Patna High Court. See **LIMITATION ACT (1908)**, No. 144, 20 C.W.N. 983.

(7) Entry in record-of-rights on the strength of such agreement—Power of, to enquire into basis of entry. See **MORTGAGE—GENERAL**, No. 32, 1 Pat. L.J. 563.

High Court—(Concluded).

(8) Appeal remanded by High Court—Power to limit scope of appeal. See **REMAND**, No. 1, 20 O.W.N. 584.

(9) Decree of—Subsequent decision of Privy Council whether a ground for review—Limitation for application for review. See **REVIEW**, No. 2, 3 L.W. 244.

High Court Fees Rules (Madras).

High Court Fees Rules (Original Side), 1903, r. 17—Costs ordered on framing additional issues—Non-payment—Additional issues and pleas ordered to be struck off—No application for enforcement of rule—Validity of order—Penal clause must be strictly pursued. **Murugesha Chetty v Arumuga Chetty**, 2 L.W. 1205=18 M.L.T. 601=31 Ind. Cas. 923. See **Final Part**, 1915, Col. 745.

High Court, Jurisdiction of.

See **JURISDICTION OF CIVIL COURTS**.

See **LETTERS PATENT**.

See **REFERENCE**.

See **REVIEW**.

See **REVISION**.

(1) Cases of grave and otherwise irreparable injustice.

However ample the powers of the High Court as a Court of extraordinary jurisdiction may be, Courts in the exercise of superintending powers will not ordinarily interfere except in cases of grave and otherwise irreparable injustice (a). **Mulambath Kunhammad v. Parakat Kathiri Kutti**, 31 M.L.J. 827.

AYLING and SRINIVASA AYYANGAR, JJ.

References :—(a) 31 M.L.J. 319; 31 B. 139, 142, F.; 26 M. 176, R.

(2) Sanction—Expiry of time—Power of High Court to extend time. See **SANCTION TO PROSECUTE**, No. 4, 18 Bom. L.R. 686.

High Court, Powers of.

(1) To supersede orders of Small Cause Courts. See **ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS)**, No. 5, 4 L.W. 402.

(2) Acts of Revenue Officer under Mad. Act I of 1908—Power of the High Court to revise. See **MAD. ACT I OF 1908 (ESTATES LAND)**, No. 29, 4 L.W. 278.

(3) See **LEGAL PRACTITIONERS ACT (1879)**, No. 10, 1 Pat. L.J. 576.

High Court Rules (Bombay).

(1) Stay of suit pending in mofussil Court—Powers of single Judge on original side of the High Court to stay—*Charter Act (24 & 25 Vic., c. 104)*, Ss. 2, 9, 13—*Amended Letters Patent*, cls. 11 and 36—*Appellate Side Rules* 1, 5—*Original Side Rule* 62. **Narayan Vilhal Samant v. Jankibal Sitaram Samant**, 17 Bom. L.R. 655=39 B. 604=30 Ind. Cas. 560 (F.B.) See **Final Part**, 1915, Col. 745.

(2) R. 519—Practice—Taxation of costs. **Bapuji Sorabji Patel v. Bhikubhai Vichand**, 17 Bom. L.R. 924=31 Ind. Cas. 868. See **Final Part**, 1915, Col. 746.

High Court Rules (Bombay)—(Concluded).

(8) (Original Side) Rules 397, 399. See QUESTION OF LAW, No. 1, 18 Bom. L.R. 793.

High Court Rules (Calcutta).

(1) R. 370 of Mr. Belchamber's Rules of the Original Side—Validity. See LIMITATION ACT (1908), No. 303, 20 C.W.N. 889.

(2) Ch. XI, r. 4, appellate side. See REVIEW, No. 3, 20 C.W.N. 967.

(3) Ch. XI, r. 45 (e), of the High Court's general rules and circular orders—Verbal acceptance of—Vakalatnamahs—Validity—Endorsement of acceptance in writing if necessary—Interpretation of the. See PLEADER, Nos. 2 and 1, 20 C.W.N. 283 and 287.

High Court Rules (Madras).

(1) Practice—Translation and printing rules—R. 105—Dismissal of second appeal for non-translation and non-printing. *Patkum Cheepothi Ammal v. Ambalathan Kandy*, (1916) M.W.N. 817=2 L.W. 999=18 M.L.T. 383=29 M.L.J. 784=31 Ind. Cas. 74. See Final Part, 1915, Col. 747.

(2) R. 33 (c). Appellate Side Rules—Batch appeals—Vakil's fee. See COSTS, No. 1, 3 L.W. 249.

High Courts Rules (N.W.P.).

Ch. IV, r. 5, General Rules of practice for Civil Courts—Property obtained by gift whether ancestral. See CIVIL PROC. CODE (1908), No. 494, 14 A.L.J. 665.

Highway.**Ownership of soil—Presumption.**

Where a public path is admitted to be the boundary between two estates, the presumption is that the soil up to half the breadth of the road belongs to each estate. Assuming that that presumption is applicable in India, it must be confined to cases where it is clearly proved, or both sides are agreed that the limits of each village do not extend beyond the off-side of the path. *Arunachalam Chetty v. Ramanathan Chetty*, 31 Ind. Cas. 684.

SADASIVA AIYAR and NAPIER, JJ.

Hindu Law.

- 1.—GENERAL.
- 2.—ADOPTION.
- 3.—ALIENATION.
- 4.—CUSTOM.
- 5.—DEBTS.
- 6.—EXCLUSION FROM INHERITANCE.
- 7.—GIFT.
- 8.—GUARDIANSHIP.
- 9.—ILLEGITIMACY.
- 10.—IMPARTIBLE ESTATES.
- 11.—INHERITANCE.
- 12.—JOINT FAMILY.
- 13.—MAINTENANCE.
- 14.—MARRIAGE.
- 15.—PARTITION.
- 16.—RELIGIOUS ENDOWMENTS.
- 17.—RELIGIOUS OFFICES.
- 18.—REVERSIONERS.

Hindu Law—(Continued).

- 19.—SELF-ACQUISITION.
- 20.—STRIDHANAM.
- 21.—SUCCESSION.
- 22.—TEXTS.
- 23.—WIDOW.
- 24.—WILL.
- 25.—WOMAN'S ESTATE.

—1.—General.

Mahad—Southern Konkan—Mitakshara paramount authority in questions of Hindu law.

The Mitakshara, and not the Vyavahara Mayukha is the predominant authority in the town of Mahad in the Kolaba District. *Narhar Damodar Valdiya v. Bhanu Moreshwar Joshi*, 18 Bom. L.R. 744=10 B. 621=36 Ind. Cas. 539.

BATCHELOR and SHAH, JJ.

—2.—Adoption.

See CUSTOMS—PUNJAB—ADOPTION.

(1) Adoption by widow—Consent of near or remote Sapindas—Essentials—Nature of consent—Adoption long after authority given to adopt—Validity—Power of Court.

As the assent is regarded as a substitute for the authority of the husband and as the Hindu law enjoins that such an assent should be obtained from those who would be the natural advisers and protectors of the widow *prima facie*, it should be sought from those who are next in the line of succession. There is no direct authority which holds that, where there are near Sapindas, the adoption is invalid, if the remoter ones are not consulted. It would introduce an inconvenient and unworkable principle, if it were held that in a large family the assent of the majority of persons who are capable of giving their consent should be obtained.

The assent of the Sapindas need not be regarded as a religious act. Yagnavalkya's text implies that it is protection in temporal affairs that is contemplated.

No general principle applicable to all cases can be laid down. Where the nearest Sapindas are a sufficiently large number (six) as in this case it is unreasonable to contend that they should be ignored, and that the widow is entitled to apply to persons more remote.

Where there are only one or two near Sapindas, who from improper motives withhold their consent, it may be open to the widow to apply to more remote Sapindas.

The widow has no right to conclude on a *priori* reasoning that the Sapindas would have refused to give their consent as they were inimical to her and that the consultation would prove futile. It is her duty to obtain their permission.

Courts will be justified in scanning with care an adoption which purports to be based on an authority given many years before the event.

Quære—Whether the authority loses force by the mere lapse of time. *Krishnaayya v. Lakshminipathy*, 30 M.L.J. 265=19 M.L.T. 286=32 Ind. Cas. 253.

WALLIS, C.J. and SESHAGIRI AIYAR, J.

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

References:—28 M. 486, Diss. 26 M. 681; 26 M. 627; 26 M. 145; 14 M.L.A. 397 (449); 1 M. 69; 1 M. 174; 2 M. 202; 30 M. 50; (1914) M.W.N. 502; (1914) M.W.N. 620, R.

- (2) *Mitakshara*—*Partition between adopted son of one brother and natural son of another*—*Position of the adopted son in Hindu law—Doctrine that adopted son on partition takes a reduced share—Its application confined in case of competition with natural born son of the same father.*

According to Hindu Law an adopted son occupies the same position, and has the same rights and privileges in the family of the adopter, as the legitimate son, except in a few specified instances, which have been clearly and carefully noted and defined by writers on the subject of adoption. The theory of adoption involves the principle of a complete severance of the child adopted from the family in which he is born; both in respect to the paternal and the maternal line and his complete substitution into the adopter's family as if he were born in it.

Statement as to the Hindu Law of adoption made by *Romesh Chunder Mitter, J.*, in 10 I.A. 138, approved.

The doctrine according to which an adopted son on partition takes only a reduced share in the family property applies only in cases in which the competition is between an adopted son and a natural born son of the same father.

Translation of Sanskrit texts were tendered in evidence and rejected. *Nagindas Bhugwan-das v. Bachoo Hurkisondas* 30 M.L.J. 193 = 14 A.L.J. 185 = 23 C.L.J. 395 = (1916) M.W.N. 258 = 40 B. 270 = 18 Bom. L.R. 172 = 19 M.L.T. 193 = 3 L.W. 259 = 20 C.W.N. 702 = 32 Ind. Cas. 403 (P.C.).

VISCOUNT HALDANE, LORD PARMOOR, LORD WRENNBURY, SIR JOHN EDGE and MR. AMERR ALI.

- (3) *Mitakshara Law*—*Adoption by a Hindu without the consent of his wife*—*Adopted son, right of, with regard to his adoptive father and the wife of his adoptive father.*

Held, that a Hindu governed by the *Mitakshara Law* can adopt without the consent of his wife. Such an adopted son has all the rights of a natural son with regard to his adoptive father but not with regard to the wife of his adoptive father who has not consented. *Narain Dat De v. Gopal Das*, 18 O.C. 341 = 33 Ind. Cas. 361.

STUART, A.J.C.

- (4) *Hindu Law*—"Santathi" includes adopted son.

Where a *rasinama* provided that, after the death of the plaintiff's adoptive father, the "Male Santathi" (ஆண்சந்ததி) if any, left by him shall enjoy half the immoveable properties in suit and also half the other properties which might be subsequently acquired by him and the other half was to go to the "Male

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

Santhathi " (ஆண்சந்ததி) of his daughter's daughter, Lokambal, *held* that the words (ஆண்சந்ததி) include also an adopted son.

Sankaran Nair, J.—Where the words used in connection with a female may or may not bear the same meaning, it is not sufficient to show that the words do not bear their ordinary sense when used with reference to a male.

Spencer, J.—If the parties used the word in the significance of "descendants," there would be no reason to exclude from this category descendants by adoption unless there were other words of restriction. *Balsubbramaniam Pillai v. Pithal Pillai*, (1916) M.W.N. 306 = 33 Ind. Cas. 552.

SANKARAN NAIR and SPENCER, JJ.

- (5) *Mitakshara*—*Adopted son—Right to demand partition of ancestral property—Conditional adoption—Prohibition of partition during adoptive father's lifetime—Validity of condition—Binding on the son.*

An adopted son, like a natural son, has power to compel his adoptive father to a partition of the ancestral property.

A condition, made at the time of adoption that there should be no partition during the adoptive father's lifetime is a valid and reasonable condition which is binding on the adopted son (A).

It only defines and limits the son's enjoyment to the kind of enjoyment which a joint son has in ancestral property of which his father is the manager. It does not deprive the son of his rights in the property itself. *Korat v. Pan-cham*, 12 N.L.R. 29 = 33 Ind. Cas. 753.

BATTEN, A.J.C.

References:—(a) 5 C. 147; 4 C. 425; 16 C. 556; 27 M. 577; 2 M. 91 (P.G.); 23 B. 227; 37 B. 251; 12 M. 490; 14 M. 172; 21 M. 10; 12 M. 490; 19 B. 428; 8 Bom. L.R. 346; 11 B. 381, R.

- (6) *Authority to adopt, verbally given, before death—Proof—Relevancy of Will, which contained no directions for adoption, made two months before death, in estimating probabilities—Probable change of intentions—Witnesses, testimony of, opinion of Trial Judge, value of—Discrepancy in witnesses' statements, consideration of—Non-citation by either side of witness who went over from one side to the other—Case raised in first Court, not urged in appeal, if should be allowed to be raised on further appeal.*

R, a Hindu mahajan of means, died on 11th February 1896, leaving him surviving a widow and a daughter. He had been suffering from phthisis for some time. Two months before his death he executed a Will, by which he made a very modest provision for his daughter, and gave his wife a life-interest in the bulk of his properties (which, however, she was liable to forfeit if she behaved contrary to the injunctions of the Will). The testator had been hopeful that a son might be born to him, and the son, if born, was, under the Will, to be the "sole

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

executor, donee and owner." The Will contained no power to adopt a son. Seven years after the death of A, his widow adopted an infant son of R's nephew J, both after R's death. By his Will R had expressly excluded J, on account of his profligacy and irreligion, from participation in his funeral ceremonies, preferring for that purpose his sister's son B, in whom he had confidence and who lived in the same house with him and whom he appointed one of his executors. The authority for the adoption was alleged to have been given by R, shortly before his death (when he appeared to have become aware of the serious nature of his illness) verbally to his wife, in the presence of several respectable witnesses, most of whom deposed that R had expressly directed a son of J (should one be born) to be taken in adoption. The Trial Judge had held the alleged authority to adopt to have been proved. But the High Court on appeal reversed that finding, relying chiefly upon the contrary inferences regarding probabilities arising from the language of the Will and discrepancies in the depositions of the several witnesses who spoke of R's giving the authority to adopt.

Held, by the Judicial Committee, that the probabilities were not adverse to the view that the testator might have modified his original intentions as expressed in his Will which was executed before he came to realise how short his life was, and the balance of testimony being distinctly in favour of the story that the authority to adopt had been given, not only had the Trial Court not approached the case with bias but had taken a fairer and less one-sided view of the facts than that which prevailed in the High Court.

That the view of the Judge who tried the case and saw nearly all the witnesses on a question of evidence such as this was obviously entitled to great weight.

That such discrepancies as there were might well be accounted for by the fact that the conversation which the witnesses described had taken place some 13 years previously.

At the trial, the widow of R, who first came forward to support the adoption, appeared later on to have gone over to the opposite camp, viz., of B, who was opposing the adoption.

Held—That the omission by both parties to cite her as a witness was in the circumstances justifiable.

The question whether, assuming authority to adopt to have been given, the adoption of J's son would make him a son of the testator capable of taking under the terms of the Will was raised in the Trial Court and decided in favour of the adopted son and it was not argued in the Appeal Court. The Judicial Committee in the circumstances did not allow the question to be raised before them. *Adwaitya Prasad v. Baldeo Dass*, 90 C.W.N. 650 = 30 M.L.J. 635 = (1916) N.W.N. 277 = 4 L.W. 587 = 33 Ind. Cas. 852 (P.C.).

VISCOUNT HALDANE, LORD SHAW, SIR JOHN EDGE and MR. AMEER ALI,

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

(7) *Property of the natural father vested exclusively in the adopted son before adoption—Adoption divests the property.*

Under Hindu Law, a boy given in adoption loses after adoption all the rights which he may have acquired to the property of his natural father, inclusive of the right to property which has become exclusively vested in him before the date of his adoption. *Dattatraya Sakharam Devli v. Govind Sambhaji Kulkarni*, 18 Bom. L.R. 254 = 40 B. 429 = 34 Ind. Cas. 423.

BATCHELOR and SHAW, JJ.

Reference:—29 M. 437, Diss.

(8) *Dayabhaga—Kayasthas in Bengal, Sudras—Adoption, amongst Kayasthas, religious ceremonies if essential—Religious ceremonies postponed after actual giving and taking—Adoption during pollution, through birth of agnate—Validity—After-born natural son of Sudra, and adopted son, shares of, if equal—Agreement by adoptive father to give equal share, if valid—Properties held by adoptive father as shebait, adopted son if may claim to hold as shebait jointly with after-born son—Pitrikrityas, and Debakrittyas—Proof that property has been endowed as debutter—Permanent image if essential to valid dedication—Income of devaluated property exceeding expenses, if conclusive that debheba only a charge on the property—Dattaka Chandrika, authority of.*

Kayasthas, according to the law prevalent in Bengal, are considered as Sudras. No religious ceremony is necessary for an adoption amongst Kayasthas, mere giving and taking of a son being sufficient to give it validity.

The *putresthi jag* and *namkaran* not being essential ceremonies in an adoption between Sudras, the fact that they took place subsequently to the giving and taking did not affect the validity of the adoption.

Pollution on account of the birth of a relative does not vitiate an adoption. It is only a bar to religious acts and renders religious ceremonies inefficacious; but gift and acceptance of a son are secular acts (a).

Such pollution results from the knowledge of the fact of birth.

In laying down the rule that the adopted son of a Sudra shares the inheritance equally with the after-born natural son, the *Dattaka Chandrika* has in no way deviated from the *smritis* and the rule, which has been accepted as correct by both the Madras and Calcutta High Courts, should not be departed from.

An *ekrar-patra* of the adoptive father covenanting that an after-born natural son of his shall not be entitled to claim a larger share but will divide the inheritance equally with the son he was adopting, is valid and operative (b).

It is now settled law that, as regards inheritance, the adopted son holds in all respects the same position as an *aurasa* son except in some special matters. An *aurasa* son has a superior

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

right in respect of *pitri-matri kṛtyas*, but there is no such preference in respect of *shevas* or *deva kṛtyas*.

Held—Therefore, that an adopted son of a Sudra was entitled to inherit *debutter* properties in the right of *shebastship* jointly with an afterborn natural son.

A permanent image is not absolutely essential for dedication to a *Thakur*.

Where the intention of the donor appeared to have been to dedicate the property absolutely to *deva sheba*, the fact that the income of the property exceeded the expenses of the *sheba* and the *sheba* frequently dealt with the property or the income as personal property would not make the property secular subject to charge for the *deva sheba*. *Asita Mohon Ghosh Moulik v. Nirode Mohon Ghosh Moulik*, 40 C.W.N. 901=35 Ind. Cas. 137.

CHAUDHURI & NEWBOULD, JJ.

References:—(a) 18 M. 397 (398), F. (b) 19 C. 513 (536); 2 B. 67, R.

(9) *Family arrangement—Widow at the time of adopting an adult boy making a contemporaneous document giving certain property to her grand-daughter—Validity of the gift.*

An adopting widow made at one and the same time two documents, by one of which she adopted defendant No. 1 who was of full age; and by the other, termed a will, she devised certain property to her grand-daughter (plaintiff). The plaintiff having sued to recover possession of the property:

Held, decreeing the suit, that the two contemporaneous documents read together constituted a single family arrangement disposing of the property to which they referred; and defendant No. 1 having deliberately accepted the family arrangement and its advantages must be held to it. *Kashubai Ramchandra Ghatge v. Tatyia Genu Pawar*, 18 Bom. L.R. 740=40 B. 668=36 Ind. Cas. 516.

BATCHELOR, AG. C.J. and SHAN, J.

(10) *Evidence of adoption—Absence of entry in accounts—Evidence of surrounding circumstances.*

"Having regard to the well-known and often proved habits of the Indian people with regard to the keeping of accounts, recording their most minute transactions, the non-production of any book, in which anything connected with the ceremony, say, for instance, of an adoption, was entered, covers the case of a party setting up an adoption with suspicion" (a).

Where, in the case of an alleged adoption, it was found that no feast is proved to have taken place on the occasion of the adoption, the ceremonies, said to have been performed, were of the briefest possible description, no formal notification was made to the authorities, that the child's name was not changed, and that he was never taken to live with his new family or recognised by them in any way, that all the surrounding circumstances and conditions point in the opposite direction. Such circumstances

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

would make it highly improbable that the alleged adoption took place at the alleged date (b). *Diwakar v. Chandanji*, 12 N.L.R. 164 =18 Bom. L.R. 992=21 J.W.N. 814=(1917) M.W.N. 60=5 L.W. 106=25 C.L.J. 17=21 M.L.T. 67(P.C.).

LORDS SHAW and PARAMOOR and MR. AMEER ALI.

References:—(a) 37 L.A. 1 at pp. 7, 8=32 A. 104, F. (b) 5 W.R. (P.C.) 109=12 E. R. 489, F.

(10-a) *Hindu Law—Right of dancing girl to adopt—Abimanaputri.*

The adoption of a daughter by a dancing girl is valid in the Madras Presidency if it is not made for the purpose of making the girl a prostitute. So an adopted girl does not cease to be such if she is called "Abimanaputri" and is entitled to succeed to her adopted mother. *Nagamuthu Das v. Sundram*, 32 Ind. Cas. 743.

ABDUR RAHIM and AYLING, JJ.

(11) *Adoption—Hindu Law and custom—Lahore khatris—No ceremony necessary only giving and accepting required—Adoption of daughter's son by widow under authority of husband—Gift of immoveable property by widow in favour of daughter after adoption is invalid—Mesne profits.*

Held that:—

1. According to Hindu Law of adoption the essential and operative portion of the ceremony is the giving and accepting, and, in the Punjab, where the strict Hindu Law ceremonies are rarely observed in their entirety the giving and accepting of a child in adoption is all the ceremony that is essential.

2. According to the custom generally prevailing among Lahore Khatries the adoption of a daughter's son is valid (a).

3. An adoption made by a widow of a Lahore Khatri under authority conveyed to her by the will of her late husband confers upon the adoptee the rights of a real son for all intents and purposes.

4. A daughter cannot succeed in the presence of such an adopted son, therefore, after adoption, a gift by the widow of her husband's immoveable property in favour of her daughter is invalid.

5. Reasonable mesne profits are recoverable by the adopted son from the daughter for the period she illegally remains in possession of her father's property. *Musammatt Nikki v. Gujjar Mal*, 152 P.W.R. 1916=34 Ind. Cas. 478.

SHADI LAL and LE ROSSIGNOL, JJ.

References:—(a) 43 P.R. 1869; 35 P.R. 1885, F.

(12) *Hindu law—Adoption—Irrevocability of—Maintenance—Right of Hindu widow to claim—Facts to be taken into account in fixing the rate—Will—Execution by person suffering from plague—Mental incapacity.*

An adoption once validly made cannot be subsequently revoked.

It is unlikely that a person suffering from a virulent type of plague had sufficient mental

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

capacity to comprehend the extent of his estate and the nature of the claims of those whom he was excluding from all participation in the property.

Obiter:—Under the Hindu law, a widow is entitled to a suitable residence and also to a fixed recurring sum for her maintenance. The rule of law is clear that in fixing the amount of maintenance for a widow provision must be made for her reasonable wants, namely, for the purpose of charities and the discharge of religious obligations, in addition to a reasonable provision for her food, raiment and lodging, having regard to the amount of the estate, which is liable for her maintenance, her position in life and the circumstances of the family. **Musammatt Kewati v. Chandu Lal**, 123 P.R. 1916=36 Ind. Cas. 985.

SHADI LAL and LE ROSSIGNOL, JJ.

(13) Hindu law—Adoption—What constitutes an intention to convert self-acquired property into joint property.

To create a title by way of joint property or to convert self-acquired property into joint property, a clear intention to waive the separate right of the owner must be established and will not be inferred from acts which may have been done out of kindness and affection.

The mere tie of adoptive father and son is not sufficient to show an intention to convert self-acquired property into joint property.

The mere fact of a Hindu and his adopted son living together, and that the adopted son assisted the father in the management of his property is not sufficient to warrant the presumption that the adoptive father had thrown his self-acquired property into the common stock which would enure for the benefit of the adopted son also. **Moulvi Syed Tajmulali v. Jaga Mohan Das**, 1 Pat. L.J. 529.

MULLICK and ATKINSON, JJ.

Reference:—22 M. 383, R.

(14) Hindu law—Mitakshara—'Appointed daughter'—Putrika—'Putra'—Daughter appointed as son—Custom obsolete—Liability of appointed daughter to pay father's debts—If exists—Gift by Hindu to his daughter—Description of daughter as putrika—Effect—Deed—Recital in deed, effect of—Operative portion.

Where during his lifetime, a Hindu governed by the Mitakshara executed and made over, to his daughter by a deed of gift certain properties and where, in that deed, he described her as putrika and her descendants as putrika putra and heirs of his present and future properties,

Held that the daughter was not appointed as a son to her sonless father, and that she was not liable as a son to discharge her father's debts.

The appointment of a daughter as a son to raise up issue to a sonless father is now obsolete. If this custom or usage is relied on in any given case it must be conclusively and undeniably proved. Even if such obsolete custom can be

Hindu Law—(Continued).**—2.—Adoption—(Continued).**

established, it cannot be held that all the duties and obligations imposed on a Hindu son to discharge the debts of his father under the Mitakshara law would apply or attach to a daughter appointed as a putrika to raise issue to a sonless father under this alleged custom (a).

A mere recital in a deed cannot cut down or abridge the clear and unambiguous words used in the operative part of the document itself.

Held that even if the Mitakshara law did apply to the donee as putrika, she would only become joint with her father during his lifetime if the property was ancestral, and then only would the joint property be available to discharge his debts. **Bablu Rata Kuer v. Babu Puran Mal**, 1 Pat. L.J. 581.

ATKINSON and KINGSFORD, JJ.

References:—(a) 2 I. A. 163 and 31 M. 310, Ref. to.

(15) Hindu Law—Adopted son—Rights of succession—Talukdari and non-talukdari property—Oudh Estates Act, 1869, S. 22—Male lineal descendant—Mutation proceedings—Property in possession of a receiver—Prima facie right.

In Hindu Law an adopted son takes exactly the same position as a natural son. He will succeed to the property of his adoptive father's uncle whether it is talukdari or non-talukdari property.

In a mutation case where possession is admittedly with a receiver the Revenue Courts have only to decide and that by a summary inquiry who is the person best entitled to possession. **Nageshar Sahai v. Mata Pershad**, 34 Ind. Cas. 496.

HOLMS, S.M. and CAMPBELL, J.M.

Reference:—8 C. 304 (P.C.), F.

(16) Adoption by widow—Consent of reversioners—Test of bona fide refusal. Kallapalli Venkatarama Raju v. Kallapalli Bapamma Raju, 27 M.L.J. 649=(1914) M.W.N. 911=26 Ind. Cas. 983=39 M. 77. See Final Part, 1914, Col. 619.

(17) Adoption—Power of junior widow with the consent of reversioners—Invalid against senior widow—Consent of senior widow as kinsman. Venkatappa v. Ranga Rao, 29 M. L.J. 18=18 M.L.T. 19=(1915) M.W.N. 424=30 Ind. Cas. 105=39 M. 772. See Final Part, 1915, Col. 754.

(18) Sudra adoption—Corporal delivery and acceptance essential—Mere intention to adopt not enough. Kuppasamy Reddy v. Venkata-lakshmi Ammal, 18 M.L.T. 434=(1915) M.W.N. 960=31 Ind. Cas. 856. See Final Part, 1915, Col. 755.

(19) Manager, appointment of, if bars an adoption by the lunatic—Finding of lunacy, effect of—Construction of Statute—Capacity to write an intelligent letter, if conclusive test of sound mind—Adoption by a lunatic, when

Hindu Law—(Continued).**—2.—Adoption—(Concluded).**

valid—Adoption, whether amounts to alienation of property. See ACT XXXV OF 1858 (LUNACY DISTRICT COURTS), No. 2, 3 L.W. 290.

(20) Hindu widow adopting an orphan and supporting the adoption whether estopped from pleading invalidity of the adoption. See EVI-DENCE ACT, No. 100, 12 N.L.R. 100.

(21) Succession to *stridhan* property—Rights of adopted son and son of rival wife. See HINDU LAW (SUCCESSION), No. 2, 20 O.W.N. 489.

(22) See HINDU LAW (WIDOW), No. 19, 18 Bom. L.R. 954.

(23) Widow appointed executrix with power to adopt five sons in succession—Gift over on her dying without son to nephews—Son adopted if divests widow. See HINDU LAW (WILL), No. 1, 20 O.W.N. 169.

(24) Adoption by widow of her brother's son under her husband's authority. See HINDU LAW (WILL), No. 6, 33 Ind. Cas. 596.

(25) See LIMITATION ACT (1908), No. 297, 4 L.W. 291.

(26) Alienation by Hindu widow and her adopted son—Suit by reversioner to set aside alienation after bar of remedy *re* adoption. See LIMITATION ACT (1908), No. 197, 36 Ind. Cas. 255.

—3.—Alienation.

(1) *Joint family—Elder brother alienating family property without consideration to defraud younger brother—Subsequent partition—Alienated property excluded therefrom—Subsequent suit by younger brother for his share and recovery thereof—Suit by elder brother for his share—Maintainability—Fraud fully carried into effect.*

The plaintiff and the 4th defendant were two undivided brothers. During the absence of the 4th defendant (the younger brother), the plaintiff, who had just then attained majority and who was then living with his father-in-law (the 1st defendant) and his brother-in-law (the 2nd defendant), alienated in 1900 a portion of the family properties, including his brother's share, in favour of his brother-in-law. In 1906, there was a division of family properties between the plaintiff and his brother and property so alienated was excluded therefrom. Later on, the 4th defendant, having discovered that the sale of 1900 was *benami* and not real and was intended to deprive him of his share in the property so alienated, brought a suit in 1911 against the 2nd defendant and obtained a decree for his half share of the property. During the pendency of that suit, the plaintiff instituted the present suit for the recovery of his half share in the properties sold to the 2nd defendant, substantially on the same allegations as the 4th defendant.

Held that, the sale to 2nd defendant having originally been intended to defraud the 4th defendant and that intention having been fully

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

carried into effect either when possession was given in pursuance of the sale or at any rate at the time of the partition in 1906, it was not competent to the plaintiff to go behind the arrangement and sue to recover the property. *Suryanarayana Nayakaram v. Butchalah Naidu*, 3 L.W. 111=(1916) M.W.N. 107=32 Ind. Cas. 810.

ABDUR RAHIM and AYLING, JJ.

References:—35 C. 551; 1 Q.B.D. 291, 800, F.

(2) *Alienation by widow—Suit by reversioner—Onus of proof of necessity on purchaser—Substantial amount paid for consideration—Form of decree.*

In a suit by the reversioner to set aside alienations made by the widow of the last male owner, the question is whether the purchasers have discharged the onus that lay upon them of satisfying the Court either that the money was in fact paid for a necessary purpose or that having made reasonable enquiries they were satisfied that it was likely to be used or was intended to be used for a necessary purpose. On the question of necessity the test to apply is the existence of necessity or the making of reasonable enquiries as to the connection between the money advanced and the necessity that is proved. The purchaser or the descendant or other representative-in-interest of the purchaser, when the purchase is from a Hindu widow, must show that he made enquiry *allunde* as regards the necessity for the debt and it cannot be left a mere matter for inference.

Where a substantial portion of the money paid by the purchaser (in the present case Rs. 1,700 out of Rs. 2,500) can be shown to have been applied to necessary purposes, the proper course is to allow the purchaser to retain the land on payment of the balance of purchase price as to which no necessary and legal purposes are proved. *Pedayya v. Venkata Krishna Nayanam*, (1916) M.W.N. 163.

COUTTS-TROTTER and SRINIVASA AIYANGAR, JJ.

(3) *Mitakshara—Mortgage by father, not proved immoral—Decree against father and sons, form of—Consideration proved—Lender if bound to prove application of money as stated in bond.*

If the consideration for the mortgage was received by the mortgagor, the mortgage cannot be held inoperative merely because the mortgagee has failed to prove that the money was applied as stated in the mortgage bond (a).

The mortgage being one executed by a Mitakshara father, and the sons having failed to show that the loan was taken for immoral purposes, a decree was passed in the form it was made in 34 C. 735=11 O.W.N. 613, e.g., mortgage decree against the share of the father, and if the sale of that share was insufficient to satisfy the debt, interest and costs, balance to be realised by sale of the son's shares and

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

interest in the ancestral property so far as necessary—Six months' time being allowed for redemption. *Rabu Krishna Prasad v. Babu Rampershad Singh*, 20 C.W.N. 508=33 Ind. Cas. 990.

CHAUDHURI and NEWBOULD, JJ.

References:—(a) 34 C. 735=11 C.W.N. 618, F.

- (4) *Aroras—Alienation by widow—Reversioner's right to contest it in the presence of a daughter.*

Held that, among Aroras, an alienation by the widow may be contested by the husband's reversioners in the presence of his daughter. *Tek Chand v. Soman Singh*, 27 P.R. 1916=147 P.L.R. 1916.

JOHNSTONE, C.J. and CHEVIS, J.

References:—149 P.R. 1908, F.; 249 P.W.R. 1912, D.

- (5) *Infant—Power of manager to alienate property—"Benefit" of estate, as distinguished from "need" of estate as justifying alienation—Speculative development of minor's estate, if for benefit.*

The rule laid down by the Judicial Committee in 5 M.L.A. 373 at p. 423 is not restricted to cases of mortgage or other forms of partial alienation, nor is it restricted in its application to cases of necessity alone, for a "benefit" of the estate is to be differentiated from the "need" of the estate as a circumstance justifying alienation.

But mere increase in the immediate income of the minor or of his estate does not necessarily justify the inference that the particular transaction is for the benefit of the estate within the meaning of the rule which could not have been intended to include cases of speculative development of estates of minors. *Krishna Chandra Chowdhry v. Ratan Ram Pal*, 20 C.W.N. 645=23 C.J. J. 432.

MOOKERJEE and NEWBOULD, JJ.

- (6) *Widow—Alienation—Necessity—Alienee bound to prove connection between money paid and necessity as well as enquiry aliunde—Factum of enquiry not inferable—Substantial consideration for widow's alienation applied for legal purposes—Purchaser to retain property on payment of balance of consideration.*

In order to render an alienation by a widow valid against the reversioners, it is not enough for the alienee merely to prove the existence of necessity, or the making of reasonable enquiries, by him. He is bound to go further and to show some connection between the money paid and the necessity of it.

It may be a hardship to require a man to show that a dead person made an enquiry of a particular nature a number of years ago and an intolerable burden of proof ought not to be cast on him after great lapse of time. But as the law stands, in the case of a purchase from a Hindu widow, the purchaser on his descendant or other representative-in-interest must

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

show that he made some enquiry aliunde and this cannot be left to be inferred from the circumstances.

Where, in the case of an alienation by a Hindu widow, a substantial portion of the purchase money is shown to have been applied for necessary and legal purposes and the rest not, the proper course is to allow the purchaser or his representatives in interest to retain the land on payment of the balance of the sale consideration not shown to have been so applied. *Seshamma v. Yenkatakrishnarayanam*, 8 L.W. 413=(1916) M.W.N. 163=33 Ind. Cas. 933.

COUTTS-TROTTER and SRINIVASA AIYANGAR, JJ.

References:—(a) 6 M.L.A. 393, R.; 23 C. 766; 14 A. 420, R.

- (7) *Sale of entire family property by father—One son in mother's womb on date of sale—Right of another son subsequently born—Suit by latter for share, if maintainable—Limitation for such suit—Art. 126, Limitation Act (1908).*

Plaintiff's father sold away all his properties to one S in 1885. S brought a suit in 1887 for possession of the properties, and he got possession eventually in 1899.

In 1906, plaintiff's elder brother (who was in his mother's womb in 1885 at the time of the sale) brought a suit making the plaintiff, and the plaintiff's father and the purchasers from S parties to the suit. Plaintiff's brother ultimately succeeded in getting his alleged $\frac{1}{3}$ share decreed to him. Plaintiff's father died in 1908. Plaintiff who was born in 1901 brought the present suit in 1910 for recovering his share in the property.

Held that, as the entire family property was sold away in 1885, there was no property left in which plaintiff had an interest by birth.

Held also, that the suit was barred under Art. 126, Limitation Act, and as the plaintiff's brother could have brought such a suit as regards the plaintiff's share also (assuming that plaintiff had a share) and did not do so, plaintiff was now barred, more than 3 years having elapsed from the date of the plaintiff's brother's attainment of majority when this suit was brought. *Soundararajan v. Saravana Pillai*, 30 M.L.J. 592=31 Ind. Cas. 794.

SADASIVA AIYAR and MOORE, JJ.

References:—35 M. 47=21 M.L.J. 246; 40 C. 966=25 M.L.J. 512; 26 M.L.J. 460; 29 M. L.J. 830; 29 M.L.J. 816; 27 M.L.J. 409; 38 M. 188=25 M.L.J. 405; 33 A. 654; 26 M.L.J. 576; 34 C. 372, R. & D.

- (8) *Mitakshara—Alienation by mother of last male-holder—Half-sister, if can object.*

Held, that, according to the Mitakshara School of Hindu Law, only females expressly named in the text can inherit. The half-sister of a deceased Hindu being not so named is not entitled to succeed to his estate, and consequently, she is not competent to question an

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

alienation made by his mother, the sole surviving heir. *Musammatt Malan v. Musammatt Jiwan*, 47 P.W.R. 1916=32 Ind. Cas. 916.

SHAH DIN, J.

References:—20 P.R. 1906=14 P.W.R. 1906; C.A. No. 1598 of 1913; 3 A. 46; 5 A. 811=A.W.N. (1883) 51; 28 A. 307=A.W.N. (1906) 13=3 A.L.J. 87, R.

(9) *Mortgage by Mitakshara father—Son, though of age, not a party to the deed—His liability—Moral obligation to pay father's debts, unless incurred for immoral purposes—Legal proof of immoral purposes.*

Liability on the part of a son to pay a father's debt arises from moral and religious duty and obligation and this is so even though the debt is not incurred for the benefit of the individual or for the estate. A son can only exempt himself from liability if he can establish that the father was guilty of applying the money for some immoral purpose.

Although there need not be any direct proof that the money was raised to be spent on any particular person, yet one must be reasonably satisfied that the father was a man of vicious, extravagant and lustful habits and that he raised the money for the purpose of applying it for the immoral purpose. In some way by reasonable legal proof it must be shown that there is a connection with the debt and the immoral purpose (a).

To be liable on a mortgage executed by the father for a purpose not proved to be immoral, it is not necessary for the adult sons to be parties to the bond.

The case of 6 C. 749 seems to have been overruled if not distinctly qualified by the later case, 9 C. 495 (b). *Bhagabat Mal Sahu v. Sk. Abdul Karim*, 20 C.W.N. 797=1 Pat. L.J. 86=34 Ind. Cas. 23.

CHAPMAN and ATKINSON, J.J.

References:—(a) 14 B. 320; 36 B. 68, R. (b) 6 C. 749; 9 C. 495, R.

(10) *Alienation by widow—Legal necessity how to be made out—Burden of proof of necessity—Effect of lapse of time—Devolution of imovable property—Custom of succession—Limitation—Res judicata.*

The decision in 38 C. 721 has been affirmed by the Judicial Committee in this case, *Ravaneswar Prasad Singh v. Chand Prasad Singh*, 43 C. 417=36 Ind. Cas. 499 (P.G.).

VISCOUNT HALDANE, LORD PARMOUR, LORD WRENBURY, SIR JOHN EDGE and MR. AMER ALI.

Reference:—38 C. 721, affirmed.

(11) *Duty of person lending money to manager of joint Hindu family—Onus when discharged.*

Per *Atkinson, J.*—A lender is bound, when advancing money to a manager of a joint Hindu property, to satisfy himself by due enquiry, honestly made, that the advance is required by the manager, as borrower, for a valid family necessity and for the benefit of the

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

estate. If he acts honestly and makes due enquiry, then, even though the necessity may not in fact exist, he has satisfied the onus imposed upon him by law, and he has reason to believe the truth of the information given to him by reason of such enquiry. This rule of law applies to loans raised by a manager of a joint Hindu family whether the co-sharers be adults or minors.

Per *Chapman, J.*—When it is desired to attach liability to the members of a joint family by reason of an act done by one of them without the consent of the others, it is necessary to show that the act was the act of a prudent manager or that enquiry into the prudence of the act was made.

It would not be sufficient, in order to charge members of a joint family, for the managing member merely to recite that the money was required for certain specified purposes. *Mandil Das v. Megh Navain Dubey*, 1 Pat. L.J. 89=34 Ind. Cas. 742.

CHAPMAN and ATKINSON, J.J.

(12) *Alienation by father—Recital as self-acquisition—Binding effect not confined to recital.*

Where a man has a double capacity and purports to deal with property in one of such capacities, he must be deemed to have parted with every interest vesting in him by virtue of the undisclosed capacity as well. The Courts should incline to the view that a transferor alienated the property in the capacity most favourable to a bona fide purchaser.

There is no authority for the broad proposition that the party accepting a document is bound by the recitals in it regarding the character of the property and that it is not open to him to put forward an alternative plea.

Where a father sold certain properties reciting in the sale-deed that the properties were his self-acquisition, it is open to the vendee to show, even though the properties were not self-acquired, that the sale was binding upon the family as the money was borrowed for family purposes. *Audmulla Mudali v. Alamelammal*, (1916) 2 M.W.N. 115=4 L.W. 126=36 Ind. Cas. 365.

• SESHAGIRI Aiyar and PHILLIPS, J.J.

(13) *Alienee from a co-parcener, whether entitled to joint possession—His position and rights—Transfer of Property Act, S. 44, if applicable to cases under Hindu Law.*

The alienee from a co-parcener in a joint Hindu family is not entitled to possession of the alienor's share as a tenant-in-common. His only right is to obtain by partition the share to which his alienor was entitled (a).

S. 44 of the Transfer of Property Act does not override the Hindu Law in a case governed by that Law. *Kota Balabhadra*,

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

Patro v. Khetra Doss, 4 L.W. 99=31 M.L.J. 275=(1917) M.W.N. 149.

ABDUR RAHIM, O.C.J., SESHAGIRI AIYAR and PHILLIPS, JJ.

References:—(a) 9 M. 265; 38 M. 684, F.; 5 C. 148; 10 C. 626, R.

(14) *Mitakshara family—Mortgage decree against father—Sons not parties—Sale in execution of decree—Suit by sons to redeem—Maintainability—Limitation—Art. 12, Limitation Act (1908).*

The plaintiffs in this case were Mitakshara sons. A decree was obtained upon a mortgage against their father nearly 12 years before the institution of the present suit. The property in suit was sold to the mortgagee (present defendant), and possession delivered to him in 1900. Plaintiffs were not made parties in the suit upon the mortgage. Plaintiffs now sued for an account and for redemption.

Held that, if a suit to redeem was maintainable, the first step necessary for redemption was a declaration that the sale should be set aside. The limitation for a suit to set aside, a sale being one year, the present suit was barred by Art. 12, Limitation Act (1908) (a).

Quere:—Whether a Mitakshara son can sue to redeem if he has been, deliberately and with notice, omitted from a suit upon a mortgage made by his father (b). **Bhola Jha v. Lala Kall Prasad**, 1 Pat. L.J. 180=34 Ind. Cas. 268.

SHARFUDDIN and ROE, JJ.

References:—(a) 25 B. 337; 11 C.W.N. 1078, Appr. (b) 28 C. 517; 33 A. 7, R.

(15) *Mortgage—Hindu father—High rate of interest—Legal necessity.*

A Hindu father borrowed money on the security of the family property, the loan carrying interest at 18 per cent. per annum with six monthly rests. The bond was in lieu of a promissory note which carried interest at the rate of 6 per cent. per annum. The Courts below reduced the rate of interest to 6 per cent. per annum from the date of the bond:

Held (per Walsh, J.) that, in dealing with matters between a money-lender and a borrower where the loan carries a high rate of interest, Courts ought to apply the strict law and that the rate of interest should not be reduced on the mere allegation that the rate charged is in itself evidence of undue influence or fraud.

Held (per Sundar Lal, J.) that, in view of the fact that the burden of proving legal necessity for a loan in a suit to which the sons were defendants was upon the creditor, it was for him to show that it was also necessary to borrow the money at an exorbitant rate of interest. **Padam Singh v. Ram Rup**, 14 A.L.J. 772=36 Ind. Cas. 217.

WALSH and SUNDAR LAL, JJ.

(16) *Alienation by father—Sale set aside by the sons to the extent of their share—Suit*

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

by alienee to recover proportionate consideration—Liability of the sons—Form of decree—Res judicata.

Where a sale of family properties by a Hindu father was after his death set aside in a suit at the instance of the sons to the extent of their share and the alienee subsequently sued the sons to recover the proportionate share of the consideration:

Held that the alienee's claim was not barred by reason of his neglect to agitate it in the previous suit and that he was entitled to recover the amount from the assets of the father in the hands of the sons and from their own joint family properties. **Raman Paudthan v. Satha Kudambau**, (1916) 2 M.W.N. 217=31 M.L.J. 504=20 M.L.T. 320=4 L.W. 366=36 Ind. Cas. 387.

SESHAGIRI AIYAR and NAPIER, JJ.

(17) *Sale by Manager of joint Hindu family—Sale not binding on other co-parcener—Remedy of purchaser.*

A sale of joint property by a co-parcener, though made without legal necessity, is, in this presidency, valid to the extent of the vendor's share (a).

If the vendee of joint family property from the manager whose purchases under circumstances that will not make the alienation binding on the other co-parceners, wishes to stand by such sale which is valid only partially, he must be content with the vendor's share, but if he wishes to repudiate the transaction altogether, his remedy is only against the vendor in a suit for the return of the price paid, on the ground that the consideration for the payment failed.

In the former case he has no equity enforceable against the other co-parcener in respect of any payment properly made (b). **Bhojraj v. Nathuram**, 12 N.L.R. 161.

MITTRA, O.J.C.

References:—(a) 23 M. 89, F. (b) 23 M. 89; 31 A. 176, R.

(18) *Hindu Law—Alienation—Sale by father and manager without necessity—Joint Hindu family—Sons repudiate sale—Mesne profits from date of repudiation.*

When a person purchases property from the father and manager of a joint Hindu family and the sons repudiate the transaction as not justified by necessity and get the sale set aside, they are entitled to receive mesne profits from the date when the sale is repudiated by them. The institution of the suit to avoid the sale amounts to such repudiation if it was not repudiated earlier. **Bhirgu Nath v. Narain Singh Tewari**, 14 A.L.J. 1161=39 A. 61=36 Ind. Cas. 476.

WALSH and SUNDAR LAL, JJ.

(19) *Hindu Law—Alienation from a co-parcener—Possession of specific property alienated, suit for, incompetent.*

The alienee is not entitled to possession of the specific parcel alienated to him and the

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

only right he acquires is a right to compel the same general partition which his vendor might have compelled and an equity to have the particular property he purchased allotted if possible to his share (a).

Per *Crouch, A.J.C.*—When an individual member of a co-parcenary purports to sell a particular parcel of the joint estate he can only transfer such right, title and interest as is actually vested in him. To do more is a legal impossibility. In such particular parcel he has a beneficial interest—a right to enjoy it in common with the other co-parceners—and also the chance of it being allotted to him on a general partition, such chance being dependant on his enforcing partition during his lifetime. That is what he alienates.

In all suits for partition, the Court considers not merely the legal rights of the plaintiff but also the legal and equitable rights of all other parties interested, whether on the record or not; and where a particular parcel has been alienated, the Court will ordinarily allot such parcel to the share of the alienating co-parcener, leaving the alienee in possession, provided that this can be done without unfairness to the other persons interested. This is the principle underlying all decisions touching what is called "partial partition."

If, therefore, one of several co-parceners entitled to a one-eighth share, sues the alienee for partition of the particular parcel and for possession of his share, the suit must be dismissed; for the plaintiff can prove no title to the share claimed. On a general partition, the whole parcel might and probably would be allotted to the alienee.

So, also, if all the co-parceners other than the alienor sue for partition of the particular parcel alienated, their claim must be rejected; for they are claiming something to which they cannot prove title, something to which they would almost certainly be found not entitled were there a general partition. *Dularam v. Badaladas*, 10 S.L.R. 34 = 35 Ind. Cas. 478.

PRATT, J.C. and CROUCH, A.J.C.

References:—(a) 1 S.L.R. 133; 1 S.L.R. 142; 11 B.H.C.R. 76; 28 B. 201; 5 C. 148, R.

(20) *Hindu widow, alienation by in excess of her powers void or voidable—Limitation Act, Art. 44.*

An alienation by a *de facto* guardian without authority is void and to such an alienation Art. 44 of the Limitation Act does not apply (a).

Per *Pratt, J.C.*—Alienation by a Hindu widow or by a mother as guardian in excess of her authority is *ab initio* void and not merely voidable and to such an alienation Art. 44 of the Limitation Act has no application.

Per *Crouch, A.J.C. contra*—Where a Hindu widow acting as the natural guardian of her son's property alienates his property for good consideration but without legal necessity the

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

defendant is entitled to the benefit of Art. 44 of the Limitation Act (b).

The use of the words "void" and "voidable" in connection with Art. 44, is misleading, for suits lie to set aside void sales, and where a sale is voidable a plaintiff can sue for possession, exercising his right to avoid the sale by an overt act of election implied by such suit. But in determining the scope of Art. 44, the High Courts of India have found the division of sales into void and voidable a convenient one. *Gehimal v. Karmunai*, 10 S.L.R. 38 = 35 Ind. Cas. 551.

PRATT, J.C. and CROUCH, A.J.C.

References:—(a) 14 Bom. L.R. 192, R. (b) 3 C.W.N. 278; (1911) I. C. 377, R.

(21) *Alienation by woman of an estate—Effect of such alienation as waste—Right of reversioner to sue for recovery of possession or for appointment of manager.*

The plaintiff, a reversioner, sued for a declaration that the alienations mentioned in the plaint were invalid and had no binding effect on him, for a decree for possession of the properties and, in case the Court held that he was not entitled to immediate possession, for a decree for placing him in charge of the properties as manager during the lifetime of the daughters of the last male owner of the properties. The plaintiff alleged, that by the *ekrarnamas* referred to in the plaint the daughters relinquished their heritable right and in consequence accelerated the succession of the plaintiff to the estate of the last male owner. Held that, though the estate of a Hindu widow or, as in this case, of a daughter might determine in various ways, the *ekrarnamas* set out in the plaint did not amount to more than an alienation. An alienation in favour of a third party did not have the effect of accelerating the estate and entitle the next reversioner to immediate possession. There was no relinquishment in favour of the reversioner in the present case nor was any such relinquishment alleged which would accelerate the estate in favour of the plaintiff as such reversioner. Therefore the plaintiff was not entitled to maintain a suit for immediate possession of the properties left by the last male owner. (a). Held also that the allegations of the plaintiff that the relinquishment by the daughters of the right of inheritance to their father's estate did not amount to waste of the estate justifying the Court in considering whether the estate should be taken out of their hands. A Hindu lady in that possession has an absolute right and full power to alienate the estate for the period of her enjoyment to an outsider. That will not give the reversioner the right to come in and plead waste, and, insist on the estate being brought into possession by the Court. There were no allegations in the plaint which pointed to anything like spoliation of the estate or indicate that the estate in any way suffered or was likely to suffer from its being held by the alienee. Therefore the plaintiff was not entitled to ask for the appointment

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

of the manager to the estate. **Sarabjit Pratab Bahadur Sahu v. Bhagwat Koeri**, 30 Ind. Cas. 578.

CHITTY and WALMSLEY, JJ.

References:—(a) 9 Ind. Cas. 273=40 C. 721=17 C.W.N. 701=17 O.L.J. 499, R.

(22) *Hindu Law—Alienation by widow—Declaratory suit by reversioner—Maintainability—Specific Relief Act (I of 1877)*, S. 42.

A suit for a declaration by plaintiffs that they are the collateral nephews and reversionary heirs of a certain person (deceased) is maintainable, notwithstanding that the plaintiffs have no present existing right to the property of the deceased. **Munnu Singh v. Bachchu Singh**, 33 Ind. Cas. 185.

STUART, A.J.C.

Reference:—2 O.C. 57, Rel.

(23) *Hindu Law—Alienation—Father's alienation of family property—After-born son—Sons in existence at the time of alienation—Ratification by the sons in existence at the time of alienation after the birth of the after-born son—Right of the after-born son to impugn the alienation.*

The alienation which the Hindu Law declares to be binding upon a son who born after the date of the alienation is a valid alienation and not which was invalid when made by reason of the existence of other sons at that time and by the non existence of circumstances justifying alienation of family property. In the case of such an invalid alienation a son subsequently born is entitled to impeach the same and no ratification after his birth by the sons in existence at the time of the alienation will suffice to make it binding on him. **Murali Lal v. Jalipa Sahai**, 34 Ind. Cas. 447.

LINDSAY, J.C.

(24) *Hindu Law—Father's alienation—Suit by purchaser for possession—Antecedent debt—Promissory note—Presumption as to consideration—Negotiable Instruments Act (XXVI of 1881), S. 118—Nominal transaction—Long delay in instituting suit.*

Where a sale-deed by a father is satisfactorily shown to have been for an antecedent debt and is not a mere nominal transaction, the mere fact of long delay in suing for possession is not very material.

* Per Phillips, J.—The presumption under S. 118 of the Negotiable Instruments Act as to passing of consideration for a promissory note does not arise where it is a false document being an antecedent one. But the presumption in the case of a promissory note by a Hindu father where it arises will avail not merely against the father the maker but also against the son. The onus in the case of an alienation by a father is on the alienee to prove the existence of the antecedent debts

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

alleged. **Raghunathachari v. Aravamuthaiah**, 34 Ind. Cas. 617.

WALLIS, O.J. and PHILLIPS, J.

References:—(1912) M.W.N. 959; 6 O.L.J. 659; 11 A.L.J. 713; 26 M.L.J. 604, R.; (1911) 1 M.W.N. 50, D.

(25) *Hindu Law—Alienation by manager of Hindu infant's estate—Benefit of minor's estate.*

A guardian and manager of a Hindu minor's estate can alienate minor's property not only for the necessities of the minor, but also when any benefit accrues to the minor's estate by such alienation. The rule applies not only to mortgages but also to sales (a).

But it must be remembered that mere increase in the immediate income of the minor or of his estate does not necessarily justify the inference that the particular transaction is "for the benefit of the estate" within the meaning of the rule, which could hardly have been intended to include cases of speculative development of estates of minors (b). **Krist Chandra v. Ratan Ram Pal**, 35 Ind. Cas. 673.

MOOKERJEE and NEWBOULD, JJ.

References:—(a) 6 M.L.A. 373, Expl.; S.D.A. 1826, p. 250, 26 C. 820, R. (b) 20 W.R. 38; 3 N.W.P.H.C.R. 121, 32 B. 577, cited.

(26) *Prior debt—Absence of proof—Validity of alienation.*

Where the consideration for an alienation is the discharge of a prior debt and there was no proof that such debt existed or it had been incurred for legal necessity the alienation cannot be said to be for a legal necessity. **Musammam Ganesha v. Thakur Nageshar Baksh Slugh**, 36 Ind. Cas. 780.

STUART, J.C. and KANHAIYA LAL, A.J.C.

(27) *Sale by father to discharge antecedent debts—Prior obligation of son to discharge father's debts—Son's obligation to prove immorality of debt.*

Where ancestral property passed out of the family either under a conveyance executed by the father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt, his sons by reason of their duty to pay their father's debts could not recover that property, unless they could show that the debts were contracted for immoral purposes and that the purchaser had notice that they were so contracted (a).

Money taken at the time of a sale or mortgage or as a part and parcel of that transaction cannot be regarded as an antecedent debt (b). **Bakhtawar Singh v. Ram Singh**, 36 Ind. Cas. 44.

STUART and KANHAIYA LAL, A.J. CS.

References:—(a) 1 I.A. 321=14 B.L.R. 187 (P.C.)=22 W.R. 56=3 Sar. P.C.J. 380; 5 O. 148=6 I.A. 88=4 C.L.R. 226=4 Sar. P.C.J. 1=3 Suth. P.C.J. 589=2 Shome L.R. 242=2 Ind. Dec. (N.S.) 705; 13 C. 21=19 I.A. 1=10 Ind. Jur. 151=4 Sar. P.C.J. 68=6 Ind. Dec.

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

(N.S.) 510, R. (b) 29 M. 200=1 M.L.T. 28=16 M.L.J. 69; 1 Ind. Cas. 479=31 A. 176=6 A.L.J. 263; 12 Ind. Cas. 327=14 O. C. 299, R.

(28) Alienation of undivided *shārē*—Position of *alienee*—Whether a tenant-in-common—*Alienee's* right to *mesne* profits. *Maharaja of Bobbili v. S. Venkataramaoujulu Naidu*, 16 M.L.T. 181=27 M.L.J. 409=25 Ind. Cas. 595=39 M. 265. See Final Part, 1914, Col. 628.

(29) Widow—Alienation—Technical necessity—*Husband's* debt, existence of—Debt secured by mortgages and being wiped out gradually by usufruct—Mortgage money payable some years hence—Sale by widow for low price to pay debt and secure ready money in her hands, whether bona fide and valid—*Alienee's* right to value of improvements—Transfer of Property Act, S. 51. *Muddusami Siddappa v. Lakshmi Narasappa*, 2 L.W. 758=(1915) M.W.N. 631=18 M.L.T. 223=29 M.L.J. 357=30 Ind. Cas. 853. See Final Part, 1915, Col. 760.

(30) Alienation by qualified owner—Contingent reversioner, suit by, contesting its validity—Relief—Declaration grantable, what—Joint family—Relinquishment by one co-parcener of his interest in joint family property—Validity—Consideration and ability of the releasing co-parcener to maintain himself otherwise by his own exertions, if essential. *Veerammal v. Kamum Ammal*, 2 L.W. 850=30 Ind. Cas. 815. See Final Part, 1915, Col. 761.

(31) Hindu Law—Alienation—Suit to set aside—Limitation runs when one of the minors attains majority—Alienation by managing member and mother as guardian of minor brothers for necessity—Valid—Interests of minor the sole concern of Courts. *Surappa Raju v. Venkayya*, (1915) M.W.N. 909=32 Ind. Cas. 802. See Final Part, 1915, Col. 762.

(32) Minor—Mother executing a mortgage of minor's property—Document not purporting to be executed by the mother as guardian—Property described as belonging to the minor and registered in mother's name as guardian—Construction of deed, whether executed by mother in her individual capacity or as guardian—Limitation Act, 1908, Art. 41. *Velayudham Pillai v. Perumal Nalcker*, 2 L.W. 1210=31 Ind. Cas. 811. See Final Part, 1915, Col. 763.

(33) Hindu widow—Alienation, power of—Test—Legal necessity for worldly purposes and promotion of spiritual welfare, distinction between—Excavation and consecration of tank—Work of religious merit—Perpetual lease—Extent of alienation. *Khul Lal Singh v. Ajodhya Misser*, 22 C.L.J. 345=43 C. 574=31 Ind. Cas. 433. See Final Part, 1915, Col. 764.

(34) *Mitakshara*—Father's sister's sons can inherit as *bhandus*—Third party, whether can be impleaded at final stage—Civ. Pro. Code (1908), O. I. r. 10. *Sundar Singh v. Mussammat Gurdevi*, 163 P.W.R. 1916=31 Ind. Cas. 27. See Final Part, 1915, Col. 764.

Hindu Law—(Continued).**—3.—Alienation—(Continued).**

(35) Sale by a Hindu father having no co-parcener at the date of sale—After-born son, right of. *Maheesh v. Goswami Banjarai Lal*, 18 O. C. 162=31 Ind. Cas. 717. See Final Part, 1915, Col. 764.

(36) Appeal—Letters Patent, cl. 15—'Judgment'—Hindu widow—Alienation—Perpetual lease—Family settlement—Grantor, limited owner—Consent to alienation—Attestation by reversioner—Compromise—Deeds, construction of. *Upendra Nath Bose v. Bindeshri Prosad*, 22 C.L.J. 452=20 C.W.N. 210=32 Ind. Cas. 468. See Final Part, 1915, Col. 765.

(37) Hindu widow's estate in a proprietary share—Sale by Hindu widow without legal necessity—Effect—Right of pre-emption. See OUDH ACT XVIII OF 1876 (LAWS), No. 9-a, 32 Ind. Cas. 225.

(38) Contract to convey land by one co-parcener—Specific performance if and when can be decreed against a surviving co-parcener—Co-parcener's liability as regards executory and executed contracts if different. See CONTRACT, No. 9, 3 L.W. 435.

(39) Mortgage by father—Suit against father and sons—Father appointed guardian *ad litem*—Allegations of immorality against father—Interest adverse to minor—Subsequent suit by sons. See GUARDIAN AD LITEM, No. 1, 14 A. L.J. 353.

(40) See HINDU LAW (INHERITANCE), No. 6, 33 Ind. Cas. 259.

(41) Coparcener's powers of alienation in the Central Provinces. See HINDU LAW (JOINT FAMILY), No. 12, 12 N.L.R. 45.

(42) Father—His powers of alienation of coparcenary property—His powers larger than those of an ordinary manager. See HINDU LAW (JOINT FAMILY), No. 25, 34 Ind. Cas. 89.

(43) See HINDU LAW (JOINT FAMILY), No. 22, 33 Ind. Cas. 778.

(44) Suit for partial partition by alienee from a co-parcener against subsequent alienee from the remaining co-parceners does not lie. See HINDU LAW (PARTITION), No. 6, (1916) 2 M. W.N. 156.

(45) Widow applying estate to charity—Consent of reversioners—Failure of one form of charity—Gift to another form—Validity. See HINDU LAW (WIDOW), No. 1, 7 P.W.R. 1916.

(46) Alienation by widow—Marriage of daughter's daughter if legal necessity—Mortgage of widow's "right and interest" if covers more than life interest. See HINDU LAW (WIDOW), No. 5, 20 C.W.N. 734.

(47) Widow when can be restrained from alienating husband's property. See HINDU LAW (WIDOW), No. 6, 53 P.W.R. 1916.

(48) Hindu Law—Sale by Hindu widow—Legal necessity—*Onus probandi*. See HINDU LAW (WIDOW), No. 14, 20 M.L.T. 335.

(49) Two co-widows—Power of one to alienate her share—Effect of such alienation—Consent

Hindu Law—(Continued).**—3.—Alienation—(Concluded).**

of the other widow—Effect. See HINDU LAW (WIDOW), No. 15, 12 N.L.R. 100.

(50) Hindu widow, alienation by—Consent of next reversioner, effect of. See HINDU LAW—WIDOW, No. 20, 10 N.L.R. 49.

(51) See HINDU LAW—WIDOW, No. 26, 31 Ind. Cas. 851.

(52) Compromise of suit with reversioner's consent—Compromise having effect of alienation—Right of reversioner to question compromise. See HINDU LAW—WIDOW, No. 25, 30 Ind. Cas. 927.

(53) Bequest to woman—Nature of estate taken—Presumption—Bequest of income only—Validity—Woman's estate—Power to alienate for discharging debts. See HINDU LAW (WILL), No. 2, 1 Pat. L.J. 16.

(54) Alienation by Hindu widow and her adopted son—Suit by reversioner to set aside alienation after bar of remedy re-adoption. See LIMITATION ACT (1908), No. 197, 36 Ind. Cas. 255.

(55) Sale of ancestral property by father—Son a minor at the time—Suit by son to recover possession thereof after 12 years of attaining majority—Suit barred. See LIMITATION ACT (1908), No. 221, 14 A.L.J. 25.

(56) Joint family—Alienation by managing member without necessity—Suit to set it aside—Limitation—Twelve years. See LIMITATION ACT (1908), No. 265, 11 N.L.R. 12.

(57) Mortgage by two out of three brothers, members of joint Hindu family—Death of one executant—Suit against other executant and the non-executing brother only as representing the deceased executant—*Ex parte* decree and sale in execution and purchase by mortgagee—Non-executing brother's original share if passed by the sale—Decree for joint possession if can be made—Transfer of Property Act, S. 44. See MORTGAGE (GENERAL), No. 8, 20 C.W. N. 675.

—4.—Custom.

See CUSTOM.

See CUSTOMS—PUNJAB.

(1) *Hindu Law—Custom of distribution among sons according to the number of their mothers—Effect of such custom on collateral succession.*

In a case governed by a custom under which the property was distributed among the sons of a person according to the number of their mothers, the question arose whether the descendants of the sons of one of them could succeed collaterally to the property left by the descendants of another of them, so long as the other descendants, though lower in degree of the same stock, were alive.

Held, that the result of such a custom was to constitute brothers by the same father and mother and their descendants (persons) of one stock for the purposes of inheritance and as a logical result of the custom the persons who are

Hindu Law—(Continued).**—4.—Custom—(Concluded).**

descended from a different mother, though nearer in degree are not entitled to preference. *Lachhman Prasad v. Durga Prasad*, 19 O.O. 165.

KANHAIYA LAL, A.J.C.

(2) See RELIGIOUS ENDOWMENTS, No. 4, 35 Ind. Cas. 630.

—5.—Debts.

See HINDU LAW—ALIENATION.

See HINDU LAW—JOINT FAMILY.

See HINDU LAW—WIDOW.

(1) *Manager—Debt for family purposes—Decree against manager alone—Liability of shares of other co-parceners in execution of the decree—Civ. Pro. Code (1908), S. 53.*

The plaintiff sued in the Small Cause Court on an instrument of loan signed by the judgment-debtor alone and obtained a decree. He next sued to establish his right to attach and sell in execution of the decree the interest of the defendant who was a brother and co-parcener of the judgment-debtor. The money was borrowed for the benefit of all the brothers. The defendant, however, was not a party to the suit in the Small Cause Court.

Held, that, as the stage of sale had not been reached, there was no reason for assuming jurisdiction to dispose of property belonging to one who was no party to the suit and was not a representative of the judgment-debtor.

Quere.—Whether the decisions in 14 B. 597 and 23 B. 372 are good law? *Laxman Nilkant Pusalkar v. Vinayak Keshav Pusalkar*, 18 Bom. L.R. 52=40 B. 329=33 Ind. Cas. 956.

SCOTT, C.J. and SHAH, J.

(2) *Joint family—Money borrowed by father for family purposes—Son, whether liable for re-payment—Death of son pending appeal—Liability of family property—Finding that money was borrowed for family purposes—Second appeal—S. 41 of Act III of 1914.*

Held, that the finding that the money was borrowed for family purposes, cannot be interfered with in second appeal.

Where, in a suit to recover money due on a deed, it appeared that the father of the defendant borrowed the money for family purposes, the father and the son forming a joint Hindu family:

Held, (1) that the father in borrowing the money acted as the agent of the family and, therefore, the son was as much liable for the payment of the debt as the father;

(2) that under the circumstances the question of the son's personal liability did not arise, as he had died during the pendency of the appeal leaving his widow as his sole heir, and that the family property was liable for the amount. *Anant Ram v. Mansa Ram*, 39 P.W.R. 1916=32 Ind. Cas. 780.

SHADI LAL, J.

Hindu Law—(Continued).**—5.—Debts—(Continued).**

- (3) *Joint family—Negotiable instrument—Promissory note executed by the manager—Transferee, suit by—Other members of the family, if liable—Liability whether on the note or on original debt.*

In a suit by the transferees of a promissory note executed by the managing member of a joint Hindu family for a debt incurred in the family trade, the other members of the family are liable jointly with the maker of the note, as their liability is not confined merely to the antecedent obligation discharged by the note but also extends to the debt evidenced by the note. *Ayyasami Pillai v. Gurusawmi Naicken*, 3 L.W. 463=33 Ind. Cas. 691.

COUTTS-TROTTER, J.

References.—23 M. 597; (1915) M.W.N. 217, F.; (1912) M.W.N. 1011, Not F.

- (4) *Sons' liability for father's debts—Antecedent debts, if tainted with immorality does not validate mortgage of family property—Embezzlement—Code of Civil Procedure, S. 105 and O. XXII, r. 9 (2).*

S was agent and servant of L. L gave S a certain sum of money to be paid over to a creditor of L. The money was neither so paid nor returned to L. L obtained a decree against S for recovery of the money; but there was no criminal prosecution. In satisfaction of the decree as well as for other consideration S executed a mortgage of joint ancestral property. In a suit on the mortgage, the sons and a grandson of S, contended that the family property could not be made liable for the mortgage debt, because part of the consideration for the mortgage was tainted with immorality inasmuch as it was a re-imbusement of money which had been embezzled by S.

During the pendency of the suit, the plaintiff died and the suit abated and was dismissed. Subsequently the suit was restored under O. XXII, r. 9 (2), Civ. Pro. Code, and was eventually decreed on appeal.

Held, that it could not be said in the present case that the decrees had been passed for recovery of money which had been criminally embezzled.

If an antecedent debt relates to a transaction which was tainted with immorality, its existence would not vitiate the subsequent mortgage to be enforced against the joint family property.

The words "error, defect or irregularity" in S. 105, Civ. Pro. Code, evidently mean error, defect or irregularity affecting the decision of the case on the merits. Hence, the validity of an order under O. XXII, r. 9 (2), Civ. Pro. Code, cannot be questioned under S. 105, Civ. Pro. Code. *Nidha Lal v. The Collector of Bulandshahr*, 14 A.L.J. 610=35 Ind. Cas. 209.

BANERJI and FIGGOT, JJ.

- (5) *Debt—Immoral purposes—Consideration—Onus—Necessity—Books of account how proved—Bonami purchase—Ancestral property defined.*

1. In the absence of any proof to the contrary, the presumption is that property purchased in the name of a minor son belongs to his father.

Hindu Law—(Continued).**—5.—Debts—(Continued).**

2. The property purchased with the aid or on the security of ancestral property is itself ancestral property.

3. If all necessary and legal debts of a person are defrayed from one known source, the presumption that all other loans were expended on immorality arises only when the debtor had no debts or business on which the loans *might* have been expended with propriety (a).

4. In a suit brought against the heirs of an original debtor for the recovery of moneys advanced on the security of mortgage-deeds, the onus lies on the plaintiff to establish that full consideration passed (b).

5. Where a person advances money to another on that other's assurance that the loans were required for business purposes, the person advancing the loan is not bound to see to the proper application of the money.

6. Where plaintiffs in a suit to recover moneys advanced on the security of mortgage-deeds attempted to prove consideration by reference to their books of account, and on appeal the objection was taken that the books were not proved but it was established that, on the production of the books by the plaintiffs, the trial Court had ordered a commissary to inspect and report on the books in the presence of parties and their Counsel which was done, and the defendants' Counsel after inspection furnished the commissary with a set of questions none of which suggested that the books were irregular or unreliable.

Held, that the books must be taken to have been adequately proved. *Indar Narain v. Nanak Chand*, 74 P.W.R. 1916=58 P.R. 1916=33 Ind. Cas. 454.

CHEVIS and LE-ROSSIGNOL, JJ.

References.—(a) 50 P.R. 1913=15 P.W.R. 1913=17 Ind. Cas. 735, R.

- (6) *Plea of immorality—Proof of particular debt being tainted with immorality.*

Where the debts of the father were impeached on the ground of being tainted with immorality, until definite evidence is forthcoming that a particular debt was incurred for immoral purposes, the sons cannot claim to be exempted from their liability to discharge it. General allegations as to the immorality of their father would not entitle them to have relief of this kind. *Narendra Bahadur Singh v. Abdul Haq*, 30 Ind. Cas. 216.

LINDSAY, J.C., and KANHAIYA LAL, A.J.C.

- (7) *Debt contracted by father—Plea of immorality by son—Burden of proof.*

Where a debt contracted by a father is disputed by the son on the ground that it was incurred for immoral purposes, to avoid his liability to pay the debt, the son must prove the particular immoral purpose for which it was used and a mere allegation of general

Hindu Law—(Continued).**—8.—Debts—(Concluded).**

immorality of the father is not sufficient. **Bakhtawar Singh v. Ram Singh**, 36 Ind. Cas. 44.

STUART and XANHAIYA LAL, A.J. CS. References:—11 INE. Cas. 930-8 A.L.J. 649; 17 Ind. Cas. 729=17 C.W.N. 124; R.

(7-a) *Liability of son to pay father's debt incurred by appropriating money due to another.*

A debt incurred by a Hindu father by appropriating money due to another not being found under the circumstances of the case, to be an immoral one, an undivided Hindu son is liable to pay the same. **Harj Singh v. Sant Prosad Singh**, 32 Ind. Cas. 969.

CHAPMAN and MULICK, JJ.

(8) *Joint Hindu family—Debt incurred by one of the members—Liability of other members.* **Brij Lal v. Jasht Ram**, 172 P.L.R. 1915=106 P.W.R. 1915=30 Ind. Cas. 500. See Final Part, 1915, Col. 770.

(9) *Mitakshara—Debt—Liability of members of a joint Hindu family—Debt contracted by manager—No presumption.* **Bhura v. Banarsi Das**, 174 P.L.R. 1915=113 P.W.R. 1915=30 Ind. Cas. 481. See Final Part, 1915, Col. 771.

(10) *Father's debt—Debt created by the father, a Government servant, for trade privately carried on—Sons' liability for the debt—Debt not immoral—Governments' Servants' Conduct, r. 14.* **Ramkrishna Trimbak Chakravarti v. Narayan Shivrao Aras**, 17 Bom. L.R. 955=40 B. 126=31 Ind. Cas. 301. See Final Part, 1915, Col. 771.

(11) See EVIDENCE, No. 6, 32 Ind. Cas. 380.

(12) *Sale by father to discharge antecedent debts—Pious obligation of son to discharge father's debts—Son's obligation to prove immorality of debt.* See HINDU LAW—ALIENATION, No. 27, 36 Ind. Cas. 44.

(13) *Son's liability—Legal proof of immoral purposes.* See HINDU LAW (ALIENATION), No. 9, 20 C.W.N. 797.

(14) *Debt contracted by father—Suit against sons—Hindu Law—Plea that the debt was for immoral purposes—Plea to be investigated in the suit itself and not to be left to be determined in execution.* See TRANSFER OF PROPERTY ACT, No. 81, 34 Ind. Cas. 397.

—8.—Exclusion from Inheritance.

See HINDU LAW (INHERITANCE).

Exclusion from inheritance—Insanity congenital or not—Exclusion of the heir of such excluded person—Illegitimate daughter—Suit for declaration and possession—Limitation Act, 1908, Arts. 120 and 141.

A person is disqualified under the Hindu law from succeeding to property if he is insane when the succession opens; whether his insanity is curable or incurable. The daughter of such a lunatic has no title to the estate of her grandfather.

Hindu Law—(Continued).**—8.—Exclusion from Inheritance—(Old).**

Under the general principles of Hindu law, an illegitimate daughter cannot succeed to her father's property as against the legitimate daughter by a lawful wife. The ruling in 20 A. 35 applies only to a case in which the plaintiff comes into Court alleging that he is in possession and that a slur has been cast upon his title and only asks the Court to declare that he is the owner and possessor of the property (a). **Ram Singh v. Mussamat Bhandi**, 14 A.L.J. 11=38 A. 117=32 Ind. Cas. 127.

TUDHALL and WALSH, JJ.

Reference:—(a) 20 A. 35, R.

—7.—Gift.

See CUSTOMS—PUNJAB—GIFT.

See GIFT.

See GRANT.

See HINDU LAW—ALIENATION.

See HINDU LAW—WILL.

(1) *Gift to husband and wife at the time of marriage—Interest acquired, whether joint tenancy or tenancy-in-common—Transfer of Property Act, S. 53—Transfer of whole estate by a debtor in favour of his first wife's children—Consideration, permission to marry second wife—Transfer, if in fraud of creditor.*

Where a Hindu gives away immoveable property by way of gift to his daughter and her husband at the time of her marriage, the donees take the same as tenants-in-common and not as joint tenants with right of survivorship (a).

A transfer of all the properties of a person in favour of his children by his first wife at a time when he was about to marry a second wife and in consideration of his being permitted to do so by the relations of his first wife, is not a transfer in fraud of creditors and is not voidable under S. 53 of the Transfer of Property Act, even though the transferor was heavily indebted at the time. **Kapil Goundan v. Sarangapani**, 3 L.W. 287=(1916) M.W.N. 288=34 Ind. Cas. 744.

AYLING and NAPIER, JJ.

Reference:—(a) 23 C. 670, F.

(2) *Gift by co-parcener of lands less than his share, validity of—Estoppel—Property given, being reasonable in extent—Gift to one who was taking care of donor in his old age.*

A gift of immoveable property made by a member of a joint Hindu family, which was not unreasonable, regard being had to the extent of his share in all the joint family properties, and his undivided son did not impeach the gift during his father's lifetime, and it was further found that the gift was to a person with whom the donor was living in his old age, and who was also taking care of him, and that the gift was in consideration of this care that was taken of the donor, it was held, that neither the son nor the grandson could question the validity of the same after the

Hindu Law—(Continued).**—7.—Gift—(Concluded).**

donor's death. *Narayana Annavi v. Ramalinga Annavi*, 39 M. 587—86 Ind. Cas. 428.
SANKARAN NAIR and OLDFIELD, JJ.

- (3) *Hindu Law—Gift by male proprietor—Suit by donor's widow and daughter for possession—Compromise decree—Reversioner's claim to share allotted to daughter under compromise—Construction of compromise.*

P, a Hindu during his life-time gifted his property to his sister's sons R and C of whom R was married to his daughter K. After P's death, his widow and his daughter sued to recover his property, ignoring altogether the gift in favour of the nephews and setting up that R held the property merely as manager. The suit ended in a compromise under which the whole property was divided into 3 shares of which C was to take one absolutely, and R and K one each, both of which were to go after their deaths to their common children. After K's death the plaintiffs as reversioners claimed her 1/3 share on the allegation that it was held by her as a woman's estate.

Held, that in effecting the compromise the intention of the parties thereto was not that K should be allotted 1/3 of the property as heir of her deceased father, but that the property should be settled as to two-thirds upon R and his wife and their children, the result being that the two shares were ultimately settled upon the heirs of R by K, and that effect should be given to intention of the parties thus expressed in the absence of proof that the compromise decree was a fraud entered into to defeat the rights of reversioners. *Ramasami Naidu v. Gomathi*, 33 Ind. Cas. 521.

JOHN WALLIS, C.J. and PHILLIPS, J.

*References:—*33 A. 356 (P.C.)—38 I.A. 87, D.; 3 Agra H.C.R. 82, R.

- (4) *Gift—Joint family—Gift by one member in favour of another, validity of.*

It is not competent to a member of a Hindu family to make a gift of his share in the family property even to another member of the family. Such a gift would be inoperative, except as a surrender by the former of his entire interest in the family property in favour of the latter. *Bakhtawar Singh v. Ram Singh*, 36 Ind. Cas. 44.

STUART and KANHAIYA LAL, A.J.CS.

*Reference:—*16 A. 369, R.

(5) *Hindu Law—Husband and wife—Gift by husband in favour of wife—Direction that donee and her children shall enjoy with all rights (sarva swathanthratrudan)—Estate, extent of, taken by wife. Manicka Mudali v. Muthachi Goundan alias Nallanna Goundan*, 2 L.W. 887—18 M.L.T. 346—30 Ind. Cas. 635.
See Final Part, 1915, Col. 773.

(6) *Joint family—Gift by the managing member of one-tenth of the joint family properties to his daughters on the occasion of their marriage—Validity of the gift. In re Subba Nalcker*, 2 L.W. 754—30 Ind. Cas. 781. *See* Final Part, 1915, Col. 774.

Hindu Law—(Continued).**—8.—Guardianship.**

See GUARDIANS AND WARDS ACT.

- (1) *Hindu Law—Mother of infants charged with bad character and found to have expressed intention to become and make her boys Christian—Bad character not proved—Undertaking not to baptise children—Associating Hindu uncle in guardianship.*

D, the uncle of two fatherless Hindu boys aged 7 and 5 years respectively, applied to be appointed their guardian, alleging that their mother S, was a woman of bad moral character and had made up her mind to adopt the Christian religion and to get her sons baptised. The first allegation was not established.

Held—That the charge of immorality, though not proved, made it impossible for S to live with the family who made the charge and must be taken into consideration in passing orders on the petition.

That S's expressing a desire to become a Christian or even becoming one would in itself be no ground for removing her from the guardianship, provided she was in a position to satisfy the Court that she was able to carry out the obligations which the law imposed upon her of bringing up her children in the faith of her husband, whatever faith she herself might adopt.

It was proved that she had expressed her intention to convert her sons to Christianity but her counsel having given an undertaking that she would not baptise her children, the Court passed order appointing her guardian of the minors' person and property, associating in the guardianship, the uncle D, who would as such guardian be in a position to see that S's undertaking to bring up the children in the Hindu faith was properly carried out. The older boy was ordered to be placed at once as a boarder in a Hindu hostel which though attached to the Church Missionary Society was conducted in conformity with Hindu religious views, the younger boy being also ordered to be similarly placed when he should attain the age of 7 years until which time he was to live with S, liberty being given to D to apply to the District Judge whenever a breach of the undertaking was apprehended. *Dwijapadar Kar-makar v. Miss Balicau*, 20 C.W.N. 608—34 Ind. Cas. 632.

WOODROFFE and RICHARDSON, JJ.

- (3) *Father's power to appoint guardian for minor's person and property—Father's power where property is joint or trust property—Thirumaligais' and Athan Thirumaligais' whether private or trust properties—Will—Burden of proof—Ss. 7, 10, 39, Guardians and Wards Act (1890).*

A Hindu father has got the power to appoint by will a guardian of the person of his minor child (a).

As regards properties which survive to the minor son of a Hindu testator as ancestral family property on the death of the father, the father has no power to appoint a guardian,

Hindu Law—(Continued).**—8.—Guardianship—(Concluded).**

If the properties are the ancestral private properties of the testator, appointment by will of a guardian of such properties is invalid. If they are, however, properties dedicated to a religious trust, then no question of guardianship at all arises (b).

The properties belonging to the *Thirumaligais* and *Athan Thirumaligais* are private properties and not trust properties.

Whoever puts forward a will as genuine or supporting his contentions ought to prove it and cannot throw the burden of proving the negative on the opposite party (c). *K. P. Alagappa Iyengar v. Mangathal Ammanagar*, 30 M. L. J. 504 = 34 Ind. Cas. 766.

SADASIVA AIYAR and MOORE, J.J.

References:—(a) 22 M. L. J. 247, F.; (b) 21 Ind. Cas. 848, F.; 29 Ind. Cas. 475; 7 W. R. 74, R. (c) 38 M. 166 = 24 M. L. J. 577, F.; 28 Ind. Cas. 959, R.

(3) Minor whether can be manager of Hindu family or guardian of person or property of his minor wife or children. See GUARDIANS AND WARDS ACT, No. 12, 30 M. L. J. 21.

(4) See HINDU LAW—ALIENATION, No. 20, 10 S. L. R. 38.

—9.—Illegitimacy.

(1) *Inheritances—Illegitimate son—Sudras—Extent of share:*

Under Hindu law, among Sudras, an illegitimate son is entitled to inherit along with the legitimate daughter; and takes a share which is one-half of the share taken by the daughter, that is, one-third share in the whole property. *Gangabal Pirappa v. Bandu Pirappa*, 18 Bom. L. R. 70 = 32 Ind. Cas. 985 = 40 B. 369.

SCOTT, C.J. and SHAH, J.

(2) Right of illegitimate daughter to succeed as against legitimate daughter. See HINDU LAW (EXCLUSION FROM INHERITANCE), No. 1, 14 A. L. J. 11.

—10.—Impartible Estates.

(1) *Joint family—Succession to—Grant of confiscated property to one member—Effect of.*

The question of partibility or impartibility of an estate is a question of fact in each case. When the Government makes a grant of an estate, it can determine the nature of the grant, but, in the absence of specific terms in the grant, regard must be had to surrounding circumstances.

Where joint family property was confiscated and on reconstitution being made, the Government restored it by making a fresh grant to one of its members without any reference being made to the nature of that grant, held that the property so restored would be joint family property of the family.

The normal constitution of a Hindu family holding property whether partible or impartible is that of union. In the case of impartible *raj*,

Hindu Law—(Continued).**—10.—Impartible Estates—(Continued).**

however, the estate is enjoyed by the whole family through the occupant of the *gaddi*, but the junior members have no right to partition nor can they agree to separate. They get property for their maintenance.

Where the descendants of a junior member of an impartible *raj* partitioned the property given to their ancestor for maintenance, held that, even if they had a legal right to partition, it was not conclusive on the question whether the *raj* had ceased to be joint for the purpose of finding out a successor to the *gaddi*.

In this case by virtue of a custom the widow succeeded her husband to the *gaddi* of an impartible estate. On her death the dispute arose between the plaintiff who was descended from the senior branch of the family and the defendants who were nearer in blood to the late *raja*: Held, that the estate being joint and indivisible the plaintiff had a preferential right. *Baljnath Prasad Singh v. Tej Ball Singh*, 14 A. L. J. 919 = 38 A. 590.

RICHARDS, C.J. and RAFIQ, J.

(2) *Primogeniture, custom of, if excludes succession by widow, when holder of estate separated = Members living jointly with holder, if co-parceners — Separation, proof of—Partition, proof of, not available and unnecessary. Thakurani Tara Kumari v. Chaturbhuj Narayan Singh*, 19 C. W. N. 1119 = 18 M. L. T. 228 = 29 M. L. J. 371 = 2 L. W. 843 = (1915) M. W. N. 717 = 13 A. L. J. 1034 = 17 Bom. L. R. 1012 = 22 C. L. J. 498 = 42 C. 1179 = 30 Ind. Cas. 893 (P. C.). See Final Part, 1915, Col. 777.

(3) *Impartible estate — Right of a junior member to a maintenance—Based on co-parcenary or right by birth—The Pitapur Zemindari maintenance grant. Gangadhara Rama Row Bahadur v. Venkata Kumara Mahipathy*, (1915) M. W. N. 369 = 28 M. L. J. 624 = 29 Ind. Cas. 356 = 29 M. 326. See Final Part, 1915, Col. 777.

(4) *Custom, allegation as to, must be distinct and certain and must contain particulars — Issue as to custom must contain particulars—Pleadings in India, parties not to be pinned down to — Issue, ambiguity as to, can be raised at the earliest stage — Hindu Law—Joint family—Impartible Zamindari—Members living separately in different houses in the same compound, how far evidence of division—Separate possession and enjoyment of property and discontinuance of allowances by the Zamindar, if evidence partition—Inheritance—Succession to impartible Zamindari—Illegitimate son, widow and step brother of deceased, contest between—Preference—Separate property of Zamindar — Illegitimate son and widow, if share equally—Release by mother of Hindu minor—Consideration inadequate — No independent advice — Absence of dispute—Validity of release—Family settlement—Custom—Gandharva form of marriage is valid among Kambala caste—Whether an illegitimate son is not entitled to any share at all in his father's property in Kambala caste—*

Hindu Law—(Continued).**—10.—Impartible Estates—(Concluded).**

Illegitimate son, share of, whether one-third or one-half when dividing with widow. **T. B. K. Yiswanathaaswami Naiker v. Kamulu Ammal**, 2 L.W. 1214 = (1915) M.W.N. 968 = 30 M.L.J. 451 = 19 M.L.T. 296 = 31 Ind. Cas. 833. See Final Part, 1915, Col. 779.

—11.—Inheritance.

- (1) *Mitakshara—Benares school of law—Right of daughter of father's brother of last male owner to inherit in the absence of other heirs.*

According to the Benares school, females do not succeed to males unless their right of inheritance is expressly recognised by some text in their favour. Females whose right of inheritance is so recognised are (1) the widow; (2) the daughter; (3) the mother; (4) the father's mother, and (5) the father's father's mother.

Therefore, under the Mitakshara Law, the daughter of the uncle of the last male owner (an Arora) is not entitled, in the absence of all other heirs, to inherit the property. **Musammam Bibi Sodhan v. Harsa Singh**, 51 P. R. 1916 = 138 P.W.R. 1916 = 155 P.L.R. 1916 = 34 Ind. Cas. 585.

RATTIGAN, J.

References:—16 C. 367; 20 P.R. 1906; 28 A. 207, R.; 22 A. 338, Diss.

- (2) *Hindu law—Mitakshara—Succession—Mother's paternal aunt's son—Mother's sister's son's son—Preferential right of the former to succeed.*

Under the Mitakshara School of Hindu law, the mother's paternal aunt's son has, in the absence of gotrajas, a preferential right to succeed over the mother's sister's son's son of the propositus (a). **Adit Narayan Singh v. Mahabir Prasad Tewari**, 1 Pat. L.J. 324 = 35 Ind. Cas. 687.

CHAMIER, C.J., and JWALA PRASAD, J.

References:—(a) 42 C. 384; 12 M.L.A. 448; 28 B. 453; 19 M. 405; 9 Bom. L. R. 1129; 29 M. 115; 20 C.W.N. 1; 22 C. 339 and 6 C. 119, Ref. to.

- (3) *Mitakshara—Inheritance—Competition among heirs—Bandhus—Mother's sister's son and mother's brother's son, preference.*

Under the Hindu law, a mother's brother's son of a deceased Hindu is a preferential heir over a mother's sister's son. **Ram Charan Lal v. Rahim Bux**, 14 A.L.J. 538 = 38 A. 416 = 34 Ind. Cas. 108.

BANERJI and PIGGOTT, JJ.

- (4) *Hindu law—Succession—Grandfather's daughter's daughter's son—Bandhu—Ex parte paterna.*

A grandfather's daughter's daughter's son is a Bandhu ex parte paterna. **Mukha v. Qabza**, 31 Ind. Cas. 553.

RICHARDS, C.J. and BANERJEE, J.

- (5) *Hindu law—Succession as last male owner's heirs ab intestatio—Burden of proof—Objection to secondary evidence of*

Hindu Law—(Continued).**—11.—Inheritance—(Continued).**

registered will admitted without demur—Whether can be taken in appeal.

In a claim to succeed under the Hindu law to the property as the last male owner's heirs ab intestatio the burden of proving the allegation with respect to the relationship lay on the plaintiffs.

When secondary evidence of a registered will was admitted in the lower Court without demur, objection to the admissibility of the same could not be taken in appeal. **Hardeo Ram v. Parbati**, 31 Ind. Cas. 600.

SHADI LAL and SCOTT-SMITH, JJ.

- (6) *Hindu Law—Daughter's estate—Partition of mother's estate amongst daughters—Alienation by sons of one daughter—Death of daughter—Suit by surviving daughter against alienees not maintainable.*

Where two or more daughters succeed to their mother's estate, the interest which they take is a joint interest which in the absence of agreement between themselves, would devolve on the survivors on the death of any one of them, and their sons would not take as their heirs, but as the heirs of their grandmother.

A mother died leaving three daughters, and they instead of remaining in joint possession, each of them took one-third of the property. Each of them had sons and each of them got their sons' names recorded in respect of the one-third which they took. The sons of one daughter transferred their one-third share. On the death of their mother, the remaining daughter (the other daughter having died long ago) sued the transferees to recover possession of one-third share.

Held that the only possible inference that could be drawn from the above circumstances was that the ladies had agreed to divide up the property amongst them in such a way as to bind all three; and that as the three daughters were all bound by what they did the last surviving daughter was not entitled to sue for her deceased sister's share. **Baldeo Prasad v. Musammam Bhagwanti**, 33 Ind. Cas. 259.

RICHARDS, C.J. and RAFIQUE, J.

- (7) *Hindu Law—Mitakshara—Succession—Paternal grandfather's daughter's son's son—Whether heir.*

The paternal grandfather's daughter's son's son, being removed from the propositus only in the fifth degree is a rightful heir entitled to succeed under the Mitakshara Law (a).

Although the position of a bandhu in Mitakshara Law is based on consanguinity, it must still be supported by a right to offer oblations to a common ancestor (b). **Harilal Charan v. Jang Bahadur**, 34 Ind. Cas. 183.

SHARFUDDIN and ROSE, JJ.

References:—(a) 22 C. 339, R. (b) 57 A. 404 = 42 L.A. 208, R.

- (8) *Sudras—Adopted son's share in competition with subsequently born aurasa son—Authority of Viruddha Gautama and Dattaka Chandrika—Partition decrees—Provision or marriage*

Hindu Law—(Continued).**—11.—Inheritance—(Concluded).**

expenses. **Karuturi Gopalan v. Karuturi Venkataraghavalu**, 29 M.L.J. 710=31 Ind. Cas. 574. See Final Part, 1915, Col. 780.

(9) *Illegitimate son of a Sudra—Born of a continuously and exclusively kept, dancing girl—Whether entitled to succeed to joint family property.* **Soundararajan v. Arunachalam Chetty**, 29 M.L.J. 793=18 M.L.T. 552=2 L.W. 1247=(1916) M.W.N. 31=39 M. 136=33 Ind. Cas. 858 (F.B.). See Final Part, 1915, Col. 780.

(10) See CUSTOMS (PUNJAB—SUCCESSION), No. 3, 143 P.W.R. 1916.

(11) *Memens of Cutch—Settlement in East Africa—Law applicable—Emigration—Domicile—Presumption.* See CUTCH MEMENS, No. 1, 20 C.W.N. 362.

(12) *Alienation by mother of last male-holder—Right of half sister to succeed or to object to alienation.* See HINDU LAW (ALIENATION), No. 3, 27 P.W.R. 1916.

(13) *Sudras—Illegitimate sons—Extent of share.* See HINDU LAW (ILLEGITIMACY), No. 1, 18 Bom. L.R. 70.

—12.—Joint Family.

See HINDU LAW (ALIENATION).

See HINDU LAW (DEEDS).

See HINDU LAW (PARTITION).

(1) *Parties—Joint Hindu family—Mitakshara—Bond in favour of three members—Death of one—Suit by survivors maintainable.*

A registered money-bond was executed in favour of three members of a joint Hindu family governed by the Mitakshara. One of the obligees died. A suit was brought on foot of the bond by the two survivors and the brothers of the deceased. The suit was dismissed because the other members of the family had not been impleaded and it was too late to implead them:

Held, that the suit ought not to have been dismissed, because, if the members of a joint family allowed three members to represent them and one died, the survivors continued to represent them. **Ram Kishore v. Parmeari**, 14 A.L.J. 255=33 Ind. Cas. 123.

RICHARDS, C.J., and RAFIQ, J.

(2) *Co-parcenary—Conversion to Islam—Effect—Suit by convert for his share of co-parcenary property after separation—Limitation—Date of separation—Onus of proof—Claim for share in ancestral property—Limitation Act (1908), Arts. 142, 127.*

X, a Khatri, had three sons G, B and K. G had two sons, R and M, the present plaintiff. B died childless. K had two daughters H and D, of whom H had a son S. K who survived G and B died in 1903 and left considerable property of which a small portion was ancestral property. M who, during the lifetime of K, became a convert to Islam, instituted in 1911 the present suit for the possession of the entire

Hindu Law—(Continued).**—12.—Joint Family—(Continued).**

property left by K, on the footing that he was joint in estate with K, and that after K's death he was entitled to take the whole property by survivorship.

Held, that the plaintiff embraced Islam ten or eleven years before the institution of the suit and that the effect of his conversion was *ipso facto* to separate him from the co-parcenary (a).

As by reason of his conversion to Islam he was not a member of the joint Hindu family at the time when the suit was instituted, it was for him to prove that the separation had not taken place more than 12 years before the suit was instituted (b).

Held, that the plaintiff failed to prove that his suit for a share of co-parcenary property on separation was within time under Art. 142 of the Limitation Act.

Held also, that all that the plaintiff was entitled to was a share in the ancestral property.

The presumption as regards ancestral property is that his title continued until it was extinguished by some overt act of adverse possession. **Ganga Singh v. Mussammat Begam**, 57 P.R. 1916=159 P.W.R. 1916=1 P.L.R. 1917=25 Ind. Cas. 543.

SHADI LAL and LESLIE-JONES, JJ.

References:—(a) 25 A. 546, 573, *Rel. on.* (b) 18 A. 90, R.

(3) *Crim. Pro. Code, S. 88—Absconding offender, a member of a joint Hindu family—Attachment of undivided interest—Effect—Right of Government—After-born sons whether entitled to shares.*

By attachment under S. 88 of the Crim. Pro. Code of the undivided interest in the joint family property of an absconding member, the Government does not acquire any title to the property but is entitled only to the income thereof. The right of the Government cannot be higher than that of the absconder and therefore the after-born sons of the absconder are entitled to their shares in the property so attached. **Secretary of State v. Rangasawmy Aiyangar**, 20 M.L.T. 60=4 L.W. 21=31 M.L.J. 120=(1916) 2 M.W.N. 90=17 Cr. L.J. 296=35 Ind. Cas. 162.

SESHAGIRI IYER and SRINIVASA IYENGAR, JJ.

(4) *Crim. Pro. Code, S. 88—Absconding offender—Hindu co-parcener—Joint family property—Attachment of a share.*

The undivided interest of an absconding person who is a member of an undivided Hindu family in the family property or any portion thereof can be attached under S. 88 of the Code of Criminal Procedure. The share attached will be subject to the rights of the other members of the family and may be realized by a Receiver in a suit for partition or otherwise. **Secretary of State v. Rangasawmy Aiyangar**, 20 M.L.T. 58=4 L.W. 21=31 M.L.J. 84

Hindu Law—(Continued).**—12.—Joint Family—(Continued).**

= (1916) 2 M.W.N. 88 = 17 Cr. L.J. 296 = 39 M. 891 = 95 Ind. Cas. 168 (F.B.).

WALLIS, C.J., KUMARASWAMI SASTRI and PHILLIPS, J.J.

(5) *Mitakshara family—Trespass on family waste lands — Power of manager to sue — Law governing suits under Bengal Tenancy Act.*

The head of a *Mitakshara* family is competent, in respect of all contracts which it is open to him to make on behalf of the family, to sue as managing member of the family (a).

So also in a case of trespass upon the waste lands of the family, the head of the family should be permitted to represent the whole family.

Quere—Whether suits under the Bengal Tenancy Act are to be excluded from the above general rule. *Mohammad Sadik v. Khedani Lal*, 1 Pat. L.J. 154 = 36 Ind. Cas. 197.

SHARFUDDIN and ROE, JJ.

References:—(a) 33 A. 272 F.; 16 C.L.J. 427, R.

(6) *Hindu Law—Mitakshara property acquired by person receiving special training by the help of the joint property is part of that property—Initial presumption that a member has received such help—Indian Evidence Act (I of 1872), S. 114—Joint family and separate property of member defined—Party not coming into witness-box—Its effect—Extent of liability of each member for the family debt—Extent of a minor co-parcener—What is family credit—What is joint family property can be left for determination of Executive Court—Effect of previous decision not inter partes—Res judicata—Rulings of the Special Bench.*

In a case where a member of a joint Hindu family has received a special training to qualify himself for a profession or for the service of a State, there is an initial presumption in the absence of all evidence on the point, that he received his training at the expense of the joint family property; it is not necessary to allege and prove this fact like any other fact in the case and the onus of rebutting this presumption lies heavily upon such member and if no evidence is given on either side, the fact should be found in the affirmative (a).

Per Shah Din and Le Rossignol, JJ.—The property acquired by such member becomes part and parcel of the joint family property (b).

2. *Per M. Shah Din, J.* (24th March, 1916).—The income of a member of a joint family is his separate property if it has been obtained—(1) by his own exertions and (2) without the aid of the joint family property (c).

3. *Per Le Rossignol, J.*—(17th March 1916).—It is most significant circumstance when a party does not go into the witness-box to deny the allegation made against him.

Hindu Law—(Continued).**—12.—Joint Family—(Continued).**

4. *Per M. Shah Din, J.* (24th March, 1916).—Where nothing affecting materially the interest of a party has been said there is no need for him to come in the witness-box to give any explanation and therefore no adverse reference can be drawn against him (d).

6. *Per M. Shah Din and Le Rossignol, JJ.*—Where a Hindu father and his sons constitute a joint Hindu family and are jointly carrying ancestral trade or business they are all liable to pay the amount due on the *hundis* executed in liquidation of debt incurred, whilst the family business was in an active condition, for the purpose of that business, to the extent of their share in the whole joint family property but not personally.

The fact that one of the sons has become an Indian Civilian and the other a pleader and consequently they have quitted their paternal home is immaterial as such cessor of commensality is a mere accident.

7. *Per M. Shah Din and Le Rossignol, JJ.*—A minor co-parcener in a joint Hindu family carrying on an ancestral business is liable during his minority only to the extent of his interest in the joint family property, and, on reaching majority, he may sever his connection with the joint family and partition his net share, i.e., after deducting the joint family debt and thereafter be free from all liability in respect of the family he has quitted; should he however elect to remain in the family he impliedly undertakes responsibility for future family debts, but, except in cases where he is an actual contracting party, his liability is confined to his share in the joint estate—unlike a contractual partner he will incur no personal liability (e).

8. The family credit which the manager is entitled to pledge is the credit not of the members but that of the family as a quasi corporate body (f).

9. What is joint family property is a matter which can be left for decision in execution, but where the point has been considered by the 1st Court it is necessary for the appellate Court to determine the principle involved.

Accretions to joint property due to the employment of joint funds are joint property.

10. *Per Shah Din, J.*—The decision in a previous case is neither *res judicata* nor relevant in a subsequent suit in which the parties are not the same.

So the finding by the Chief Court in *re Amar Nath v. Gurdas Mal* reported as 63 P.W.R. 1914 to the effect that the present appellants were not partners in their family firm, known as Nagar Mal Joti Mal and consequently were not liable on the *hundis* then in dispute is not relevant as the present plaintiff has no party to it.

11. A member of a joint Hindu family becomes personally liable, where he either enters into the contract himself or subsequently duly ratifies or adopts it. *Gokalchand v. Hukam*

Hindu Law—(Continued).**—12.—Joint Family—(Continued).**

Chand, 109 P.W.R. 1916=164 P.L.R. 1916=34 Ind. Cas. 714.

RATTIGAN, SHAH DIN and LE ROSSIGNOL, JJ.

References:—(a) 29 A. 224 at pp. 254, 255 (P.C.), F. (b) 1 M. 252; X. S. Weekly Reporter, 122; 2 M.H.C.R. 56; 7 M.H.C.R. 47 at p. 51. R.: 7 M.H.C.R. 47 at p. 50, R. (c) C.A. No. 145 of 1900; 6 B. 225; 15 B. 32; 20 A. 435; 32 A. 305, R. (d) 31 A. 116 at p. 122, Expl. (e) 1 B.H.C.R. App. 51; 21 M. 166; 29 A. 176, Rel. upon; 59 P.R. 1993, D. (f) 22 M. 166, F.; 1 C. 470, R.

(7) *Presumption as to the time of separation, where separation admitted—Evidence Act, S 90—Ancient documents, discretion of Court in presuming genuineness of.*

S. 90 of the Evidence Act leaves it to the discretion of the Court whether or not in certain circumstances it will make the presumption there contemplated.

Where the original is not said to have been lost or to have been missing or to be in the custody of any person who declined to produce it and only a copy of it is produced, it would not be wise to raise a presumption regarding such original.

When certain members of a joint Hindu family bring a suit for possession of certain property—as belonging to that joint family—and allege, in their plaint, a separation some years prior to the date of the suit, there is no presumption remaining: but the family remained joint up to any particular time; and it is for such plaintiffs to prove separation at such a period in the family history as would entitle them to the decree sought. *Tika v. Mahabir Prasad*, 19 O.C. 92=36 Ind. Cas. 629.

KANHAIYA LAL and KENDALL, JJ.

(8) *Manager, powers of—Transfer made in order to acquire property on advantageous terms, whether binding on minor members.*

There is nothing in the Hindu Law to prevent the head and manager of a joint family comprising only minor members, from doing anything in the interests of the family which any other prudent manager may have done under similar circumstances. It would be in the highest degree deleterious to the interests of such minor members if the head and managing member of the family were restrained from doing anything, however beneficial to their interest, which necessitated the raising of a loan on the security of the ancestral property till the minors attained majority.

Held further, that a transfer made in the interests of the family, that is to enlarge the means of its subsistence might thus be as binding as one made to pay antecedent debts or to meet an immediate necessity.

Where the father acting as manager mortgaged ancestral property in order to acquire by pre-emption on advantageous terms property belonging to a distant branch of the family, *held*, that the transfer was binding on the

Hindu Law—(Continued).**—12.—Joint Family—(Continued).**

minor sons. *Muneshar Bakhsh Singh v. Arjun Singh*, 19 O.C. 100=34 Ind. Cas. 738.

STUART and PANDIT KANHAIYA LAL, J. CS.

(9) *Hindu Law—Joint Hindu family—Money borrowed for marriage of daughter of a deceased member—Family necessity.*

Held, that in a joint Hindu family of *Thakurs* governed by the *Mitakshara* Law money raised to meet the expenses of the marriage of a daughter of a deceased member to whose property the remaining male members had succeeded by survivorship must be held to be money borrowed for family necessity (a). *Ganga Bakhsh Singh v. Ahbaran Singh*, 19 O. C. 113=33 Ind. Cas. 601.

STUART, A.J.C.

Reference:—26 M. 505, *Not Appl. & Dist.*

(10) *Hindu Law—Joint Hindu family—Mortgage by a member at a high rate of interest, power of Court to vary the rate—Creditor's duty to establish family necessity justifying the high rate—Second appeal.*

In cases of mortgages of the family property by a member of a joint Hindu family, the Court not only has a discretion but is under an obligation to vary the rate of interest if the creditors fail to establish that the necessity of the family justified the high rate of interest agreed to and entered in the deed.

To a certain extent the fixing of the rate must remain within the Court's discretion but the decision on the point can be challenged in second appeal. *Sarabjit Singh v. Gur Bakhsh Singh*, 19 O.C. 159=36 Ind. Cas. 916.

STUART, J.C.

(11) *Suit by manager—Want of necessary parties—Dismissal.*

Where there is an agent appointed to enter into contracts on behalf of the *Mitakshara* family, it is only proper that that agent should be regarded as representing the family in all suits brought to enforce the contract.

Where a contract has been entered into by one *karta*, the succeeding *karta*, upon the death of the maker of the contract, would be entitled to represent the whole family in a suit upon the contract (a).

But if it is intended to sue in the name of a managing member of a family on account of a breach of contract made by a former managing member, it must be clearly stated in the plaint that the suit is by that managing member as a managing member. The name of the present managing member must be clearly given. It is not sufficient that he should be accidentally on the record as one out of the many members of the family of whom several persons had been omitted.

If a plaintiff proceeds to trial to recover property which is the joint property of two or more persons, and he omits to join all proper and necessary parties and if when the case comes to trial the rights of those parties who ought to

Hindu Law—(Continued).**—12.—Joint Family—(Continued).**

be added as parties to the suit are barred by limitation, then the Court has no alternative but to dismiss the application for want of proper or defective joinder of parties..

Any subsequent joinder of parties could not cure the defect underlying the plaint. *Girwar Narain Mahton v. Musammatt Makbunessa*, 1 Pat. L.J. 468=36 Ind. Cas. 542.

ROE and JWALA PRASAD, JJ.

References:—(a) 33 A. 272, F.

(12) *Joint family consisting of father and 3 sons—Suit by father and one son to recover debt due to the family—Father alone agreeing to be bound by oath of defendant—Son withdrawing suit with liberty to bring fresh suit—Fresh suit by the three sons for ½ of the debt—Maintainability—Co-parcener's power of alienation in the Central Provinces.*

The joint family in this case consisted of the father and three adult sons. The first suit was brought by the father and one son B only to recover a grain debt, due to the family. When the suit came for trial, the father was willing to be bound by the oath of the defendant, but the son B was not willing and obtained permission to withdraw the suit with permission to bring a fresh suit. The suit as brought by the father was dismissed. B and his two brothers now brought a fresh suit on the same cause of action. *Held* that the parties were exactly in the same position as if all the four members of the family had brought one suit together and the father consented to be bound by the oath of the defendant, while the sons did not, and that the sons were therefore entitled to a decree for their ½ share in the total claim.

When a Hindu father, a member of a joint family, sues or is sued, it is to be presumed that he sues or is sued in his representative capacity, (a) but in the present case, the father was not the sole plaintiff in the first suit, and there was not, in the circumstances of the case, any presumption that he was suing as manager on behalf of the family.

Under the Mitakshara Law as interpreted in the Central Provinces, a member of a joint family can alienate his share without the consent of the other members. *Rameshwar v. Bhanglial*, 12 N.L.R. 45=32 Ind. Cas. 996.

BATTEN, A.J.C.

References:—(a) 12 M. 483; 27 C. 229; 5 N. L.R. 181; 33 A. 272; 36 A. 383, R.

(13) *Mitakshara—Joint family—Will executed by father—Separation—Debt contracted during minority—Ratification—Liability of minor.*

B died leaving him surviving three sons K, G and H. B executed a will in which he directed that his three sons should live jointly, but should any disagreement arise, then K, the eldest son, would have to give to his two minor brothers Rs.50 each per month for their support, and upon their attaining majority they would get Rs.50,000 in cash and some landed property. The residue of the testator's property was given

Hindu Law—(Continued).**—12.—Joint Family—(Continued).**

to the eldest son including bonds connected with money lending business, and he was to be liable for the debts. In 1904 while both G and H were minors K paid over Rs. 20,600, and gave to his brothers the property to which they were entitled under the will, and in that year the business styled "Baldeo Das Gulab Chand" was started. G attained majority in or about 1905, and H not till 1912. This firm was started, with the money got from K, G executed the *hundis* in suit in 1910, on behalf of the firm. H contended in the suit that he was not personally liable, the *hundis* having been executed and the debts, if any, incurred whilst he was a minor: *Held*, that the liability having been incurred whilst H was a minor, he was not, under the circumstances of the case, liable to the plaintiff.

Semble, the only separation that could have taken place would be on the basis that the three brothers had agreed to accept the division made by their father, that is to accept the will, but inasmuch as such an arrangement involved a contract there could be none such, a minor being prohibited from contracting by the express provision of law. *Har Bilas v. Shankar Lal*, 14 A.L.J. 521=36 Ind. Cas. 402. RICHARDS, C.J. and RAFTQ, J.

• (14) *Partition—Alienations by members of portions of joint family property, effect of—Joint family, disruption of.*

Held that, the fact that for years past the various members of a joint Hindu family have been repeatedly alienating various portions or shares of the family property as their own, is enough to show that a disruption of the joint Hindu family has taken place, although there has been no regular partition of the estate by metes and bounds. *Mathra Das v. Gopal Das*, 63 P.W.R. 1916=33 Ind. Cas. 526.

SEAH DIN and CHEVIS, JJ.

(15) *Hindu Law—Mitakshara—Joint family—Charge created by one member, whether it binds the family property after his death—Whether share of son born subsequently to creation of the charge is bound—Limitation Act (IX of 1909), Arts. 120 and 132—Principal and surety—Debt barred by limitation against principal, whether surety liable.*

Where a Mitakshara father has purported to create, for a purpose not connected with the family, a charge upon the property of a joint family of which he was the head, that charge cannot be enforced after the death of the father against a son born into the joint family subsequently to the transaction (a).

One co-parcener has no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family estate, in order to raise money on his own account and not for the benefit of the family (b).

One member of a joint family cannot deal with his share in the property of the joint family so as to create a charge which will

Hindu Law—(Continued).**—12.—Joint Family—(Continued).**

survive him. **Jwala Prasad v. Maharajah Protap Udal Nath Sahi Deo**, 1 Pat. L.J. 497.

ROE and JWAHA PRASAD, JJ.

References:—(a) 24 A. 501; 5 B. 647; 28 B. 248; 12 C. 230; 33 M. 408; 3 B.L.R. (F.B.) 31; 3 C. 198; 5 C. 148, R. (b) 3 B.L.R. (F.B.) 31, R.

(16) Joint family property—Self-acquisition.

Under the Hindu law co-parcenary property falls into three classes. (1) Ancestral property i.e., property which a man inherits from a direct male ancestor. (2) Property acquired by the members of a joint family by or with the assistance of joint funds or by their joint labour and (3) self-acquired property voluntarily thrown by the owner into the joint-stock with the intention of abandoning all separate claims upon it. The member of a joint Hindu family, who alleges that a particular property is joint family property, must show that it falls within one or other of these three categories. Very strong evidence would be needed to make out a case of the third kind. A father's self-acquired property cannot become the joint family property of himself and his sons, simply because the sons had been living with him. In the absence of proof that self-acquired property has been voluntarily thrown into the joint stock it cannot be said to have accreted to the nucleus of joint family property formed by the ancestral property obtained subsequent to the self-acquired property. **Narenar Bahadur Singh v. Abdul Haq**, 30 Ind. Cas. 26.

LINDSAY, J.C., and KANIYAIYA LAL, A.J.C.

(17) Mortgage by one member—Liability of survivors on death of that member.

Where a member of joint Hindu family mortgages the joint family property, the mortgagee cannot get a mortgage decree for sale against the surviving members on the death of the mortgagor, unless the mortgagee proves that the money was borrowed for purposes which are binding on the joint family. Nor can a personal decree against the surviving members be passed, as such a decree would amount to giving the mortgagee indirectly what he cannot obtain directly. **Ram Nath v. Mahadeo Prasad**, 30 Ind. Cas. 382.

LINDSAY, J.C.

(18) Property acquired by a member without aid of ancestral or joint family funds, nature of.

Property acquired by a member of a joint Hindu family without the aid of ancestral or joint family funds, in the absence of any indication of intention to the contrary is joint family property. But it is open to the person so acquiring to show that the property was treated as his separate property. **Muthan v. Puniakoti Mudallar**, 31 Ind. Cas. 18.

AYLING and TYABJI, JJ.

References:—25 M. 119; 27 M. 32; 34 M. 211; 12 M.L.T. 240, F.

(19) Charity—Management—Agreement—his Construction.**Hindu Law—(Continued).****—12.—Joint Family—(Continued).**

The language of the agreement in this case between the members of a joint Hindu family, which directed division and indicated that certain charities should be managed by the head of the family in each branch for the time being, was held to clearly point to the intention that the management should be in the hands of the male heads and not in the hands of females. **Krishnaswami Pillai v. Mookayi Ammal**, 31 Ind. Cas. 35.

WATILIS, C.J., and SRINIVASA AIYANGAR, J.

(20) Promissory note by some members for family purpose—All members liable.

If some members belonging to an undivided Hindu family, for family purpose, execute a promissory note and borrow, all the members of the joint family are liable. It is a liability imposed on them by the Hindu law apart from the contract entered into by the other members. (a) **Chinniah Chetty v. Tikkan Ramaswamy Chetty**, 31 Ind. Cas. 317.

SRINIVASA AIYANGAR, J.

Reference:—(a) 23 M. 597, F.

(21) Partition—Agreement among members not a partition—How far binding.

A compromise whereby a Hindu widow bound herself to enjoy (jmal) possession of the family property with the sons and grandsons of her deceased husband's brother and not to ask for partition is binding upon her, if no equitable ground has been made out by her for not giving effect to the agreement (a).

An agreement between the members of a Hindu family not to come to a partition might be binding upon themselves. **Chalta Dassya v. Madan Chandra Das Sarkar**, 33 Ind. Cas. 33.

N.R. CHATTERJEA and RICHARDSON, JJ.

Reference:—(a) 12 C.W.N. 793, R.

(22) Debt—Alienation of property by some members—Legal necessity—Consent of co-parceners—Onus of proof.

A debt contracted by a member of an undivided Hindu family cannot be presumed to have been incurred for a family necessity: it is for the creditor to establish the point by evidence. The fact that a long period having elapsed it would be difficult for the creditor to adduce evidence on the point would in no way relieve him of the obligation to do so. Similarly there is no presumption that a transfer of family property by some of the co-parceners was assented to by the other co-parceners. **Bishwanatha Singh v. Rampal Singh**, 33 Ind. Cas. 778.

STUART, A.J.C.

(23) Mitakshara—Decree against father—Suit by sons to set aside execution against ancestral estate—Onus of proof as to nature of debt—Property in hands of a member—Presumption—Property taken by sons under their father's will, nature of.

Where a decree obtained against a member of joint family under the Mitakshara law for a

Hindu Law—(Continued).**—12.—Joint Family—(Continued).**

debt contracted by him is executed against the ancestral estate, the judgment-debtor's sons cannot sue to set aside the execution unless they prove that the debt was contracted for immoral purposes (a).

There is no presumption that property belonging to a member of a joint Hindu family is necessarily joint ancestral property, and the onus of proving that it is ancestral lies upon the person who alleges it to be ancestral (b).

Where a will by which a Hindu father disposes of property in favour of his sons is assented to by them, and its terms show clearly that the testator did not intend that the property should be held subject to the incidents of survivorship, the property taken by the sons under the will must be regarded as their self-acquired property (c). **Jadunath Singh v. Bhabhuti Prasad**, 23 Ind. Cas. 755.

STUART, A.J.C.

References:—(a) 15 C. 717 (P.C.) = 15 I.A. 99; 17 O.C. 218 = 1 O.L.J. 503 = 25 Ind. Cas. 917, R. (b) and (c) 14 O.C. 244 = 12 Ind. Cas. 770, F.

(24) *Mortgagee — Assignment of mortgage rights by heirs of mortgagee—Suit for foreclosure by assignee — Maintainability—Assignment by adult member—If lending on his minor brother—Debt incurred for benefit of family.*

A mortgage had been effected in favour of a member of a joint family. After his death, his rights descended to his widow, two nephews and his brother's widow. The period of limitation for a suit on the mortgage which was held by this joint family was about to expire. The widows and one nephew who was an adult, the other being a minor, assigned their rights under the mortgage by registered deed for the best sum they could obtain, in order to clear off the debt which had been incurred in the name of the adult member and the two widows, and which had been expended on purposes which were for the benefit of the family. The adult member did not in the deed purport to act as family manager on behalf of his minor brother. The assignees sued the representatives of the mortgagor for foreclosure. *Held* that they were entitled to a foreclosure decree; and that the adult nephew, in executing the deed of assignment, was acting as *karta* on behalf of the joint family; and that the assignment was justified by legal necessity which was binding upon the minor although he was no party to the deed. **Rukmi Kuar v. Ashiq Hussain**, 34 Ind. Cas. 3.

LINDSAY, J.C.

(25) *Hindu Law—Mitakshara—Joint family—Father—His powers of alienation of co-parcenary property—His powers larger than those of an ordinary manager.*

Although according to the Mitakshara system of law, the father takes no greater interest than that of a son in co-parcenary property, he can pay his personal debts out of the income of such

Hindu Law—(Continued).**—12.—Joint Family—(Continued).**

property and bind his son and grandson, whether they be minors or adults by a charge or make alienation of the co-parcenary estate or any portion thereof for the purpose of paying such of his debts which he has incurred before the date of such charge or alienation, provided that such debts have not been incurred for an illegal or immoral purpose or consideration. Once the property has been alienated out of the family, the son or the grandson can only recover possession by proving that the particular debt for the discharge of which the property was alienated was contracted for an illegal or immoral purpose.

The father in the joint Hindu family, although he may be the manager has the power of alienating the joint family property for the purpose of satisfying an antecedent debt contracted by himself, provided only that the debt is not tainted with illegality or immorality. **Jugal Kishore v. Raghubar Singh**, 34 Ind. Cas. 69.

LINDSAY, J.C.

(26) *Mortgage by father—Suit against sons—Legal necessity—Burden of proof—Practice—Amendment of plaint—When allowed.*

Where a mortgagee of joint family properties from the father in a joint Hindu family sued the sons to recover the amount thereof by sale of the mortgaged properties, and the sons pleaded that the mortgage was not valid and binding on them as there was no necessity therefor.

Held, that the burden was on the mortgagee to prove either that the debt was borrowed for a legal necessity and is therefore binding on the joint family property or to show at any rate, that he made some enquiries with the object of satisfying himself that the money was being taken for purposes considered legally binding (a).

Where the relief claimed in the plaint was only for a decree for sale on the basis of the mortgage and the suit was tried in the Court of first instance on the basis alone, *held* that the plaintiff should not be allowed to amend his plaint, in the appellate Court by adding a prayer in the alternative for a simple money decree against the defendant in case the sums borrowed under the mortgage deed was not proved to have been for legal necessity especially when the defendants had asserted that the moneys, if any, were borrowed by the father for his immoral purposes and no issue regarding it had been raised and decided upon in the lower Court. **Budhan Lal v. Jagan Nath**, 34 Ind. Cas. 757.

LINDSAY, J.C.

References:—(a) 12 Ind. Cas. 347 = 14 O.C. 299, R.

(27) *Ancient grant in favour of one member of the family—Presumption—Ejectment, suit in—Burden of proof—Waiver as proof of title.*

The presumption is that all ancient grants are made for the benefit of the joint family and

Hindu Law—(Continued).**—12—Joint Family—(Continued).**

not for the benefit of the individual member thereof in whose name they stand.

In a suit for ejectment before the plaintiff can succeed he must strictly prove his own title and no title can be acquired against a third party by a waiver not binding on that party and still less can it be acquired by a waiver which to the knowledge of the Court is a false waiver. **Durga Bai v. Sobha Singh**, 31 Ind. Cas. 327.

ROE and JWALA PRASAD, JJ.
Reference:—9 W.R. 558, R.

(28) *Discretion exercisable by manager—Building of a residential home whether a legal necessity.*

A certain discretion must be allowed to the manager of a joint Hindu family. He is expected to deal with the family property as a reasonable person would deal with his own. *Held* under the circumstances that the construction of a residential home was a legal necessity. **Ram Singh v. Narain Lal**, 35 Ind. Cas. 326.

PIGGOT and LINDSAY, JJ.

(29) *Earnings of two brothers, nature of—Appeal (second appeal)—Findings of fact unsupported by evidence.*

Where two brothers of a Mitakshara family coming to Calcutta worked as coolies and out of money so earned by them purchased a hut, such circumstance does not legally warrant the conclusion that the hut was purchased from the joint family funds, in the absence of evidence that the money earned by them was ever put into a common stock or treated as money belonging to the two brothers representing a joint Hindu family. **Moti Bouli v. Bhagawan Mlari**, 35 Ind. Cas. 655.

FLETCHER and TRUNON, JJ.

(30) *Separation—Burden of proof—Allowance to mother by sons—Ease by all members—Family custom, proof of—Widow—Maintenance in joint family—Encumbered property inherited—Paying off encumbrance from joint funds—Effect—Survivorship in regard to property inherited collaterally—Evidence Act (I of 1872), S. 145—Discrepancies in witnesses' statement—Judgment, value as authority.*

Per Stuart, A.J.C.—Where it is admitted that the members of a Hindu family were joint, the burden of proving separation is on those who allege it. Sons in a joint Hindu family may well give their mother a small separate allowance from the joint family funds for her private expenses to be expended on religious purposes. This circumstance does not lead to the inference that the members had separated.

The fact that a cert. in lease was executed by all the members of the family does not prove that the family is divided. Very strong and cogent evidence should be produced to prove a family custom to the effect that a widow succeeds to the property of her husband even though he is a member of a joint Hindu family.

Hindu Law—(Continued).**—12.—Joint Family—(Continued).***

Where the plaintiff claims the property of his deceased brother by right of survivorship on the ground that he and the deceased were members of a joint Hindu family and the deceased's widow pleads separation between the two brothers and contends that, in case the Court finds that the brothers were undivided, her claim for maintenance should be fixed, the Court need not fix her maintenance if it finds that the family was joint.

Where a joint Hindu family inherits an encumbered property from a collateral, the paying off of the encumbrance out of joint family funds does not show that the property was acquired from such funds.

From the mere fact that a member of a joint family as *lambardar* managed the property, it cannot be inferred whether the property was or was not treated as joint family property.

If the property has been inherited by members of a joint Hindu family, if it could have been partitioned among them at the time that it was inherited, the rule of survivorship applies. It is not material whether such property came by obstructed inheritance or by unobstructed inheritance (a).

Per Kanhaiya Lal, A.J.C.—Where a Court finds certain discrepancies between a witness's statement made before it and that previously made before another Court, the witness should be asked to explain them as required by S. 145 of the Evidence Act (b).

The payment of a joint liability out of joint funds would not make the property on which that debt is charged a joint acquisition.

Although the rule of survivorship governs property inherited by undivided brothers from their maternal grandfather and which can be treated as ancestral or joint family property, that rule cannot be extended to cases of collateral succession, because the property inherited from separated collaterals cannot be treated as ancestral or joint family property. Unless the property comes by descent from a lineal ancestor in the male line, it cannot be deemed ancestral or joint family property. There is no distinction in principle between separately acquired property and property separately inherited by two or more members of a joint family. The distinction between ancestral and self-acquired property on the one hand and self-acquired and separate property on the other is well marked, and the authorities in India are agreed that the property inherited from collaterals follows the incidents of self-acquired property (c).

A judgment is an authority for what it decides, but not for what may seem logically to follow from it (d). **Suraj Bakhsh v. Sukhdal**, 32 Ind. Cas. 291.

STUART and KANHAIYA LAL, A.J.CS.

References:—(a) 17 C. 33; 9 M.I.A. 539=2 W.R.P.C. 31; 19 M. 70; 25 M. 678=29 I.A. 156 (P.C.)=7 C.W.N. 1=12 M.L.J. 290; 27 M. 300=13 M.L.J. 398; A.W.N. (1907) 211=4 A.L.J. 582=29 A. 667; 1 Ind. Cas. 750

Hindu Law—(Continued).**—12.—Joint Family—(Continued).**

=39 M. 88=5 M.L.T. 74; 9 Bom. L.R. 1293, *R. and discussed.* (b) 29 Ind. Cas. 639=13 A.L.J. 570=19 C.W.N. 749=17 Bom. L.R. 527=22 O.L.J. 1=29 M.L.J. 34=18 M.L.T. 1=(1915) M.W.N. 484=2 L.W. 611=39 B. 441, *R.* (c) 25 M. 678; 6 Ind. Cas. 741=18 M.L.J. 379=12 C.W.N. 1049=8 O.L.J. 359=35 C. 1039=35 I.A. 206 (P.C.)=10 Bom. L.R. 790=4 M.L.T. 207=128 P.W.R. 1908=42 P.R. 1910; 11 M. I.A. 75; 9 M.I.A. 539; 7 Ind. Cas. 445=34 B. 510=12 Bom. L.R. 487; 15 Ind. Cas. 774=36 B. 424=14 Bom. L.R. 400; 29 A. 667; 32 M. 88; 27 M. 300; 6 C.L.J. 383; 9 Bom. L.R. 1293, *R.* (d) (1901) A.C. 495 (506); (1914) A.C. 25 (40), *R.*

(31) *Hindu Law—Joint family property—Property acquired by one member—No nucleus of ancestral property—Separate property—Burden of proof—Joint business—Presumption.*

In a case where the property was acquired by one member of a joint Hindu family, and there was no pre-existing nucleus of ancestral property, the presumption is that it is his separate property and the burden of proving that the property was subsequently thrown into the common stock is on those who assert this; the fact that he lived with his son in that property and supported and married him and carried on business with him elsewhere, and even raised money for the purposes of the business by mortgaging this very property, would not be enough to discharge the onus. *Ethirajulu Naidu v. Govindarajulu Naidu*, 32 Ind. Cas. 12 (F.B.).

WALLIS, C.J., SESHAGIRI IYER and PHILLIPS, JJ.

(32) *Mortgage by Karta—Absence of description in the deed as being executed by karta.*

Where a mortgage-deed was executed by the karta of a joint Hindu family, who was the sole member of the family competent to enter into legal relations on behalf of the family, the mortgage transaction binds the other members of the family, even though the executant of the document has not described himself as executing the deed as karta of the family. *Mahadeo Prasad v. Mussammatt Tikai*, 36 Ind. Cas. 685.

STUART, A.J.C.

References:—25 A. 407=5 Bom. L.R. 479=7 C.W.N. 681=30 I.A. 165=8 Sar. P.C.J. 483 (P.C.), *F.*

(33) *Insolvency of Manager of joint family—Entry of debt in schedule attached to petition—Saving of limitation as against other members.*

Where the manager of a Hindu family became a bankrupt and filed a petition in insolvency, the entry of a debt in the schedule attached to the petition does not amount to an acknowledgment of the debt within the meaning of S. 19 of the Limitation Act, so as to bind

Hindu Law—(Continued).**—12.—Joint Family—(Continued).**

the other members of the family, as an insolvency proceeding is not one on behalf of the other members of the family, but is only the personal act of such manager. *Klesendoss v. The Katan Makanjee Spinning and Weaving Co. Ltd.*, 36 Ind. Cas. 389.

WALLIS, C.J. and PHILLIPS, J.

(34) *Entry in revenue papers of name of widow of deceased member—Separation of family.*

The entry of the name of the widow of a deceased member of a joint family in the Revenue papers does not afford any evidence of separation as between the members of the family, as mutation of names is often effected in favour of widows for their consolation. *Bakhtawar Singh v. Ram Singh*, 36 Ind. Cas. 44.

STUART and KANHAIYALAL, A.J.CS.

(34-a) *Hindu Law—Conversion of self acquisition into family property—Widowed daughter-in-law's maintenance—Wedding presents.*

Per *Coutts-Trotter, J.*—If a man has property which he has acquired by his own exertions, but shows conclusively by his subsequent conduct and subsequent dealings with that property that his intention was that it should be regarded, and he himself regards it, as being property in which his family has a share then that becomes thence forward family property under the Hindu Law (a).

A widowed daughter-in-law is entitled to be maintained out of such family property.

Wedding presents such as cloths and jewels given to a Hindu wife for her own use at the time of her marriage are her separate property intended to be enjoyed by herself.

Srinivasaiyengar, J.:—*Quere.* Whether a member of a joint Hindu family who owns immoveable property as his self-acquisition can convert it into joint family property without an instrument in writing registered in the Provinces where the Transfer of Property Act is in force. *Theylambal v. Krishna Pattur*, 32 Ind. Cas. 955.

COUTTS-TROTTER and SRINIVASAIYENGAR, JJ.

References:—10 M.I.A. 190; 25 M. 149; 10 Bom. L.R. 175; 15 Bom. L.R. 584; 32 B. 479; 12 M.L.T. 340, *F.*

(34-b) *Managing member, pro-note by, renewed after he ceased to be such—Acknowledgment, effect of.*

A pro-note executed by a managing member of a joint Hindu family for himself and his brothers cannot be renewed by him after he ceases to be such. An acknowledgment by him will not bind the other members of the family so as to save limitation against them. *Kodanda Rama Aiyar v. Arunachala Aiyar*, 32 Ind. Cas. 997.

SRINIVASA IYENGAR, J.

Reference:—17 B. 512, *D.*

Hindu Law—(Continued).**—12—Joint Family—(Continued).**

(35) *Joint Hindu family—Ancestral business—Liability of minor members.* **Wadhawa Shah v. Rattan Chand**, 189 P.L.R. 1915=126 P.W.R. 1915=90 Ind. Cas. 813. See **Final Part**, 1915, Col. 784.

(36) *Mitakshara Law—Joint family—Disruption—Burden of proof.* **Narpat Rai v. Devi Das**, 85 P.R. 1915=31 Ind. Cas. 634. See **Final Part**, 1915, Col. 785.

(37) *Aroras—Law applicable—Widow of pre deceased son—Widow holding husband's share by way of maintenance—Widow's power of alienation.* **Chandao Mal v. Mussammat Wasiuddi**, 92 P.R. 1915=168 P.W.R. 1915=31 Ind. Cas. 541. See **Final Part**, 1915, Col. 785.

(38) *Tender of patna, when valid—Manager of joint Hindu family, if competent to tender patna.* See **MAD. ACT VIII OF 1905 (RENT RECOVERY)**, No. 2, 4 L.W. 654.

(39) *Ownership holding—Succession—Personal law—Joint family—Death of one member—Devolution of interest.* See **U. P. ACT II OF 1901 (AGRA TENANCY)**, No. 13, 14 A.L.J. 278.

(40) *Co-heir includes members of joint family though their names be not entered in the *khewat*.* See **U. P. ACT IV OF 1912 (COURT OF WARDS)**, No. 1, 19 O.C. 306.

(41) *Possession obtained by one member on behalf of whole family—Nature of possession of that member as against others.* See **ADVERSE POSSESSION**, No. 6, 30 Ind. Cas. 566.

(42) *Joint family carrying on business in partnership—Contract by family if terminates with death of co-partner.* See **BROKERAGE CONTRACT**, No. 1, 20 O.W.N. 708.

(43) *Joint decree debt of the family—Power of manager to give discharge without concurrence of the other members.* See **CIV. PRO. CODE (1909)**, No. 40, 3 L.W. 579.

(44) *Suit fully contested by manager of joint family—Representation of minors—Irregular appointment of guardian *ad litem*—Effect.* See **CIV. PRO. CODE (1909)**, No. 581, 14 A.L.J. 589.

(45) *Suit for malicious prosecution against manager of joint Hindu family—Abatement—Cause of action—Survival—Legal representative applying for setting aside abatement—Refusal—Appeal.* See **CIV. PRO. CODE (1909)**, No. 549, 31 Ind. Cas. 4.

(46) See **EVIDENCE**, No. 6, 32 Ind. Cas. 380.

(47) *Minor whether can be manager of Hindu family or guardian of person or property of his minor wife or children.* See **GUARDIANS AND WARDS ACT**, No. 12, 20 M.L.J. 21.

(48) *What constitutes an intention to convert self-acquired property into joint property.* See **HINDU LAW (ADoption)**, No. 13, 1 Pat. L.J. 529.

(49) *Gift—Joint family—Gift by one member in favour of another, validity of.* See **HINDU LAW (GIFT)**, No. 4, 36 Ind. Cas. 44.

Hindu Law—(Continued).**—12.—Joint Family—(Concluded).**

(50) *Presumption as to whether the earnings of one member belong to the family—Son assisting father—Inference as to managership.* See **HINDU LAW (PARTITION)**, No. 2, 30 M.L.J. 308.

(51) *Joint Hindu family—Business started by father alone—Whether son can be adjudicated insolvent for father's debts—Contract Act, S. 248.* See **INSOLVENCY**, No. 3, 20 M.L.T. 565.

(52) *Unambiguous declaration of intention to separate—Subsequent management by one member on behalf of all—Acknowledgment by such manager if binding on the others.* See **LIMITATION ACT (1908)**, No. 80, 3 L.W. 231.

(53) *Partition—Joint family property—Suit for partial partition, if maintainable—Plaintiff to be given option of amending the plaint—Costs on part decreed.* See **PARTITION**, No. 9, 156 P.W.R. 1916.

(54) *Partnership—Joint Hindu family—Membership of the manager not membership of the family—Termination on the death of the manager—Suit for dissolution—Limitation.* See **PARTNERSHIP**, No. 1, 19 M.L.T. 66.

(55) *Allegation of separation by a member—Adverse decision—Second appeal—Setting up existence of joint family.* See **PLEADINGS**, No. 9, 36 Ind. Cas. 625.

(56) *Personal contract with managing member of joint Hindu family—Liability of sons—Civ. Pro. Code, 1909, O. VI, r. 17.* See **SPECIFIC PERFORMANCE**, No. 9, 31 Ind. Cas. 1.

(57) *Discharge of father—Liability of sons in a joint Hindu family.* See **STRAITS SETTLEMENTS BANKRUPTCY ORDINANCE**, No. 1, 31 M.L.J. 386.

(58) *Survivors, right of, on death of member—If to get succession certificate.* See **SUCCESSION CERTIFICATE ACT (1889)**, No. 6, 31 Ind. Cas. 901.

—13.—Maintenance.

See **HINDU LAW—PARTITION.**

See **HINDU LAW—WIDOW.**

See **MAINTENANCE.**

(1) *Wife voluntarily residing away from husband—Plea of unchastity—No proof, but mere suspicion—Duty of Court.*

Where a suit is brought by a wife to recover maintenance from her husband and the husband sets up the plea of unchastity on her part, a woman should not be branded as unchaste by judgment of a Court on the ground of mere suspicion; it must do so only upon strong and sure grounds (a).

Suit by a wife claiming separate maintenance from her husband. It was found that the plaintiff's allegation that the defendant expelled her from his house was not true. The real cause of her having lived separately from her husband was the misunderstanding arising from the

Hindu Law—(Continued).**—13.—Maintenance—(Concluded).**

circumstance of her husband having married a second wife. There was no proof that the defendant abandoned or deserted or expelled the plaintiff without justifying cause. *Held* that the plaintiff having voluntarily deserted her husband without justifying cause was not entitled to claim separate maintenance from her husband. **Yesubal Bhutar Sadashiv Ganesh Deshpande v. Sadashiv Ganesh Deshpande**, 30 Ind. Cas. 931.

BATCHELOR and HAYWARD, JJ.

References :—(a) 7 Ind. Cas. 237=14 C.W.N. 865 (P.C.); 7 A.L.J. 571=8 M.L.T. 147=12 C. L.J. 905=20 M.L.J. 614=32 A. 110=12 Bom. L.R. 638=(1910) M.W.N. 313=37 1 A. 152, *E*.

(2) *To widow provided for by agreement in writing—Subsequent unchastity—Rights, if forfeited—Starvation allowance, when allowed.* **Sathyabhama v. Kesavacharya**, 18 M.L.T. 28=29 Ind. Cas. 397=29 M.L.J. 87=39 M. 658. See Final Part, 1915, Col. 789.

(3) *Illegitimate son of a co-parcener—Property given for maintenance—Not ancestral—No right by birth to illegitimate son's son.* **Kristnaswami Naidu v. Seethalakshmi Ammal**, 18 M.L.T. 512=33 M. 1029=3 L.W. 317=31 Ind. Cas. 803. See Final Part, 1915, Col. 789.

(4) *Agreement, construction of an Hindu widow agreeing with her husband's reversioner to lead chaste life—If not leading chaste life, forfeiture of maintenance—Second appeal—S. 11 of Act III of 1914.* **Musammatt Tara Devi v. Dhanapat Rai**, 150 P.W.R. 1915=31 Ind. Cas. 797. See Final Part, 1915, Col. 790.

(5) *Daughter-in-law's claims against her father-in-law.* **Musammatt Buchau v. Radha Kishen**, 103 P.R. 1915=32 Ind. Cas. 33. See Final Part, 1915, Col. 790.

(6) *Widow—Claim for maintenance—Purchase of property from income—Absolute interest if acquired from purchase—Succession to such property.* See HINDU LAW (WOMAN'S ESTATE), No. 1, 3 L.W. 422.

(7) *Hindu Law—Conversion of self-acquisition into family property—Widowed daughter-in-law's maintenance—Wedding presents.* See HINDU LAW (JOINT FAMILY), No. 31-a, 32 Ind. Cas. 955.

—14.—Marriage.

See HINDU LAW (WIDOW).

(1) *Marriage of Hindu girl contracted by maternal uncle, validity of—Presence of paternal relatives—Injunction obtained without reasonable and probable cause—Suit for damages—Code of Civil Procedure (1909), O. XLI, rr. 23, 25—Remand.*

According to Hindu Law, so long as there are competent paternal relatives in existence, the maternal relatives of a girl have no authority to give her in marriage; but in cases where the

Hindu Law—(Continued).**—15.—Marriage—(Concluded).**

paternal relatives refuse to act or have disqualified themselves from acting, the maternal relatives acquire authority to contract marriage on behalf of the girl.

A Hindu girl who was living with her paternal aunt and paternal uncle was made over to her maternal uncle as the result of an agreement come to between the parties. Subsequently the paternal aunt's application to be appointed guardian was dismissed. After this the maternal uncle of the girl arranged for the marriage of the girl with a certain person. The paternal aunt then obtained a temporary injunction and got the wedding put off. The marriage, however, was accomplished with the person selected by the maternal uncle. The maternal uncle brought a suit to recover damages for the loss caused to him by the wrongful issue of the injunction and the postponement of the wedding. The Munsiff tried all the issues excepting the one as to the measure of damages and dismissed the suit. Upon appeal the District Judge finding that the paternal uncle was an outsider and that the aunt had no authority to give the girl away in marriage, remanded the case under O. XLI, r. 23 of the Code of Civil Procedure. *Held*, that under the circumstances of the case the maternal uncle was competent to enter into a contract of marriage on behalf of the girl, but that the proper order was one under O. XLI, r. 25 of the Code. **Kasturi v. Panna Lal**, 14 A.L.J. 757=38 A. 520=36 Ind. Cas. 215.

PIGGOTT and LINDSAY, JJ.

(2) *Guardian appointed by Court—Infant girl given in marriage without guardian's consent or in disobedience of Court's order, effect of—Marriage performed in inauspicious times—Right to give girls in marriage—Duty of giving girls in marriage, rules as to, nature of—Guardians and Wards Act (VIII of 1909), S. 21.* **Musammatt Maya Devi v. Ram Chand**, 177 P.W.R. 1915=20 P.L.R. 1916=31 Ind. Cas. 186. See Final Part, 1915, Col. 792.

(3) *Marriage of co-parcener—Provision for expenses of marriage at partition—Expenses, incurred subsequent to suit cut before decree—Anticipatory provision for future marriage, right for.* See HINDU LAW (PARTITION), No. 5, 39 M. 577.

—15.—Partition.

See HINDU LAW—ALIENATION.

See HINDU LAW—DEBTS.

See HINDU LAW—INHERITANCE.

See HINDU LAW—JOINT FAMILY.

(1) *Joint family—Partition—Mortgage debt—Debt left out of account in partition suit as being valueless—Subsequent suit to enforce the mortgage—Joinder of parties.*

Sadasiva Aiyar, J.—A co-parcener who wishes to get a partition of family properties has only a single cause of action in respect of all the joint properties and hence a suit for partial partition does not lie. After a partition, none

Hindu Law—(Continued).**—15.—Partition—(Continued).**

of the parties to it holds any of the properties till then held jointly along with any other party unless the partition agreement or partition award or decree itself provides for such joint holding or unless there has been accident, mistake, or fraud in the non-inclusion of some of the property at the division.

Where in a suit for partition by a son against his father a mortgage-debt due to the family is left out of account in arriving at the amount, decreed to the son for his share, as the mortgage was considered to be valueless, the son loses his right to claim partition of the mortgage deed in a second suit, and therefore a subsequent suit to enforce the mortgage by father alone is not bad for non-joinder of parties.

Napier, J.—A decree in a partition suit operates only as a mutual release of the parties' rights in the actual properties divided thereby. Any property left undivided for any reason as in a case where it is considered valueless and so not taken into account continues to be joint property. Hence to the suit to enforce the mortgage, the son is a necessary party, and the suit instituted by the father alone is liable to be dismissed for want of parties. *Kandum Yenkata-swami v. Ballgadu*, 19 M.L.T. 43=3 L.W. 74=32 Ind. Cas. 179.

SADASIVA AIYAR and NAPIER, JJ.

- (2) *Joint family—Partition—Minor members if can resist partition by adults—Minors, rights of—Partition, how far a family arrangement—Family settlements, principle of, if applicable to partitions—Limits to the rule—Onus of proof that partition is unfair—Shifting of onus—Suit to set aside partition on the ground of unfairness—Question to be considered—Presumption as to whether earnings of one member belong to the family—Son assisting father, inference as to managership.*

Though the guardian of a minor member of a joint Hindu family cannot insist on a partition on behalf of the minor unless partition was for the benefit of the minor, every adult member of the family is entitled to demand partition and can insist on having his share separated and given him and the minor members of the family cannot resist the demand. All that their guardian can do is to protect their interests in the partition.

So long as the minor members are represented by their natural guardians, a partition is as binding on the minors as on the adult members, unless negligence or fraud on the part of the guardians is proved.

Partition of the family is a family arrangement and is generally resorted to in order to keep peace in the family or to preserve the family properties, and the principles applicable to family settlements are applicable to partitions among the members of the family. There must of course be equal knowledge on the part of the members and there must not be any over-

Hindu Law—(Continued).**—16.—Partition—(Continued).**

reaching or fraud. Even material mistakes do not matter, provided that all the members have the same knowledge (a).

The onus of proving that a partition is not fair is in the first instance on the plaintiff and the minority of a plaintiff does not take the case out of the operation of the rule. In some cases the very nature of the transaction or the method of divisions may show that it was unfair or prejudicial to the interests of a minor; and in such cases the burden is shifted on to the defendant, as also in cases where the facts are specially in the knowledge of a particular party.

Where a person who was a minor at the time of a partition sues to set it aside on the ground that it was unfair and that certain properties, which had been treated as the self-acquired property of one of the members was not really so but joint family property in which he ought to have been given a share, the question for determination is not whether the property has been acquired without detriment to or without the aid of the family funds, but whether the adult members of the family *bona fide* allowed the property to that member as his self-acquisition.

There is no presumption that the earnings of one member of a family belong to the family in the absence of any evidence that they were thrown into the common stock or were jointly made by the members. From the mere fact that a son is assisting his father, it cannot be inferred that the son was a manager or part manager of the family. *Ramamurthy v. Ramamma*, 30 M.L.J. 308=3 L.W. 322=33 Ind. Cas. 961.

COURTES-TROTTER and SRINIVASA AIYANGAR, JJ.

References:—(a) 3 Swanst. 400, 463; 10 C. L.J. 503 (510); 2 M.H.C.R. 182; 30 L.A. 189=30 C. 738; 31 A. 412 (422); 19 B. 593, R.

- (3) *Mitakshara family—Father's power to partition without son's consent.*

A father of an undivided Hindu family can make an equal partition of ancestral property between himself and his sons without the consent of all the sons. *Murugayya Maniyakaran v. Palaniyandi Maniyakaran*, 31 M.L.J. 147=(1916) 2 M.W.N. 284=36 Ind. Cas. 507.

ABDUR RAHIM and PHILLIPS JJ.

References:—2 M. 317, affirmed; 23 M. 16; 27 M. 577=14 M.L.J. 310; 23 M. 1; 23 B. 636; 12 B.L.R. 373; 1 M.H.C. 77; 35 A. 337 (346); 40 C. 966; 30 C. 738; 23 Ind. Cas. 6, R.

- (4) *Mitakshara—Joint family property, partition of—Individual if may sever himself from family by his own act and how—Division into mees and bounds, if essential—Agreement by all members to divide, if essential—Distinction between severance of status and division of property—Suit for*

Hindu Law—(Continued).

—15.—Partition—(Continued).

partition by co-sharer—Plaintiff's death pending suit—Widow if may continue suit.

Under Hindu Law, "separation," i.e., severance of the status of jointness is a matter of individual volition, and agreement between all the co-parceners is not, still less is actual division and distribution of the property held jointly, essential to the disruption of the joint status.

Once an individual co-sharer has unequivocally expressed and clearly intimated to his co-sharers his decision to sever himself from the joint family, his right to obtain and possess the share to which he admittedly has a title is unimpeachable. Neither the co-sharers can question it, nor can the Court examine his conscience to find out whether his reasons for separation were well founded or sufficient; the Court has simply to give effect to his right to have his share allocated separately from the others.

The intention to separate may be evinced in different ways, either by explicit declaration or by conduct. If it is an inference derivable from conduct, it will be for the Court to determine whether it was unequivocal and explicit.

H, one of the members of a joint Mitakshara Hindu family, served on his co-parceners a registered notice in which he affirmed in explicit terms his desire to get partitioned his one-third share and then instituted a suit for partition. The defendants, somewhat unwillingly, agreed to the demand and admitted the plaintiff's share in the joint property and the extent thereof; and all that remained for the Court to determine was the best mode of effecting the division; but before this could be done, H died leaving him surviving his widow who applied for substitution of herself on the records in the place of the plaintiff:

Held, that H had indicated his intention to separate himself most unequivocally by the registered notice, coupled with the suit, and that these acts amounted to a separation with all its legal consequences;

that on the facts there was no disagreement or averseness on the part of the defendants to the plaintiff's demand for separation;

that the widow of H was entitled to have H's one-third share separated and given to her. *Musammam Girja Bai v. Sadasiv Dhundiraj*, 20 C.W.N. 1086 = 14 A.L.J. 822 = 20 M.L.T. 78 = 12 N.L.R. 113 = (1916) 2 M.W.N. 65 = 18 Bom. L.R. 621 = 4 L.W. 114 = 24 C.L.J. 207 = 31 M.L.J. 455 = 43 C. 1031 (P.C.).

LORD SHAW, LORD SUMNER, SIR JOHN EDGE and MR. AMEER ALI.

References:—40 I.A. 40 = 17 C.W.N. 333; 17 I.A. 194 (196) = 18 C. 157; 17 C.W.N. 273; 6 I.A. 228; 8 W.B. 82, R.; 11 M.I.A. 76, *Expt.*

(5) *Marriage of co-parcener—Provision for expenses of marriage at partition—Expenses incurred subsequent to suit but before decree—Anticipatory provision for future marriage, right for—Decree in partition suit.*

Hindu Law—(Continued).

—15.—Partition—(Continued).

Marriage is so far a normal and obligatory incident in a Hindu's life that the expenses of its performance are chargeable against the joint family, to which he belongs (a).

An unmarried co-parcener is not entitled to have an anticipatory provision made for the expenses of his future marriage at partition (b).

Where the expenses of the marriage of a co-parcener were incurred subsequent to the institution of a suit for partition but prior to the decree of the Court of first instance, it was *held*, that the severance of a joint family was effected only by the decree, and that the expenses should be credited to him in the account to be taken in the suit (c). *Narayana Annai v. Ramalinga Annai*, 39 M. 587 = 36 Ind. Cas. 428.

SANKARAN NAIR and OLDFIELD, JJ.

References:—(a) 84 M. 422, F. (b) 38 M. 556, Diss. (c) 35 M. 239, R.

(6) *Suit for partial partition by alienee from a co-parcener against subsequent alienee from the remaining co-parceners does not lie.*

Where the representative of the purchaser in Court-auction of the share of one of four co-parceners sued to recover a fourth share of certain items of family properties in the possession of subsequent alienee from the remaining co-parceners and the other items were in possession of persons not parties to the suit:

Held, that the plaintiff was not entitled to maintain the suit as it was one for partial partition.

The rule against partial partition is a processual law dictated by considerations of convenience (a).

Fresh exhortions to the rule against partial partition should be made as sparingly as possible and only on grounds of manifest convenience. *Sundaresa Aiyar v. Krishnamurthi Aiyar*, (1916) 2 M.W.N. 156 = 31 M.L.J. 317 = 4 L.W. 238 = 35 Ind. Cas. 677.

WALLIS, C.J. and COUTTS-TROTTER, J.

Reference:—(1914) M.W.N. 356, *App.*

(7) *Partial partition—Separation of some members of a joint Hindu family—Effect—Power of Hindu father to effect a partition.*

One member of a family may separate himself from the rest leaving the others to continue as before as members of a joint Hindu family; this can be done even in cases where for the determination and allotment of the share of the member who separates it is necessary to ascertain and set out the shares of the remaining members. It is not correct to say that either in the first or the second case the separation of one member is in law necessarily a separation of the remaining members and that the remaining members if they desire to remain or become joint Hindu family, they can only do so by an agreement to reunite subject to the limitations of the Hindu Law regarding that status.

"There is no presumption when one co-parcener separates from the others, that the

Hindu Law—(Continued).**—15.—Partition—(Continued).**

latter remain united. In many cases it may be necessary in order to ascertain the share of the outgoing member, to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all. An agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact" (a).

The status of reunited members is not the same as that of the members of a joint Hindu family.

The conduct of the parties must be looked at, in order to arrive at what constitutes the true test of partition of property according to Hindu Law, namely the intention of the members of the family to become separate owners (b).

Though there can be no compulsory partial partition either in respect of the joint property belonging to the family or in respect of the persons constituting the undivided family, yet by mutual agreement of parties the partition can be partial either in respect of the property or of the persons constituting the family.

No doubt when a partition has been proved the presumption is that the partition was complete both as regards the property of the family and the members composing it; but this presumption may be rebutted without proof *aliunde* by the terms of the partition deed, or decree for partition, and if there is no written evidence of the separation, by the nature and mode of separation, and the circumstances attending it (c).

The power of a father to separate one or more of his sons from himself is undoubted; and if as in this case the father separated his two elder sons there is again no scope for any presumption of division as between the father and his other son (d). *Rangasami Naidu v. Sundarajulu Naidu*, 31 M.L.J. 472=35 Ind. Cas. 52.

NAPIER and SRINIVASA AIYANGAR, JJ.

References:—(a) 30 C. 725, 736, F. (b) 30 C. 725 (P.C.); 1 L.W. 799; 16 M.L.T. 610; 35 B. 293, R. (c) 30 C. 231 (P.C.). (d) 25 M. 149, 156, R.

(8) *Hindu Law—Partition—Mother's share on a partition between sons and step-sons—Effect of possession of stridhan by mother on her share—Estoppel against estoppel, effect of.*

On a partition between sons and stepsons, governed by the Mitakshara law, a mother is entitled to a share equal to that of her son.

Held further, that an estoppel against an estoppel settles the matter at large.

Where the mother acting as guardian for her minor son entered into an agreement for reference to arbitration for the purpose of effecting a partition and in the course of partition claimed maintenance which was allowed to her by the arbitrator but this portion of the award was afterward set aside by the Court on the objection of the stepson, *held*, that the effect of the modification of the award was to that extent to restore the *status quo ante*, and

Hindu Law—(Continued).**—15.—Partition—(Continued).**

that it was no longer open to the stepson to say that the mother had become estopped by her previous conduct from claiming a share.

Held also, that there might be cases where the possession of separate property as *stridhan* by the mother might have the effect of reducing *pro tanto* the share to which she may be entitled on partition. *Sarup Chand v. Musammat Pahi*, 19 O.O. 240.

KANHAIYA LAL and KENDALL, A.JOS.

(9) *Hindu Law—Partition—Partial partition—Partition of items alleged to be left undivided—Burden of proof—Limitation—Possession within 12 years—Pleadings—Change of case attempted afterwards.*

In a suit for partition, the burden of proof is on the plaintiff, if it is clear that there has been a partial partition to show that there has been no partition of the properties of which partition is claimed. It is also necessary for the plaintiff to show either possession by plaintiff either at the time of the suit or possession within 12 years. Where plaintiff made a definite case of possession by himself he cannot be allowed to make in appeal an entirely new case of possession through co-sharers, having failed to prove possession by himself. That each case must be fought upon the pleadings is in general a sound rule. It is extremely dangerous for any Court to arrive at a conclusion which is not in accordance with the case of either side. *Singheswar Misser v. Rameshwar Jha*, 34 Ind. Cas. 466.

SHARFUDDIN and ROE, JJ.

(10) *Property to be partitioned should be taken as at the date of partition—Shares taken by members separated before partition not to be taken into account.* *Franjivandas Shiyal v. Ichhatam Vibhukhandas*, 17 Bom. L.R. 712 = 39 B. 734 = 30 Ind. Cas. 918. See Final Part, 1915, Col. 796.

(11) *Mitakshara School—Suit for partition—Karta, if accountable and to what extent—Account of properties as they exist—Karta's statement if conclusive.* *Pormeshwar Dubey v. Gobind Dubey*, 20 O.W.N. 25 = 43 C. 459 = 33 Ind. Cas. 190. See Final Part, 1915, Col. 797.

(12) *Mitakshara—Partition—Share of step-mother.* *Har Narain v. Bishambar Nath*, 18 A.L.J. 1129 = 38 A. 83 = 31 Ind. Cas. 907. See Final Part, 1915, Col. 797.

(13) *Deed of partition including only some items of property—Whether effects division of status—Intention—Presumption—Construction.* *Subba Reddi v. Alagammal*, 18 M.L.T. 545 = 31 Ind. Cas. 674. See Final Part, 1915, Col. 797.

(14) *Joint family—Partition—Filing of suit for, by a member—Whether effects separation.* *Sundararajan v. Arunachellam Chetty*, 18 M.L.T. 568 = 29 M.L.J. 816 = 2 L.W. 1247 = (1916) M.W.N. 31 = 39 M. 159 (F.B.). See Final Part, 1915, Col. 798.

(15) *Suit for partition of property in Allahabad—Previous suit for partition of property at*

Hindu Law—(Continued).**15.—Partition—(Concluded).**

Sultanpur—Applicability of O. II, r. 2, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 813, 14 A.L.J. 257.

(16) Partition between adopted son of one brother and natural son of another—Share of adopted son. See HINDU LAW (ADOPTION), No. 2, 30 M.L.J. 193.

(17) Ancestral property—Adopted son—Right to claim partition—Condition against partition during father's lifetime—Validity. See HINDU LAW (ADOPTION), No. 5, 12 N.L.R. 29.

(18) See HINDU LAW (ALIENATION), No. 19, 10 S.L.R. 34.

(19) Alienations by members of portions of joint family property—Effect—Disruption of joint family. See HINDU LAW (JOINT FAMILY), No. 14, 69 P.W.R. 1916.

(20) Family temple—Idols and places of worship—Right to partition—Right of management by rotation. See HINDU LAW (RELIGIOUS ENDOWMENTS), No. 2, 9 S.L.R. 209.

(21) Omission to put in some properties in the list of joint family properties in the plaint—Inadvertance—Mistake—Fraud—Effect. See PARTITION, No. 4, 20 C.W.N. 1276.

—16.—Religious Endowment.

See CIV. PRO. CODE (1908), S. 92.

See RELIGIOUS ENDOWMENTS.

See RIGHT OF SUIT.

See TRUST.

See TRUSTEE.

(1) Religious endowment—Muth or asthal, position of mahant, that of trustee—Appointment by reigning mahant of a married relation as successor in violation of the vows of the order and abdication in his favour, a breach of trust—Mahant if entitled to continue in office—Succession—No general customary law—Usage of each muth to be proved and applied—Previous judicial proceedings, how far admissible in evidence—Trial Judge's finding on question of fact, value of.

Property of a muth or asthal is held by the mahant as its owner in trust for the institution, and succession to him in such property follows with the succession to the office.

Although large administrative powers are undoubtedly vested in the reigning mahant, the trust exists and must be respected.

As the mahant is not only a spiritual preceptor but also a trustee in respect of the asthal over which he presides, a Court will be justified on proper grounds in removing him from office.

The reigning mahant A of an asthal having by a series of deeds appointed his nephew as his successor-in-office and abdicated in his favour. Plaintiff claiming to be the senior chela of A challenged the defendant's title, first, on the allegation of a custom of the asthal by which the senior chela alone succeeded, and secondly,

Hindu Law—(Continued).**—16.—Religious Endowment—(Continued).**

on the allegation that the defendant being a married man with children was disqualified from holding the office of mahant. By the custom of the asthal, the mahant had to be a *bairagi* or celibate *chela*. The defendant denied that he was married and alleged a custom of succession by appointment from amongst the *chelas* by the reigning mahant.

Held—that questions of succession to the mahantship in India are not settled by an appeal to general customary law. It must depend upon the custom and usage of the particular muth or asthal.

That neither party had proved the custom alleged by him.

A note in the Magistrate's judgment of an admission made by a witness in a criminal case or a copy of recorded evidence of the witness was not by itself admissible as evidence in a later civil suit between the parties, and was rightly rejected by the Trial Judge, though the fact that the witness (who was acting in the civil suit as the legal representative of the party affected by such admission and was present in Court when the note was produced) was not called by him into the box to clear up the matter or deny that he made the statement or explain it, naturally made a deep impression upon the Judge.

Regarding the allegation that the defendant was a married man, the Trial Judge found upon the evidence adduced that the allegation had been established.

Held—that, upon such a question of fact, the verdict given by the Trial Judge who had the advantage of seeing and hearing the witnesses, could not be lightly set aside, especially as that Judge was also presumably acquainted with the manners and customs of the people among whom the transaction was alleged to have occurred.

The High Court which reversed the Trial Judge not having stated sufficient grounds for disturbing his verdict, and upon an examination of the evidence.

Held, further, that this rule could not be safely departed from in the present instance.

As part of his case plaintiff alleged that in 1904 the mahant had asked his signature on one of the documents by which he wanted to set up the defendant as his successor, and that on his refusal he had been assaulted and expelled from the muth. Plaintiff sought to prove proceedings in the Criminal Court taken by him about the time showing that a conviction for assault had been obtained by him and that in these proceedings plaintiff had assigned his failure to execute such a document as the reason therefor. The conviction had been quashed on appeal.

Held—that these proceedings were not relevant to the case, the one important fact being that they were taken on the ground which was referable to the execution of the document, and were taken by the plaintiff as claiming to be a resident as of right in the asthal from which he had been expelled?

Hindu Law—(Continued).**—16.—Religious Endowment—(Concluded).**

Held (on the evidence), that plaintiff had established that he was a *bairagi chela*, and (on admission) that, if not the only *chela*, he was the senior *chela* of the *mahant*.

That, by conferring the *mahantship* upon a relation who was a married man, A had consented to a violation of the vows and practices of asceticism and celibacy which it was his duty as a trustee to maintain and protect.

That his installation of the defendant as *mahant* and retirement from *mahantship* amounted to an abdication of his office, which in the circumstance the Court should accept, and in the absence of just cause disqualifying the plaintiff for appointment as *mahant*, the plaintiff as the senior *chela* and (even on the defendant's case) the next in succession in default of appointment was properly declared by the Trial Judge as the person entitled to the office of *mahant*. **Mahant Ram Parkash Das v. Mahant Anand Das**, 20 C.W.N. 801=43 C. 707=14 A.L.J. 621=3 L.W. 556=(1916) M.W. N. 406=18 Bom. L.R. 490=31 M.L.J. 1=24 C.L.J. 116=20 M.L.T. 267=33 Ind. Cas. 583 (P.C.).

VISCOUNT HALDANE, LORD SHAW, SIR JOHN EDGE and MR. AMEER ALI.

(2) Family temple—Idols and places of worship—Right to partition—Right of management by rotation.

The property of which partition was sought in this case was a family temple consisting of (1) a room, a veranda and a yard (the room containing two sacred pictures and a perennial light), and (2) a small house (quite near the temple) used as quarters for the servants in charge of the temple. The property in suit was admittedly used for purposes of worship for nearly 100 years.

Held, that the temple and its contents cannot be divided by metes and bounds, as that would mean the abolition of the practice of worship, which cannot be abolished as long as some of the family desire its continuance.

But the management of such property (including the servant's quarters) may be enjoyed in turns by the different branches of the family, subject to the condition that all members of the family shall be entitled to perform ordinary worship in the temple at any time, though they may not officiate as priests except in their turn according to rotation. **Thakur Sakhawatral v. Thakur Partabral**, 9 S.L.R. 209=34 Ind. Cas. 909.

PRATT, J.C. and BOYD, A.J.C.

References:—8 W.R. 193; 27 M. 192; 34 M. 470; 6 B. 298; 17 B. 271 (280), *F*.

(3) See RELIGIOUS ENDOWMENTS, No. 4, 35 Ind. Cas. 630.

—17.—Religious Offices.

Hereditary religious offices—Right of females to inherit and perform duties by proxy—Onus.

A female is not, under Hindu Law or custom,

Hindu Law—(Continued).**—17.—Religious Offices—(Concluded).**

disqualified from succeeding to a hereditary religious office and getting such duties as she may be disqualified by reason of her sex from performing, performed by proxy.

The onus is on those who deny her right to prove a custom excluding females. **Raja Rajeswari Ammal v. Subramania Archakar**, 30 M.L.J. 222=32 Ind. Cas. 975=40 M. 115.

KUMARASWAMI SASTRI and PHILLIPS, JJ.

References:—16 M.L.T. 423; 27 M.L.J. 179, *F*.; 26 M.L.J. 316, *Not F*.; 42 C. 455; 8 M. L.T. 345, *R*.

—18.—Reversioners.

See HINDU LAW (ALIENATION).

See HINDU LAW (WIDOW).

(1) Reversioner—Compromise by father as next reversioner—Whether binding on son—Estoppel by conduct.

Where in a suit brought by the plaintiff as the next reversioner for the recovery of property of the last male owner as against the defendant who claimed under his will, it was found that a previous suit, brought by the father of the present plaintiff at a time when he was the nearest reversioner to contest the will, had been compromised with the defendant, whereby he had recognised the title of the defendant under the will as valid, and also that the plaintiff had subsequently taken a conveyance of certain lands comprised in the will from the defendant in favour of himself and his wife, **held**, that the plaintiff was not bound by the compromise entered into by his father, but that he was estopped, by his conduct in accepting the conveyance, from claiming the lands in the possession of the defendant. **Dorassamy Reddy v. Muthulinga Reddy**, 19 M.L.T. 1=32 Ind. Cas. 50.

WALLIS, C.J. and SESHAGIRI AIYAR, J.

References:—38 M. 406; 30 A. 1, *R*.; 24 A. 94, *F*.

(2) Alienation by widow and daughter—Existence of daughter's son—Suit by remote reversioners for declaration of invalidity of alienation—Not maintainable—Principle applicable—Sareen Khattris of Lahore—Hindu Law—Applicability of.

C, a Sareen Khattri of Lahore, died leaving him surviving his widow B, his daughter R and his daughter's son J, a minor. B, R and J conveyed a house in Lahore by means of a registered sale-deed in favour of K and others. S and N, the reversionary heirs of C, instituted the present suit for a declaration that the sale shall not affect their reversionary rights and contended that by a special custom the alienation was invalid.

Held, that the parties were governed by Hindu Law.

Held that the principle applicable to the present case is that laid down by the Privy

Hindu Law—(Continued).**—18.—Reversioners—(Continued).**

Council in 6 C. 764 at pp. 772 and 773 to the following effect, *vis.* :—

As a general rule, such a suit must be brought by the presumptive reversionary heir, that is to say, by the person who would succeed if the widow were to die at that moment. But such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow or have precluded themselves from interfering.

Held that the plaintiffs who were remote reversionary heirs were not entitled to maintain the action (a).

In the present case, the daughter's son, a minor, was incapable, from a legal point of view, of colluding with his mother and grandmother or of concurring in their act of alienation and that he had not, since the date of sale, by his own act or conduct precluded himself from suing. *Kanshl Ram v. Sarda Nand*, 60 P.R. 1916=88 P.W.R. 1916=38 Ind. Cas. 763.

SHAH DIN, J.

References :—(a) 6 C. 764 (772, 773) (P.C.), *Rel.* ; 119 P.R. 1901; 149 P.R. 1908 ; 34 A. 207; 18 Ind. Cas. 212 ; 32 C. 62 ; 28 M. 57, R.

- (3) *Hindu Law—Suit by reversioner to recover property after death of widow—Plaint, amendment of, so as to claim title through different reversioner—Limitation Act, S. 22—Choukidar's register, value of, as to date of birth or death.*

In a suit by a Hindu reversioner to recover property after the death of a widow the plaintiff at first claimed title through his father who was alleged to have survived the widow. Subsequently it was alleged that the plaintiff's father predeceased the widow, but that his uncle survived her and the plaintiff amended the plaint, claiming title through the uncle.

Held, that as it was not essential that the plaintiff should have named any intermediate reversioner through whom he claimed title, and there was no substitution or addition of a new plaintiff, amendment of the plaint after the period of limitation prescribed for the suit had expired did not bring into operation, S. 22 of the Limitation Act.

Held further, that a Choukidar's pocket book, if regularly kept, has not much probative value as to the date of any birth or death, the Head Constable writer, whose duty it is to make the entries in his pocket book, not being bound to require the exact date on which the man, woman or child supposed as born or dead, was born or died. *Bisheshar Dayal v. Mira Lal*, 19 O.C. 221=36 Ind. Cas. 941.

KANHAIYA LAL and KENDALL, A.J.CS.

- (4) *Suit to recover property—Duty to establish non-existence of intermediate heir.*

In a suit to recover property as the nearest reversionary heir of a deceased Hindu, the plaintiff must show that there is no intermediate heir in existence with a better claim

Hindu Law—(Continued).**—18.—Reversioners—(Continued).**

to succeed to the property than he asserts. *Chandan Singh v. Bhabhuti Singh*, 30 Ind. Cas. 220.

STUART, A.J.C.

References :—14 Ind. Cas. 399 = 15 O.C. 364, R.

- (5) *Right to redeem mortgage during lifetime of widow.*

It is competent to the reversioners of a deceased Hindu to redeem a mortgage on the estate during the lifetime as well as after the death of the widow. *Jangl Ram v. Sheoraj Singh*, 30 Ind. Cas. 231.

STUART and KANHAIYA LAL, A.J.CS.

References :—8 O.C. 349, R.

- (6) *Acceleration of estate—Acquisition of property by person not being next heir.*

No question of acceleration of estate can arise when the person to whom the property has come does not happen to be the next heir. A woman cannot withdraw her own estate so as to vest the property in her grandson during the lifetime of her daughter, as the life estate of the daughter is interposed between that of the grandmother and the grandson. *Surajball v. Tilok Chand*, 36 Ind. Cas. 66.

LINDSAY, J.C.

References :—13 Ind. Cas. 632=34 A. 207=9 A.L.J. 158 ; 11 Ind. Cas. 676=14 O.C. 170, R.

- (7) *Reversioner's claim to inherit—Burden of proof.* See HINDU LAW (SUCCESSION), No. 1, 3 L.W. 331.

- (8) *Widow applying estate to charity—Consent of reversioners—Failure of one form of charity—Gift to another form—Validity.* See HINDU LAW (WIDOW), No. 1, 7 P.W.R. 1916.

- (9) *Widow—Surrender of whole estate in favour of one of two reversioners—Validity—Partial alienation—Consent of reversioner whether conclusive evidence of the validity of the transaction.* See HINDU LAW (WIDOW), No. 3, 3 L.W. 278.

- (10) *Compromise by widow when binding on reversioners.* See HINDU LAW (WIDOW), No. 8, 31 M.L.J. 87.

- (11) *Compromise entered into with a Hindu widow—Not binding on the reversioners—Effect.* See HINDU LAW (WIDOW), No. 9, 14 A.L.J. 881.

- (12) *Joint surrender by widows of their interests in favour of the next immediate female reversioner's son how far valid—Consent of the next female reversioner not obtained—Effect—Whether such surrender can be regarded as an alienation with the consent of the reversioners.* See HINDU LAW (WIDOW), No. 12, 20 M.L.T. 148.

- (13) *Widow's estate—Position of reversionary heirs—Reversioner not entitled to declaration of his right while the widow lives—Representative capacity of reversioner suing to prevent waste.* See HINDU LAW (WIDOW), No. 13, 31 M.L.J. 226.

Hindu Law—(Continued).**—18.—Reversioners—(Concluded).**

(14) **Hindu Law—Relinquishment by widow—Acceleration—Consent of nearest, to alienation by widow—Evidence of necessity.** See **HINDU LAW (WIDOW)**, No. 17, 14 A.L.J. 974.

(15) See **HINDU LAW (WIDOW)**, No. 30, 35 Ind. Cas. 49.

(16) **Widow—Ex parte decrees—Effect—How far binding on reversioners—Onus of proof.** See **HINDU LAW (WIDOW)**, No. 27, 33 Ind. Cas. 446.

(17) See **LIMITATION ACT (1877)**, No. 10, 20 M.L.T. 526.

(18) **Suit by reversioner—Disappearance of widow—Presumption of death—Burden of proof on plaintiff to show that he was suing within 12 years of the widow's death.** See **LIMITATION ACT (1908)**, No. 245, 18 Bom. L.R. 14.

(19) **Suit for declaration by presumptive reversioner—Interest of reversioner one of substantial character—Representation of whole body of reversioners.** See **SPECIFIC RELIEF ACT**, No. 32, 36 Ind. Cas. 255.

—19.—Self-acquisition.

Alienation by father—Recital as self-acquisition—Effect. See **HINDU LAW (ALIENATION)**, No. 12, (1916) 2 M.W.N. 115.

—20—Stridhanam.

See **HINDU LAW (INHERITANCE)**.

See **HINDU LAW (WIDOW)**.

(1) **Stridhanam property inherited by female heirs—Nature of estate taken by them.**

Stridhan inherited by female heirs does not become the latter's *stridhan*. The female heirs take only a Hindu woman's estate in the property. **Jogendra Chandra Banerjee v. Phani Bhushan Mookerjee**, 43 C. 64=33 Ind. Cas. 810.

FLETCHER and TEUNON, JJ.

References:—25 A. 468=30 I.A. 202; 5 C. 222; 17 C. 911, F.

(2) **Stridhan property—Succession—Daughter succeeding to mother's stridhan—Character of estate—Limited estate of Hindu woman—Daughter's power to dispose of stridhan inherited from mother, by way of gift—Title passes to whom after daughter's death—Daughter's daughter—Right of succession.** **Madhumala Das v. Lakshman Chandra Pal**, 22 Ind. Cas. 518=20 C.W.N. 637. See Final Part, 1914, Col. 662.

(3) **Stridhanam—Gift by father before betrothal—Hindu law commentators—Their duty.** **K. Muthukarupa Pillai v. Sellathammal**, 16 M.L.T. 587=(1915) M.W.N. 48=2 L.W. 39=26 Ind. Cas. 785=39 M. 298. See Final Part, 1914, Col. 664.

(4) **Stridhan—Promise to give dowry at marriage—Land given years afterwards if jautuka—Ajautuka properties, succession to—Preferential heir—Husband or brother.** **Mahendra Nath**

Hindu Law—(Continued).**—20.—Stridhanam—(Concluded).**

Malty v. Girls Chandra Malty, 19 C.W.N. 1287=31 Ind. Cas. 561. See Final Part, 1916, Col. 807.

(5) **Ex-proprietary rights acquired by widow whether can be regarded as her stridhan.** See **EX-PROPRIETARY RIGHTS**, No. 1, 18 O.C. 377.

(6) See **HINDU LAW (PARTITION)**, No. 8, 19 O.C. 240.

(7) **Succession to stridhan property—Rights of adopted son and son of rival wife.** See **HINDU LAW (SUCCESSION)**, No. 2, 20 C.W.N. 489.

(8) **Wedding presents, nature of.** See **HINDU LAW (JOINT FAMILY)**, No. 34-a, 32 Ind. Cas. 955.

—21—Succession.

See **HINDU LAW (INHERITANCE)**.

(1) **Mitakshara system—Inheritance—Reversioner—Burden of proof—'Samanodakas,' meaning of—Relationship, how far extends—Gotraja and Bandhu, contest between—Rule of preference.**

It is no doubt incumbent on a plaintiff seeking to succeed to property as a reversioner affirmatively to establish the particular relationship which he puts forward as well as to satisfy the Court that to the best of his knowledge there are no nearer heirs. He cannot be expected to do anything more. It is for those who claim that their kinship is nearer than that of the plaintiffs to prove that relationship (a).

The relationship of *samanodakas* extends only to the fourteenth degree, and on the authority as well as for reasons of expediency it is not desirable to extend the meaning of the term to persons beyond the fourteenth degree of relationship to the deceased.

A *gotraja* will not be preferred to a *bandhu*, unless he is able to trace his descent from a common ancestor.

The decision of an appeal on a wrong view as to burden of proof will entail a remand in second appeal. **Rama Rao v. Kuttiya Goundan**, 3 L.W. 331=19 M.L.T. 275=30 M.L.J. 514=34 Ind. Cas. 294.

COUTTS-TROTTER and SESHAGIRI AIYAR, JJ.

Reference:—(a) 12 M.I.A. 448, D.

(2) **Mitakshara—Succession to stridhan property—Son adopted by husband in conjunction with another wife and after-born natural son by a third—Rival wife's son, if "son"—Adopted son and son of rival wife, co-heirs, as sapindas of husband—Shares—Construction of texts—Atideca upon atideca, fallacy of.**

B, a Hindu governed by the Mitakshara, adopted, in conjunction with his then wife by whom he had no issue, a son H, by a second wife whom B subsequently married, B had a natural born son G. Another wife M whom B married having died leaving no issue of her own, the question arose as to the respective rights of

Hindu Law—(Continued).**—21.—Succession—(Continued).**

H and G in certain jewellery alleged to have been left by M :

Held, that G was not entitled to succeed to M's estate as her "son" in accordance with the rules of inheritance of *stridhan* property laid down in Chap. II, S. XI, para 9, etc. of the Mitakshara.

That both H and G were entitled to succeed as *sapindas* of her husband in accordance with para. 25 read with paras. 9 and 11 of Chap. II, S. XI of the Mitakshara.

That, in the absence of express texts cutting down his share, H was entitled to share equally with G in the inheritance (a).

That the text of Manu, IX, 183: "If among all the wives of one husband, one has a son; Manu declares them all to be mothers of male children though that son" cannot be applied so as to constitute G, a son of M.

The operation of the text examined (b).

Ch. II, S. XI of the Mitakshara refers to the case of a woman dying "without issue" in the ordinary sense of the words.

Quere: Per *Mookerjee, J.*—Whether the term "son" includes a son taken by the woman in adoption in conjunction with or under an authority conferred by her husband.

Per *Curiam*.—Unless curtailed by express texts, the rights of an adopted son are similar in every respect to those of a natural son.

Mookerjee, J.—A special text or statute forming an exception to a general text or a statute should be construed strictly and applied only to the cases falling clearly within it. *Kumar Gungadhar Bogla v. Kumar Hira Lal Bogla*, 20 O.W.N. 489=23 C.L.J. 372=43 O. 944=34 Ind. Cas. 10.

SANDERSON, C.J., and WOODROFFE and MOOKERJEE, JJ.

References:—(a) 4 O.L.R. 538 (1879); 8 I.A. 229 (246)=8 O. 302; 20 C.W.N. 135, R. (b) 26 I.A. 246, 253=3 C.W.N. 730; 33 B. 404, R.; 33 B. 404, *Appr.*

(3) *Property jointly acquired and thrown into common stock—Succession.*

Property jointly acquired and thrown into common stock is subject to succession by survivorship, at least as between the parties who acquired that property. *Gobardhan Sahu v. Bulkan Mahton*, 1 Pat. L.J. 195=36 Ind. Cas. 263.

MULLICK, J.

(4) *Father's sister and maternal grandfather—Preferential rights of succession.*

Under the Hindu Law in Berar the father's sister is an heir and her rights of succession are in preference to those of the maternal grandfather. *Madho v. Janki*, 12 N.L.R. 148=36 Ind. Cas. 514.

MITTAL, O.A.J.C.

References:—26 B. 710; 4 N.L.R. 31 (34); 6 N.L.R. 39; 10 N.L.R. 24; 8 B.H.O.R.O.C.J. 344 (261); 27 B. 610, R.

(4) *Bengal law—Inheritance by childless widow.*

Hindu Law—(Continued).**—21.—Succession—(Continued).**

Under the Hindu law prevailing in Bengal a childless widow cannot inherit to the property of her father. *Bimola v. Dangoo Kansarl*, 30 Ind. Cas. 567.

JACKSON and GLOVER, JJ.

Reference:—19 W.R. 189, *Reversed*.

(6) *Mitakshara—Succession—Preference of whole blood to half-blood, limits of—Uncle of half-blood, if to be preferred to cousin of whole blood—Civ. Pro. Code (1882), Ss. 231, 317—Co-decree-holder purchasing at execution sale, trustee for other decree-holders—Scope and object of S. 317. Ganga Sahai v. Kesri*, 19 O.W.N. 1175=29 M.L.J. 399=18 M.L.T. 203=2 L.W. 837=(1915) M.W.N. 713=13 A.L.J. 999=17 Bom. L.R. 998=22 C.L.J. 508=37 A. 545=30 Ind. Cas. 265 (P.C.). See Final Part, 1915, Col. 809.

(7) *Dayabhaga School—Succession—Paternal great-grandfather's son's daughter's son and maternal uncle, who is preferable. Kedar Nath Banerjee v. Haridas Ghosh*, 19 C.W.N. 1181=29 Ind. Cas. 790=43 O. 1. See Final Part, 1915, Col. 809.

(8) *Bandhu—Who is?—Whether a grand-father's great-grandson's daughter's son a Bandhu. Shih Sahai v. Saraswati*, 13 A.L.J. 786=37 A. 583=30 Ind. Cas. 903. See Final Part, 1915, Col. 810.

(9) *Benares School—Contest between paternal uncle's grandson and father's paternal uncle's son—Preference—Construction—Putra, used with reference to collaterals, whether includes grandsons—Propinquity and capacity to offer oblations, as tests of preference—Subodhini, authority of, not canonical—Smriti Chandrika, how far applicable to explain a dubious or indeterminate phrase or term in the Mitakshara—Practice—Difference of opinion—Full Bench, reference to—Opinion of Judge not a party to a judgment—Inclusion thereof in the judgment for enforcing the conclusion arrived at—Desirability. Buddha Singh v. Lattu Singh*, 2 L.W. 897=(1915) M.W.N. 772=29 M.L.J. 434=13 A.L.J. 1007=17 Bom. L.R. 1029=18 M.L.T. 409=20 C.W.N. 1=22 O.L.J. 481=37 A. 604=30 Ind. Cas. 529 (P.C.). See Final Part, 1915, Col. 811.

(10) *Mitakshara—Unmarried daughter, suit by—Death of such plaintiff—Whether right to sue survives to her married sisters. See CIV. PRO. CODE (1908), No. 3, 14 A.L.J. 8.*

(11) See HINDU LAW (CUSTOM), No. 1, 19 O.C. 165.

—22.—Texts.

(1) *Authority of Dattaka Chandrika. See HINDU LAW (ADOPTION), No. 8, 20 O.W.N. 901.*

(2) *Construction of Texts—Atideca upon atideca, fallacy of. See HINDU LAW (SUCCESSION), No. 2, 20 O.W.N. 489.*

—23.—Widow.

See ACT XV OF 1856.

See HINDU LAW (ADOPTION).

Hindu Law—(Continued).**—23.—Widow—(Continued).**

See HINDU LAW (ALIENATION).
 See HINDU LAW (INHERITANCE).
 See HINDU LAW (PARTITION).
 See HINDU LAW (REVERSIONERS).
 See HINDU LAW (STRIDHANAM).
 See HINDU LAW (WILL).

(1) *Construction of document—Consent by reversioners to widow's applying estate to charity—Failure of one form of charity—Gift to other form, validity of.*

Held, that, where the reversioners to a Hindu woman's estate gave the widow authority to devote the property to any charity, but the particular form of charity which she had selected having failed, she applied the property to another form of charity :

Held, that the reversioners were not entitled to impeach it, as a general intention to give to charity was agreed to by them. **The Bhiwani Orphanage Association, Hissar v. Parma Nand**, 7 P.W.R. 1916=43 P.L.R. 1916=31 Ind. Cas. 737.

RATTIGAN and SHADI LAL, JJ.

(2) *Alienation by widow—Subsequent relinquishment by her—Effect upon alienees.*

Per Sadasiva Aiyar, J.—A Hindu widow has got the power to alienate her estate so as to enure during her lifetime, notwithstanding any event which may happen after the alienation. Such alienation cannot therefore be affected by her subsequent relinquishment of her estate in favour of the next reversioner (a).

Per Napier, J.—The theory that change of status of an assignor or a surrender by such assignor can invalidate legal rights obtained by an assignee is so contrary to equity and good conscience that it should not be accepted by Courts of this country whatever the ancient Hindu Law on the subject was. The proposition entails a defeasance of an assignee's title by a collusive alienation made with intent to benefit third parties by subsequent assignment and by a collusive acceleration on made with intent to defraud such assignee (b). **Subbamma v. Subramaniam**, 30 M.L.J. 260=32 Ind. Cas. 813=39 M. 1035.

SADASIVA AIYAR and NAPIER, JJ.

References:—(a) 26 M. 143; (1914) M.W.N. 795; 26 Ind. Cas. 1; 99 M.L.J. 546=(1915) M.W.N. 517; 20 A. 532, R; 33 B. 88; 11 B. 609; 19 B. 809. *Not F.* (b) 31 M. 446, R.

(3) *Widow—Surrender of whole estate in favour of one of two reversioners, without the consent of the other reversioner—Validity—Partial alienation—Consent of reversioner, whether conclusive evidence of the validity of the transaction.*

An alienation by a Hindu widow of the whole of her husband's estate in favour of one of her two grandsons (the only reversioners to the estate), without the consent of the other, is invalid as a surrender.

The consent of the nearest reversioner to a partial alienation by a Hindu widow is only

Hindu Law—(Continued).**—23.—Widow—(Continued).**

evidence of the necessity for the alienation and is not conclusive evidence of the validity thereof. **Malla Suriah v. Choudhari Suran Naidu**, 3 L.W. 278=19 M.L.T. 239=32 Ind. Cas. 999.

COUTTS-TROTTER and SESHAGIRI AIYAR, JJ.

References:—30 A. 1, *Expl.*; 21 M. 128, F.

(4) *Widow—Property acquired with income of husband's estate, nature of—Test—Intention.*

The real test to determine whether the property acquired by a widow with the income of her husband's estate is her absolute property or forms an accretion to the estate, is to ascertain the intention of the widow.

Where, therefore, a widow, in her capacity as such, brought a suit for pre-emption of the land in dispute and having obtained a decree therefor, paid the pre-emption price from the income of her husband's estate :

Held, that the mode of acquisition pointed to the conclusion that she did not mean to sever the land from the main estate and that, therefore, it became an accretion to her husband's property and that consequently she was unable to make a gift of such property without consent of her husband's reversioners. **Chela Ram v. Ishar Das**, 41 P.W.R. 1916=32 Ind. Cas. 831.

SHADI LAL, J.

References.—10 C. 324 (P C)=10 I A. 150=13 O.L.R. 418=7 Ind. Jur. 557=4 Sar. P.C.J. 459, R.

(5) *Widow's estate—Legal necessity—Marriage of daughter's daughter when son-in-law gharjama, is legal necessity—Construction—Mortgage of widow's "right and interest" if covers more than life interest.*

Where A, a Zemindar's widow, married her only daughter S to a cultivator in order that the son-in-law may come and live in the mother-in-law's house, and the issue of the marriage was a daughter.

Held—That, though A might be under a moral duty to see that the girl was properly married, the expenses of the marriage could not be charged on her husband's estate as a legal necessity.

The fact that a Hindu widow says she is mortgaging "her right and interest" in her husband's estates does not necessarily indicate that she was mortgaging only a life-interest. **Narainbati v. Ramdhari Singh**, 20 C.W.N. 734=1 Pat. L.J. 81=34 Ind. Cas. 277.

SHARFUDDIN and ROE, JJ.

(6) *Injunction—Widow alienating and wasting her husband's property—Cases in which reversioners can restrain her from doing so—Effect of injunction.*

Held, that in ordinary cases, the reversioners of the husband of a widow have no *locus standi* to obtain and the Courts are incompetent to grant a perpetual injunction restraining the widow from alienating and wasting her husband's property, and that such an injunction is a proper form of relief only in cases in which

Hindu Law—(Continued).**—23.—Widow—(Continued).**

it is found that the widow is committing or is about to commit acts of waste in the sense that that term is understood in Law, but even the injunction cannot prevent her from alienating the property for necessary purposes, as the question would arise in every case as to the existence or non-existence of the necessity. **Musammatt Tajo v. Allah Din**, 53 P.W.R. 1916=124 P.L.R. 1916=35 Ind. Cas. 229.

HATTIGAN, J.

(7) *Settlement decrees in favour of Hindu widow — Reversioner's right in property decreed in favour of Hindu widow at settlement—Adverse possession against Hindu widow—Confiscation of proprietary rights in Oudh, effect of.*

One G and his ancestors were in possession of a village which they had obtained under a *Dirt* deed from the Taluqdar. After the annexation of Oudh, the first summary settlement was made with G. Thereafter G died and his interest devolved on his nephew S, and on the death of the latter the entire family property devolved on his widows R and M. R and M jointly with the widow of G claimed the village at the regular settlement on the strength of its having been granted to the ancestors of their husbands by the Taluqdar. The Settlement Court granted them a decree subject to the rights of their co-sharers.

Held, that, as all the three ladies lived jointly and the widow of G never set up any title adverse to R and M, her joint enjoyment of the property with them was not prejudicial to their interest.

Held further, that the widows were given the village as representing a certain stock or body of proprietors with the details or particulars of which the Government did not care to concern itself, that the settlement decree did not confer on them greater rights than they had before the confiscation, that their possession even after the decree was only as Hindu widow's, and that the rights of reversioners were not prejudicially affected by the decree. **Ganesha (Musammatt) v. Nageshar Baksh Singh (Thakur)**, 19 O.C. 1=34 Ind. Cas. 257.

STUART and PANDIT KANHAIYA LAL, A.J.Cs.

(8) *Compromise by widow when binding on reversioners—'Necessity' whether to be proved.*

When there is a litigation pending, the widow is also interested in the subject-matter of the litigation and she must have a discretion as to how to conduct that litigation and to come to an arrangement with her opponent, if as a matter of fact she believed that it would be in the best interest of the estate. On the other hand, the reversioner is entitled to shew that the compromise was not arrived at with due care and caution and was such as really shewed negligence on the part of the widow.

If the compromise was a *bona fide* transaction, the reversioners are not entitled to reopen the matter.

Hindu Law—(Continued).**—23.—Widow—(Continued).**

The case of a *razinama* does not stand on the same footing as an alienation, and the validity of the *razinama* does not depend on proof of necessity. **Muthu Kumarasami Odayar v. Subramanlya Iyer**, 31 M.L.J. 87=33 Ind. Cas. 687.

ABDUR RAHIM and SRINIVASA AIYEN-GAR, JJ.

Reference :—21 M.L.J. 645=38 I.A. 97, F.

(9) *Compromise entered into with a Hindu widow—Alienation—Not binding on reversioners.*

Dwarka Das was the owner of two shops. On his death his widow succeeded to a Hindu widow's estate. The widow made an adoption. The widow sued to eject K and D who were in possession of the shops but the suit was dismissed on the ground that the tenancy which she alleged was not proved. Then the widow and the adopted son sued to recover possession. That suit was compromised with the condition that, should K and D pay a certain sum of money to the widow within a certain time, they would become the owners of the shops. A decree was made in terms of this compromise. In the meantime the adoption was set aside at the suit of reversioners. In order to raise money for payment in accordance with the compromise, a mortgage was made of the two shops, and the money was duly paid in. The mortgagees then brought a suit for sale and the shops were purchased in execution of the decree by one H who also obtained possession. On the death of the widow the reversioners commenced the present suit for possession against H who was not a party to the suit to set aside the adoption.

Held, that the title of H having been derived from the widow, the compromise decree which was passed in the suit between the widow and K and D was in effect nothing more than an alienation on the part of the widow of property which formed part of the husband's estate, and could only bind the reversioners if it were shown to have been made for such purposes as would justify a sale by a Hindu widow, and no such purposes having been proved, the reversioners were not bound.

Held also, that the test to apply to a transaction which is challenged by the reversioners as an alienation not binding on them is whether the alienee derives title from the holder of the limited interest or life-tenant (a). • **Kanhaiya Lal v. Kishore Lal**, 14 A.L.J. 881=38 A. 679=35 Ind. Cas. 683.

PIGGOTT and LINDSAY, JJ.

Reference :—(a) 33 A. 356 (P.C.), F.

(10) *Hindu widow—Gift of property with consent of reversionary heir expectant—Donee given possession—Suit for declaration of proprietary title in widow's lifetime against strangers—Decree if may be made apart from proof of necessity.*

The widow of P, the former owner of an impartible estate, with the consent of the reversionary heir expectant on the death of the widow

Hindu Law—(Continued).**—23.—Widow—(Continued).**

and his brother, made a gift of the estate to C. C's application for mutation of names was successfully opposed by B, who claimed the estate under an alleged Will of P, and further denied that the persons who consented to the gift were related to P, and suggested two other persons as the reversionary heirs, whereupon C sued B for a declaration of his title as proprietor of the estate. The trial Court found that P had made no Will as alleged, that the persons set up by B as his reversionary heirs were fictitious persons and that the estate passed by the gift by P's widow with the consent of persons who were related to P in the manner alleged by the plaintiff and accordingly decreed the suit. B on appeal did not challenge these findings, but urged that the deed of gift did not represent a genuine transaction, and that the widow (who was a party to the suit and had died pending the appeal, the consenting reversionary heirs being substituted in her place in the records) had remained in possession and had no power to confer any valid title to C.

Held, that the suit not being a suit for ejectment of a defendant who was in possession, but a suit for declaration of title by a plaintiff who was in possession, it was not incumbent on the plaintiff to prove a better title in himself to possession of the property than the title of the defendant.

That on the findings B was a mere impertinent intervener in another person's affair and had no right to contest the declaration of title which was obtained by C. *Chaudhri Bukhah Singh v. Raja Indar Bikram Singh*, 20 C.W.N. 1149 = (1916) 2 M.W.N. 120 = 20 M.L.T. 164 = 4 L.W. 288 = 31 M.L.J. 505 = 14 A.L.J. 1044 = 18 Bom. L.R. 846 = 38 A. 440 = 24 C.L.J. 291 = 19 O.C. 141 (P.C.) = 35 Ind. Cas. 958 (P.C.).

LORD ATKINSON, LORD PARKER OF WADDINGTON, SIR JOHN EDGE and MR. AMBER ALI.

- (11) *Widow—Hindu widow—Alienation—Setting aside—Alienation—Compensation for improvements—Evidence—Relationship—Statement in will of widow—Conjectural suggestions as to will in arguments.*

The plaintiff on the death of a Hindu widow brought a suit for possession of a certain house with its compound as the next heir of her husband and pleaded that an alienation made by the widow against his interest in favour of the defendant was invalid. The plaintiff alleged that he was son of a daughter of her husband by a former wife. The allegation was denied by defendant. The plaintiff produced a Will made by the widow five years before suit, mentioning the plaintiff as daughter's son by relationship.

Held, that the statement in the Will was a weighty piece of evidence of the plaintiff's relationship, and that the widow was the proper person to make such a statement of fact, which was within the scope of her own knowledge, especially when the statement was corroborated by other relatives mentioned in the Will and whose evidence on the matter was against their

Hindu Law—(Continued).**—23.—Widow—(Continued).**

interest, and was uncontradicted by any reliable evidence.

Held, also, that erection of a temple in the compound of a house could not be regarded as an improvement. The alienee was permitted to remove materials, for the building was not erected with the consent of the plaintiff and his acquiescence was not proved. The Chief Court allowed half the amount spent in adding another storey to the house and sinking a well. *Mathu Mal v. Kidar Nath*, 77 P.L.R. 1916 = 36 Ind. Cas. 62.

RATTIGAN and CHITTY, JJ.

Reference :—20 B. 298, R.

- (12) *Widow's estate—Joint surrender by widows of their interests in favour of the next immediate female reversioner's son, how far valid—Consent of the next female reversioner not obtained, what effect—Whether such surrender can be regarded as an alienation with the consent of the reversioners.*

Two co-widows relinquished their interests in the property of their deceased husband in favour of the daughter's son of one of them, the other widow consenting to relinquishment on receiving an absolute interest in a portion of the property in lieu of her widow's interest in the half. It was not shown that the daughter who was the immediate reversioner consented to the widow's action either at the time of relinquishment or afterwards.

Held, the property did not pass to the daughter's son.

The relinquishment did not operate as a surrender because it was not intended to be a surrender of the whole estate, one of the widows having obtained an absolute estate in a portion of the property in lieu of her half-share in the whole, and because it was not in favour of the nearest reversioner at the time, *vis.*, the daughter.

The relinquishment could not be treated as an alienation made with the consent of the whole body of the reversioners, for the daughter did not give her consent to the relinquishment, nor is there any proof of consent on the part of the other expectant reversioners given either at the time or afterwards.

Per *Abdur Rahim, J.*—The proposition laid down by the Privy Council in 30 A. 1 amounts to this, the consent of substantially the whole body of expectant reversioners is itself sufficient, apart from legal necessity, to validate an alienation even though such consent was given after the transaction and on receipt of consideration.

Per *Srinivasa Iyengar, J.*—The consent of the kindred is only a piece of evidence and where evidence of the actual necessity is lost by lapse of time, it may be very valuable evidence; also when the question is whether the alienee is a person who purchased *bona fide* after making reasonable inquiries, the consent of the reversioners to the transfer, if it purports to be a transfer for legal necessity,

Hindu Law—(Continued).**—23.—Widow—(Continued).**

may, unless rebutted, be sufficient proof. Consent unless given *bona fide* and without being purchased can be of no avail. *Mulugu Kotayya v. Modigonda Chandramowli Sastri*, 20 M.L.T. 148=31 M.L.J. 406=4 L.W. 149=(1916) 2 M.W.N. 137=36 Ind. Cas. 407.

ABDUR RAHIM and SRINIVASA AIYENGAR, JJ.

References:—8 M.I.A. 529; 13 M.I.A. 209; 41 C. 793; 42 C. 876; 25 B. 129, R.; 30 A. 1 (P.C.), *Expt.*

- (18) *Widow's estate—Position of reversionary heirs—Declaration of right—Reversioner not entitled to such declaration while the widow lives—Representative capacity of reversioner suing to prevent waste.*

A Hindu widow's right with respect to the estate of her deceased husband is of the nature of a right of property; her position is that of owner; her powers in that character are, however, limited; but so long as she is alive no one has any vested interest in the succession. While she is, it is futile to make a declaration as to who is the reversionary heir of her deceased husband which might be rendered valueless by the development of events.

A reversionary heir although only having a contingent interest is recognized by the Courts as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life; but such heir thus appealing to the Court does so in a representative capacity so that the *corpus* of the estate may pass unimpaired to those entitled to the reversion.

Where the respondent, a reversionary heir, sued for an injunction and a receiver, alleging waste by the appellant, a widow, who denied that the respondent was the reversioner, and it was found that the charges of waste were unfounded, but the respondent was granted a declaration that he was the "next reversionary heir" under cover of his prayer "for further relief."

Held, that he was not entitled to such a declaration. *Janaki Ammal v. Narayanasami Aiyar*, 31 M.L.J. 225=20 M.L.T. 168=20 C. W.N. 1323=39 M. 634=14 A.L.J. 997=(1916) 2 M.W.N. 188=18 Bom. L.R. 856=24 C.L.J. 309=4 L.W. 530 (P.C.).

LORD SHAW, LORD PARMOOR and MR. AMER ALI.

References:—31 I.A. 67; 42 I.A. 125.

- (14) *Hindu Law—Sale by Hindu widow—Legal necessity—Onus probandi—Recitals in deed—Weight to be attached to them as against third parties—Attestation of a deed does not by itself create estoppel against or imply consent of the attesting reversioner—Dilatory conduct in appeal to Privy Council—Costs.*

Where a Hindu widow, who is entitled to the usufruct of her deceased husband's property,

Hindu Law—(Continued).**—23.—Widow—(Continued).**

purports to dispose of his whole estate, the burden of proving that the disposition was made under circumstances of legal necessity rests on the purchaser, however great the lapse of time (a).

Under ordinary circumstances and apart from Statute, recitals in a deed of sale can only be evidence between the parties to the conveyance and those who claim under them. But where a very long time has elapsed between the date of the deed and the institution of the suit challenging the sale, such recitals cannot be disregarded, although, on the other hand, no fixed and inflexible rule can be laid down as to the proper weight which they are entitled to receive. If the deed is challenged at the time or near the date of its execution, so that independent evidence would be available, the recitals would deserve but slight consideration, and certainly should not be accepted as proof of the facts establishing legal necessity. But as time goes by, and all the original parties to the transaction and all those who could give evidence on the relevant points have grown old or have passed away, a recital consistent with the probability and circumstances of the case assumes greater importance, and cannot lightly be put aside; for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper inquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then, when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, will be sufficient evidence to support the deed. To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction perfectly honest and legitimate when it took place would ultimately be incapable of justification merely owing to the passage of time.

Attestation proves no more than that the signature of an executing party has been attached to a document in the presence of a witness. It does not involve the witness in any knowledge of the contents of the deed nor affect him with notice of its provisions. It can, at the best, be used for the purpose of cross-examination, but, by itself, it will neither create estoppel nor imply consent (b).

Where there is considerable delay (delay of seven years in the present case) in setting down an appeal for hearing, a successful appellant will not be allowed costs unless he clears himself of the imputation of having needlessly protracted the proceedings. *Nanda Lal Dhur Bhowas v. Jagat Kishore Acharjya Chowdhuri*, 30 M.L.T. 335=31 M.L.J. 563=18 Bom. L.R. 868=4 L.W. 458=14 A.L.J.

Hindu Law—(Continued).**—23.—Widow—(Continued).**

1108=(1916) 2 M.W.N. 336=24 C.L.J. 487=21 C.W.N. 225=36 Ind. Cas. 420. (P.C.).

LORD CHANCELLOR (LORD BUCKMASTER), LORD ATKINSON and SIR JOHN EDGE.

References:—(a) 22 I.A. 57, F. (b) 42 I.A. 64, F.

- (15) *Two co-widows—Power of one to alienate her share—Effect of such alienation—Consent of the other widow—Effect.*

One co-widow can alienate for her life her share in her husband's estate, whether before or after partition, though the alienation will only be binding on the other widow so as to defeat her right of survivorship if that other consented to it. *Govind v. Chandrabhaga*, 12 N.L.R. 100=34 Ind. Cas. 675.

DRAKE BROCKMAN, J.C., and PRIDEAUX, A.J.C.

References:—7 C.P.J.R. 153; 10 N.L.R. 51; 31 B. 560; 11 M.I.A. 487; 9 C. 590; 8 C.W.N. 658; 23 M. 504; 33 M. 473; 26 M. 334; 1 M. 290; 33 A. 443; 12 A. 51; 19 A 524; 29 A. 289; 33 A. 356, R.

- (16) *Widow—Setting up will of last maleholder—Onus—Suit by reversioner for setting aside will as forgery and for declaration of invalidity of widow's alienation—Nature of suit—Limitation Act, Art. 93.*

Where a document is a nullity, there is no need to set it aside.

A suit which asks for a declaration of the invalidity of a document as being a forgery and for other substantial reliefs is not barred, even though it is brought more than three years after the expiry of the period for getting the document set aside.

In a suit by reversioner for a declaration that an alienation by a widow is void beyond her lifetime though it is part of his case that the last male owner died intestate and that the female heir succeeded only to a limited estate, there is no presumption that the deceased left a will and if the defendant pleads a will, it is for him to prove it. *Gokula Venkamma v. Gokula Narasimha*, (1916) 2 M.W.N. 325=4 L.W. 441.

AYLING and SRINIVASA AYYANGAR, JJ.

- (17) *Hindu Law—Relinquishment by widow—Acceleration—Consent of nearest reversioner to alienation by widow—Evidence of necessity.*

In order to accelerate the vesting of the estate in the nearest reversioner there must be complete surrender of the widow's estate (a).

The rule laid down by the Privy Council in *Bajrang Singh v. Manoharnika Baksh*, 30 A. 1, is applicable to transfers for consideration. It has not been extended to a case where a transfer has been made by way of gift. If the transfer be with the consent of the nearest reversioner, it takes effect because it affords evidence of the propriety of the transaction, in other words, it justifies the transaction on

Hindu Law—(Continued).**—23.—Widow—(Continued).**

the ground of legal necessity. *Khawani Singh v. Chet Ram*, 14 A.L.J. 972=39 A. 1.

PIGGOT and LINDSAY, JJ.

Reference:—19 C. 236 (P.C.), *Expl.*

- (18) *Hindu Law—Hindu widow, alienation made by—Legal necessity established for bulk of the consideration, effect of.*

Held, that although the principle laid down by their Lordships of the Privy Council in 29 A. 331, namely, that a sale could be set aside on payment of amount borrowed for legal necessity, where a portion of the purchase-money was justified by any legal necessity, is one which must ordinarily apply in cases of alienations by a Hindu widow, yet exceptional circumstances may arise, such as where almost the whole of the consideration money is proved to be paid for legal necessity, and only a small amount remains unaccounted for, where alienation should not be set aside.

Where a legal necessity was found to have been proved for Rs. 3,782-4-9 out of a total consideration of Rs. 4,000, held, that the alienation should not be set aside. *Bunyard Husain v. Mata Din Singh*, 19 O.C. 122=36 Ind. Cas. 57.

KENDALL, A.J.C.

- (19) *Hindu Law—Widow—Next reversioners—Acceleration of estate by the widow—Acceleration must be of the entire estate—Alienation—Legal necessity—Adoption—Divesting of estate—Maxim—A man shall not take advantage of his own fraud—Applicability of the maxim.*

L, a Hindu widow, having mortgaged her husband's estate to B, the plaintiffs, the next reversioners, sued in 1893 to set aside the alienation as a hollow transaction. The parties referred their disputes to arbitration which resulted in an award whereby the plaintiffs were allowed to redeem the mortgage, B was to convey the mortgaged property to the plaintiffs, L was to surrender all her right, title and interest in it, and the plaintiffs were to give to her a house and 18 *bighas* of land, out of the estate so re-conveyed to them, for her life as maintenance. In 1906, B created a sub-mortgage on the property in favour of D; and passed a rent-note to him. The plaintiffs took a re-conveyance of the property from B, and paid off D who transferred his rights to them. In 1909, L adopted M, the son of B, thereupon B delivered over possession of the property:

Held, dismissing the suit, (1) that the transaction which resulted from the suit of 1893 and which was the basis of the plaintiff's claim, was in no sense an acceleration, inasmuch as the consideration expressed in the award was really no consideration but a reservation in the widow's interest of a very substantial part of her original life-estate;

(2) that if the transaction be regarded as an alienation it could only be validated by proof of legal necessity;

(3) that L's alienation of 1893 under the award not having been for legal necessity, was

Hindu Law—(Continued).**—23.—Widow—(Continued).**

void against M from the moment of his adoption;

(4) that M was not precluded from raising the plea for, neither was he guilty, of fraud nor did he give any advantage in the special issue between him and the plaintiffs.

There are two ways in which a Hindu widow in the enjoyment of a normal widow's estate can convey a greater interest than that which she herself has, one is by acceleration, the other by alienation for legal necessity.

In acceleration a Hindu widow enjoying the normal Hindu widow's life-estate surrenders it in favour of the next reversioner; but it is absolutely necessary that the entire interposed life-estate must be withdrawn.

An alienation by a Hindu widow for legal necessity rests upon a strict proof of the necessity. The consent of the reversioners is no more than a factor in the proof of legal necessity. It may always be used in support of the alienor's contention that there was legal necessity, but *per se* it will not be sufficient to do away with all other proof.

A true acceleration differs from alienation for legal necessity. The two legal notions are not only irreconcilable, but virtually antagonistic. In strictness no acceleration can be an alienation and no alienation can be an acceleration.

A subsequent adoption will not divest estates vested before it was made.

In applying the maxim that a man shall not take advantage of his own fraud, two points are to be looked at; first, whether the person against whom the maxim is used has really committed a fraud at all; and, secondly, whether, assuming that he has committed a constructive fraud, that has given him any advantage in the particular issue he is contesting. **Moti Lalji v. Laldeo Jibhal**, 18 Bom. L.R. 954=41 B. 93.

BEAMAN and HEATON, JJ.

(20) *Hindu widow, alienation by—Consent of next reversioner, effect of.*

Where the whole widow's estate is alienated with the consent of the whole of the next reversion, the alienation is valid as the reversioners transfer as heirs; that estate having been accelerated by the widow's disclaimer it is valid irrespective of any consideration of necessity.

This theory can only be applied when the alienation is of the whole estate for it rests on the fiction that the widow has declined the inheritance which therefore passed direct to the next reversion. 'If the alienation is of part of the estate there is no room for this fiction.

In all other cases, *i.e.*, where the widow transfers part of the estate with the consent of some or all of the next reversion or the whole estate with the consent of some and not all of the next reversion—the consent raises a presumption of the propriety of the alienation. To raise this presumption the consent of the whole of the next reversion is *ordinarily* necessary, but there may be special cases in which the

Hindu Law—(Continued).**—23.—Widow—(Continued).**

consent of a part of the next reversion will suffice (a).

The reversioner who consents may be barred by estoppel, but a more distant reversioner who by subsequent events becomes the actual reversioner would not be bound. **Jiwatmal v. Mussamat Gianibal**, 10 S.L.R. 49=35 Ind. Cas. 681.

PRATT, J.C. and CROUCH, A.J.C.

References:—(a) 17 C. 896, F.; 6 A. 116; 80 A. 1=35 I.A. 1; 10 C. 1103; 17 C. 896; 19 C. 236; 25 B. 129; (1861) 8 M.I.A. 529; (1869) 18 M.I.A. 209; 40 C. 721; 1 S.L.R. 196; 14 Bom. L.R. 602, R.

(21) *Right of reversioner to mortgage property in possession of widow—Suit by widow for declaration that mortgage was of no effect against her interest.*

During the lifetime of a Hindu widow a reversionary heir executed a mortgage-deed in respect of the property in possession of the widow. In the mortgage deed the mortgagor did not state that the property was for the time being owned by the widow or that he was mortgaging his reversionary interests only. The widow thereupon sued for a declaration that the mortgage-deed was of no effect so far as her interest in the property in her possession was concerned. *Held* that, although her estate was merely that of a Hindu widow, she might rightly complain that some injury might be done to her by the mortgage transaction unless some declaration was obtained by her at the earliest opportunity, that it was in no way to affect her right. Therefore she was entitled to maintain the declaratory suit. **Mussamat Chandra Kuar v. Kuar Raghubar Singh**, 30 Ind. Cas. 198.

LINDSAY, J.C., and KANHAIYA LAL, A.J.C.

(22) *Release in favour of reversioners — Acceleration of vesting of estate.*

Where a Hindu widow relinquished her life-estate in favour of the nearest reversioners of her husband under a deed of release, the effect of the release was to accelerate the vesting of the estate in the reversioners or at all events of transferring the life-interest held by her to them for life. **Jangl Ram v. Sheoraj Singh**, 30 Ind. Cas. 234.

STUART and KANHAIYA LAL, A.J.CS.

(23) *Attestation by heir—Mortgage by widow —Estoppel.*

Where the heir of a deceased Hindu deliberately allowed the widow of the deceased to hold herself out as the owner of the property of her husband and attested the mortgage-deed in proof of his consent, he cannot be allowed to resile from that position and deprive the mortgagee of the money paid by him on the faith of that representation. **Gajadhar Lal v. Gulaba**, 30 Ind. Cas. 388.

KANHAIYA LAL, A.J.C.

References:—20 C. 296=19 I.A. 203; 18 Ind. Cas. 613=15 O.C. 67, R.

Hindu Law—(Continued).**—23.—Widow—(Continued).**

- (24) *Suit for maintenance—Plea of her having other means of support.*

In a suit for maintenance by a Hindu widow the defendant cannot be allowed to raise the contention that the plaintiff has got other means of support and is therefore not entitled to claim maintenance at all out of her husband's joint family property. *Utharankat Parakkal Eazuvan Raman alias Kuttan's wife Kalliani v. Utharankat Parakkal Eazuvan Raman*, 30 Ind. Cas. 897.

SADASIVA AIYAR and BAKEWELL, JJ.

References:—28 Ind. Cas. 200 = 38 M. 163 = 28 M.L.J. 260, F.

- (25) *Compromise of suit with reversioner's consent—Compromise having effect of alienation—Right of reversioner to question compromise.*

Where a widow compromised a suit with the consent of the then reversioner and the compromise entered into had the effect of alienating the husband's estate, the compromise bound the actual reversioners on the death of the widow, inasmuch as the compromise was a *bona fide* settlement of a doubtful claim brought about by the nearest reversioner then alive. *Elamarty Bangarayudu v. Mangipoody Perayya Sastry*, 30 Ind. Cas. 927.

SPENCER and SESHAGIRI AIYAR, JJ.

References:—24 Ind. Cas. 309 = 27 M.L.J. 149 = 18 C.W.N. 929 = 1 L.W. 648 (P.C.); 10 Ind. Cas. 477 = 15 C.W.N. 545 (P.C.) = 8 A.L.J. 552 = 13 Bom. L.R. 427 = 12 C.L.J. 575 = 10 M.L.T. 25 = 21 M.L.J. 645 = 33 A. 356 = (1911) 1 M.W.N. 432 = 38 I.A. 87; 14 W.R. 146; 5 Ind. Cas. 640 = (1910) M.W.N. 60 = 7 M.L.T. 340 = 20 M.L.J. 204 = 33 M. 473; 6 C.L.R. 76; 12 Ind. Cas. 464 = 38 C. 639; 12 Ind. Cas. 123 = 10 M.L.T. 179 = 35 M. 560, F.

- (26) *Act III of 1901 (U. P. Land Revenue), S. 4 (12)—Alienation by Hindu widow of husband's property including sir—Widow's claim to exproprietary rights after sale disallowed—Effect of cancellation of sale by reversioners.*

Where the claim of a Hindu widow for exproprietary rights after a sale by her of proprietary rights including sir in her husband's property was disallowed held in a suit by the reversioners for cancellation of the sale after the widow's death, that the sale should be cancelled and that the cancellation revived the sir rights in favour of the reversioners. *Barmal Singh v. Sheo Nath*, 31 Ind. Cas. 851.

HOLMS, S.M. and CAMPBELL, J.M.

- (27) *Widow—Ex parte decree—Effect—How far binding on reversioners—Onus of proof.*

The fact that a decree is allowed by a widow to go *ex parte* is not conclusive to show that it is not within the meaning of the decision of the Privy Council in 2 W.R. 31 "fairly and properly obtained;" and the onus of proof rests primarily upon those who challenge it to establish that it was fairly and properly obtained. But where in a case there has been a great

Hindu Law—(Continued).**—23.—Widow—(Continued).**

lapse of time, and where all the circumstances of suspicion exist it would be quite wrong to bind the reversioners by that *ex parte* judgment. *Rangaswami Pillai v. Valdylinga Mudallar*, 33 Ind. Cas. 446.

COUTTS-TROTTER and MOORE, JJ.

References:—2 W.R. 31 (P.C.) *Expt.*; 29 A. 487, R.; 17 M.L.J. 160, D.

- (28) *Gift by widow—Gift with power of alienation—Construction of document—Intentions of parties.*

A gift by a Hindu widow of property in which she had a widow's estate passes only the limited estate which the widow had and the occurrence in the deed of the words "with power to alienate the same by gift, sale, etc." only means that the widow's estate thereby conveyed can be sold, etc.

There is no doubt that the onus is upon those who seek to prove that the widow was purporting to convey more than she could legally convey.

The Court should not allow the evidence of what the parties subsequently did to influence the construction of a document any more than their evidence as to what they intended to do though the Court is entitled to look at the surrounding circumstances to see how the parties were placed and to find the matters with reference to which they were contracting or writing deeds or making wills.

Quære—Whether the principle of Hindu Law that an alienation by a widow can be validated by the consent of the reversioners can be applied to gifts by life-estate owners. *Yeerakkal v. Thirumakkal*, 34 Ind. Cas. 596.

COUTTS-TROTTER and SESHAGIRI AIYAR, JJ.

References:—10 A. 407, doubted; 34 B. 165, R.

- (29) *Tenure held by widow—Rent decrees against the widow—Execution of decrees—Execution against the holding in the hands of the reversioners—Bengal Tenancy Act (VIII of 1885), S. 65.*

The tenure in the hands of the reversionary heirs does remain liable to be sold in execution of decrees for rent obtained in the time of the widow and this view is also in accordance with the provisions of the Bengal Tenancy Act, S. 65. *Ahutoosh Mookerjee v. Akhoy Kumar Debi*, 34 Ind. Cas. 581.

TRUNON and SHEETSHANKS, JJ.

References:—30 C. 550 (P.C.), F.; 16 C. 511; 17 C.W.N. 337, D.

- (30) *Hindu law—Widow, mortgage by, and the then reversioner—Decree, effect of—Execution sale—Auction purchaser, title—Fraud in securing decree.*

A decree of a competent Court in a mortgage suit in which the defendants were not only the Hindu widow but also the then reversioner must be taken to bind the whole estate. As long as that decree stands and until it is set aside for good reason, the actual reversioner

Hindu Law—(Continued).**—23.—Widow—(Continued).**

cannot maintain a suit for recovery of possession of the mortgaged property from an auction-purchaser in execution of that decree (a).

Per Mookerjee, J.—When a mortgagee from Hindu widow seeks to obtain a decree which would bind not merely the qualified interest of the widow, but the entire inheritance itself, the then next reversioner is a proper party to the suit. A reversioner so impleaded may well be deemed a party in a representative capacity. A decree fairly made in his presence, so long as it stands, binds the inheritance, whether he or some one else ultimately becomes the actual reversioner when the succession opens out on the death of the widow (b).

The title of the purchasers can consequently be defeated by the plaintiff, only after the decree which is the root of that title, has been successfully impeached for fraud, collusion, or other like reason. If this were established, the fact that the parties had gone through the form of a suit and a decree could not justly be held to prejudice the right of the actual reversioners (c). *Ganga Narayan Datta v. Indra Narayan Saha*, 35 Ind. Cas. 49 = 25 C.L.J. 391.

SANDERSON, C.J. and MOOKERJEE, J.

References:—(a) 42 O. 876 (P.C.); 41 C. 793; 40 C. 721, R. (b) 11 M.I.A. 241; 17 W.R. 422; 23 W.R. 174; 3 C.W.N. 637; 41 C. 69; 25 Ind. Cas. 84; 4 A. 532; 34 M. 188; 32 E.R. 514; 38 M. 406 (P.C.), R. (c) 9 M.I.A. 539, R.

(31) *Maintenance—Gift by husband to one who has been maintaining him during illness—Lien—Charge.*

Right of a Hindu widow to maintenance by her husband in his life-time or to a charge upon his property must be dependent on his right to alienate the property for a family necessity.

An alienation by way of gift, by a deceased Hindu husband of his property, for his maintenance during his illness is an alienation for good consideration and for a family necessity. His widow cannot claim any charge over that property for her maintenance. *Kanta Mohini Das v. Nanichra Soba*, 35 Ind. Cas. 566.

SANDERSON, C.J. and NEWBOULD, J.

(32) *Hindu Widows' Re marriage Act XV of 1856, S. 2—Re-marriage of widow—Right to husband's estate—Widow's unchastity after inheritance, effect.*

If a widow can validly remarry according to the custom of her caste, such a remarriage does not deprive her of her right to the estate of her deceased husband (a).

If a widow has become unchaste and such unchastity has taken place subsequent to her inheriting the property of her first husband, she does not by reason of such unchastity forfeit the interests which vested in her by right of inheritance to her husband (b). *Ram Del v. Kishan Del*, 32 Ind. Cas. 338.

BANERJEE and PIGGOTT, JJ.

References:—(a) 11 A. 330 = A.W.N. (1899) 77; 1 Ind. Cas. 761 = 6 A.L.J. 107 = 31 A. 161; 6 Ind. Cas. 116 = 7 A.L.J. 417 = 32 A. 489, F. (b) 5 C. 76 (P.C.) = 6 C.L.R. 322 = 7 I.A. 116.

Hindu Law—(Continued).**—23.—Widow—(Continued).**

(33) *Hindu Law—Decree against widow—Form—Construction—Sale of widow's right, title and interest in her husband's properties—Test to determine the interest sold—Decree for mesne profits.*

Where in execution of a decree against a Hindu widow her right, title and interest in her husband's property has been sold, the test to be applied in order to determine the exact interest which passed at the sale would depend upon the question whether the suit in which the sale was directed was one brought against the widow upon a cause of action personal to herself, or one which affects the whole inheritance of the property in the suit. (a)

A decree against a Hindu widow should state specifically whether the decree is a personal decree or one against her as representing her deceased husband and it is therefore open to any Court dealing with a decree containing no such specification to interpret it in accordance with sound principles of law. (b)

In a suit in which the estate of her husband is in any way involved, the widow represents the whole estate of her husband and she alone is entitled to be a party as representing the estate and the decree fairly and properly obtained against her will bind the whole estate. (c)

In interpreting a decree for mesne profits against a Hindu widow, the frame of the original suit can and should be gone into when the decree does not specifically show on the face of it whether it was a decree against the widow in her personal or her representative capacity (d). *Kiranbala Debi v. Kali Charan Singh*, 32 Ind. Cas. 587.

HOLMWOOD and MULLICK, JJ.

References:—(a) 7 C. 357 = 9 O.L.R. 57; 10 O. 965 = 11 I.A. 66, F. (b) 6 C. 479 = 8 C.L.R. 1, Appl. (c) 6 O.L.J. 490, R.

(34) *Husband's house rebuilt out of widow's own money—Right of widow to sell the house.*

If a Hindu widow rebuilds her husband's house out of her own money and there is no evidence whatever to show that she intended this house after its being rebuilt, to be treated as a part of her husband's estate, the house must be treated as her own property over which she has absolute power of disposal. *Ram Dayal v. Sumer Singh*, 32 Ind. Cas. 356.

LINDSAY, J.C.

(35) *Alienation by widow—Onus of proof—Alienation not binding on estate—Widow's estate more than a life estate—Remainder vesting in a widow liable to be attached by husband's creditors—Effect of alienation by a widow on the estate—Civ. Pro. Code, S. 60 (m)—Transfer of Property Act, S. 6, cl. (a). *Segu Chidambaram v. Saraddi Hussainamma*, (1915) M.W.N. 577 = 2 L.W. 952 = 18 M.L.T. 394 = 29 M.L.J. 546 = 30 Ind. Cas. 101 = 39 M. 565. See Final Part, 1915, Col. 820.*

(36) *Widow—Claim of absolute title—Deed of compromise—Canon of construction—Transfer*

Hindu Law—(Continued).**—23.—Widow—(Continued).**

of Property Act, S. 8—No presumption of grant of life estate—Decree referring to compromise—Incorporation—Decd of compromise not registered—Effect of non-registration—Registration Act, Ss. 17 and 49. *Sankaravelu Pillai v. Muthusami Pillai*, 18 M.L.T. 497=(1915) M.W.N. 956=29 M.L.J. 779=31 Ind. Cas. 260. See Final Part, 1915, Col. 821.

(37) Alienation—Widow—Reversioner—Consent—Inferable from conduct—Estoppel—Inference, question of law. *Yenkatasubbler v. Muthuswami Iyer*, 18 M.L.T. 521=(1916) M.W.N. 123=31 Ind. Cas. 487. See Final Part, 1915, Col. 822.

(38) Widow—Alienation—Future maintenance—Legal necessity—Suit by reversioner for declaration of invalidity of alienation beyond the widow's life-time—Maintainability—Proper form of decree. *Motlasing Menghasing v. Sobhormal Gindomal*, 9 S.L.R. 69=30 Ind. Cas. 968. See Final Part, 1915, Col. 822.

(39) Widow, alienation by, when binds reversioner—Relinquishment for a consideration—Relinquishment of whole estate necessary—Widow retaining moveable and getting back some land to hold as life-estate—Mithila law—Family arrangement—Mortgage debt, if moveable or immovable property. *Choudhury Surendra Misser v. Musatt Mohesh Rani Mesran*, 20 C.W.N. 142=31 Ind. Cas. 983. See Final Part, 1915, Col. 823.

(40) Hindu widow's estate in a proprietary share—Sale by Hindu widow without legal necessity—Effect—Right of pre-emption. See **●UDH ACT XVIII OF 1876 (LAWS) No. 9-a**, 32 Ind. Cas. 225.

(41) Widow's power to dispose of income from husband's estate so as not to be available to her husband's creditors. See **CIV. PRO. CODE (1909)**, No. 122, 30 M.L.J. 391.

(42) See **CIV. PRO. CODE (1909)**, No. 556, 97 P.R. 1916.

(43) Hindu widow succeeding her husband as trustee—Alienation by her of the office—Effect. See **CIV. PRO. CODE (1908)**, No. 166, 31 M.L.J. 280.

(44) Will by Hindu widow—Affirmation by reversioner. See **CONSTRUCTION OF WILL**, No. 1, 32 Ind. Cas. 209.

(45) Hindu widow, alienation by, in excess of her powers void or voidable. See **HINDU LAW—ALIENATION**, No. 20, 10 S.L.R. 38.

(46) Alienation by widow—Suit by reversioner—Onus of proof of necessity—Substantial amount paid for consideration—Form of decree. See **HINDU LAW (ALIENATION)**, No. 2, (1916) M.W.N. 163.

(47) **AGRAAS**—Alienation by widow—Reversioner's right to contest it in the presence of a daughter. See **HINDU LAW (ALIENATION)**, No. 4, 27 P.R. 1916.

(48) Widow—Alienation—Necessity—Alienee bound to prove connection between money paid and necessity as well as enquiry aliunde—

Hindu Law—(Continued).**—23.—Widow—(Concluded).**

Factum of enquiry not inferable—Substantial consideration for widow's alienation applied for legal purposes—Purchaser to retain property on payment of balance of consideration. See **HINDU LAW (ALIENATION)**, No. 6, 3 L.W. 415.

(49) Hindu Law—Alienation by widow—Declaratory suit by reversioner—Maintainability. See **HINDU LAW—ALIENATION**, No. 22, 33 Ind. Cas. 183.

(50) Entry in Revenue papers of name of widow of deceased member—Separation of family. See **HINDU LAW—JOINT FAMILY**, No. 34, 36 Ind. Cas. 44.

(51-52) See **LIMITATION ACT (1877)**, No. 10, 20 M.L.T. 526.

(53) Nature of Hindu widow's estate. See **LIMITATION ACT (1908)**, No. 246, 12 O.O. 289.

(54) Alienation by Hindu widow and her adopted son—Suit by reversioner to set aside alienation after bar of remedy re-adoption. See **LIMITATION ACT (1908)**, No. 197, 36 Ind. Cas. 255.

(55) Widow's interests—Transfer of—Price over Rs. 100—Registration necessary. See **TRANSFER OF PROPERTY ACT**, No. 59, 34 Ind. Cas. 748.

—24.—Will.

See **CUSTOMS—PUNJAB—WILL**.

See **HINDU LAW—ALIENATION**.

See **HINDU LAW—GIFT**.

See **MALABAR LAW—WILL**.

See **PROBATE**.

See **WILL**.

(1) *Will, Interpretation of—Widow appointed executrix with power to adopt five sons in succession—Gift over on her dying without son to nephews—Son adopted if divests widow—Life-estate to widow inferred from tenor—Gift over valid and not touched by S. 111, Succession Act (X of 1865).*

Where a Hindu testator belonging to the Dayabhaga School appointed his wife sole executrix and authorised her to adopt a son, and five such sons in succession in case of death and the will finally provided that, if the wife died without adopting a son or if such adopted son predeceased her without leaving any male issue, the estate, after the death of his wife, would pass to such of his sister's sons as might be living at his death.

Held—that the estate was in the widow during her life, and it could pass only to the son who survived her or in case of his death in her lifetime, to his male issue if he left any.

A son adopted by the widow predeceased her without issue.

Held—that the gift over to the nephews took effect on the death of the widow.

That the gift to the nephews was not affected by S. 111 of the Succession Act, the event upon which, as distinctly mentioned in the will, the distribution was to take place being the death of the widow.

Hindu Law—(Continued).**—25.—Will—(Continued).**

S. 111, Succession Act, commented on. It should be applied only to cases strictly coming within the scope.

Under the Dayabhaga, the testator has not only the power of authorising his widow to adopt a son to him, and, in case of the death of such adopted son, to make other adoptions in order to ensure the performance of those religious rites on which depends his salvation in after-life, but he can attach to such authority a direction that her estate should not be intertered with or divested during her life, just as he can postpone the succession of his natural-born son by interposing a life-estate. *Bhupendra Krishna Ghose v. Amarendra Nath Dey*, 20 C.W.N. 169=30 M.L.J. 110=14 A.L.J. 167=19 M.L.T. 97=(1916) M.W.N. 73=3 L.W. 252=23 C.L.J. 169=18 Bom. L.R. 347=43 C. 432=34 Ind. Cas. 892 (P.C.).

VISCOUNT HALDANE, LORD PARMOOR,
LORD WRENBURY, SIR JOHN EDGE
and MR. AMBER ALL.

- (2) *Bequest to woman—Nature of estate taken—Presumption—Bequest of income only—Validity—Woman's estate—Power to alienate for discharging debts.*

Per *Mullick, J.*—A bequest only of the income of a property, without disposing of the corpus, creates something in the nature of a perpetuity and is void (a).

In the absence of words of limitation, gifts to women in Hindoo law, with the exception of a widow, must be presumed to convey an absolute interest, unless there is something repugnant in the context. It does not necessarily follow that because the donee was a woman, therefore she was incapable of taking anything more than a mere life interest (b).

Even if the estate, which passed to a Hindu woman is not absolute, but only the ordinary woman's estate, she is competent to alienate immovable property for payment of the debts incurred by her in the management of a business which formed part of the estate (c). *Jagannath Prasad v. Jalkishen Prasad*, 1 Pat. L.J. 16=34 Ind. Cas. 375.

SHARFUDDIN and MULICK, JJ.

References:—(a) 11 C. 684, R. (b) 32 C. 1051; 24 W.R. 317; 24 C. 646; 18 M. 466, F. (c) 25 I.A. 189, F.

- (3) *Declaratory suit—Res judicata—Meaning and explanation of the word Aulad—Female descendants—Bequest to a daughter with remainder to the daughter of that daughter—Gift—Hindu donor can gift an estate only to those in existence at the time of making the gift—Stridhan—Heritable estate—Gift by husband to wife—Immovable property—Predeceased daughter—Heir en ventre sa mere—Daughter to be treated as a class when property left to all.*

Held, that:—

(1) The words "the above three daughters and their descendants shall be owners of the property in equal shares, . . . All the

Hindu Law—(Continued).**—25.—Will—(Continued).**

three daughters and their descendants shall be absolute proprietors thereof in equal shares" had the effect of vesting the estate in all the daughters and their issue in existence at the time of the testator's death.

(2) The word *Aulad* ordinarily means all descendants whether male or female.

(3) If a Hindu donor wishes to confer an estate of inheritance, it must be such as is known to Hindu Law which an English estate tail is not, and a defeasance by way of gift over must be in favour of somebody in existence at the time of the gift.

(4) A provision in a Will that the ordinary rules of succession should not be followed, and a direction in the Will creating an estate not unknown to Hindu Law is valid.

(5) Immovable property gifted by a husband to his wife is never at her disposal even after his death. It is her stridhanam so far that it passes to her heirs, not to his heirs, but as regards her power of alienation, she is under the same restrictions as those which apply to property inherited by her from a male. *Kallu Mal v. Musammatt Chahlindl*, 97 P.L.R. 1916=36 Ind. Cas. 222.

REID and CLARK, JJ.

References:—16 C. 383; 9 C. 952; 4 B.L.R.O. C. 166; 3 I.A. 7=14 B.L.R. 226, F.; 24 O. 647; 10 A. 496; 5 O. 681; 6 A. 560 (P.C.); 15 B. 654; 12 C. 663, R.; 189 P.R. 1892; 9 M.I.A. 123; 9 B.L.R. 377, Rel.

- (4) *Will—Construction—Properties left for charity—Surplus income secured to the family—Whether grant is personal or dedication to charity—Prohibition as to alienation, effect of—Presumption in cases of charitable bequests by Hindu testators.*

A Hindu father made a will whereby he gave his two sons S and M, the A and B schedule properties and set apart the C and D schedule properties for charity, the properties in schedule C to be enjoyed by S and those in D by M who were, after paying the circular cost, to spend Rs. 250 from the remaining income and duly conduct the charity permanently by turns one in each year. The rest of the incomes was to be taken by the sons "for their maintenance and private expenses." The sons were not to alienate the said properties and in case they neglected the charity, two friends of the testator were to conduct the charity and recover the amount spent from the sons. A widow of P, a son of S, sued the other sons of S for P's share of the C schedule properties. It was contended that the property belonged to the charity and the family had no interest in it.

Held, that the will evidences a grant of property to the sons, burdened with an obligation to maintain the charities.

Held also that a clause prohibiting alienation in a grant conferring an absolute estate on the grantee is inoperative being a condition repugnant to the estate to which it is annexed (a).

In every case of a provision for charity made by a Hindu who has near relations, the

*Hindu Law—(Continued).**—24.—Will—(Continued).*

presumption is that the charity is a charge on the estate.

The real test in determining whether a grant is personal or a dedication to the charity is 'To whom is the surplus income reserved?' (b)

A provision that the property should be enjoyed in the male line followed up by words conferring an absolute estate does not affect rights of inheritance (c). *Kathan Mutalrian v. Sivabaghlathammal*, 4 L.W. 104=20 M.L.T. 204=36 Ind. Cas. 782.

BESHAGIRI AIYAR and NAPIER, JJ.

References:—(a) (1894) 2 Ch. 184, F. (b) 8 M.I.A. 66, F.; 5 C. 438; 2 C.L.J. 166; 7 C. 269; 42 C. 536; 42 C. 561, R.; 5 M. 302, *Expl.*; 9 B. 169; 34 A. 405; 3 C.L.J. 224, D. (c) 8 M.I. A. 66, F.

(5) *Life estate to widow—Residue to grandsons of testator then in existence and thereafter to be born—Validity of will—Meaning and effect of S. 2 (2), Madras Act I of 1914 (Hindu Transfers and Bequests).*

One V, by his will dated 23-5-1905, provided that, after his death, his wife N should enjoy the whole of his property till her death, and that the whole of the property remaining after payment of certain legacies should be "enjoyed with right by the son S already born to his daughter G and by the male issue that may hereafter be born to the said daughter."

The testator died in 1906 and S died in 1910. The widow of S brought this suit in 1912 against the testator's widow, the testator's daughter and others for declaration that, under the will, S. took a vested interest in all the properties bequeathed to him, that the testator's widow took only a life-interest in her husband's estate and that plaintiff was solely entitled to the properties after the death of the testator's widow (first defendant) and other reliefs. After the suit was instituted, the testator's daughter gave birth to a son P who was also impleaded as sixth defendant in the suit.

Held that S acquired a vested interest under the terms of the will on the testator's death and the bequest in favour of the after-born son P was valid under S. 2 (2), Madras Act I of 1914.

The language of S. 2 (2) of the Madras Act is general and has the effect of validating dispositions which are to come into operation at a future date in accordance with the intention of the testator. S. 2 (2) of the Act means that, if the testator intended that his disposition should take effect at a future date and that date happened to be subsequent to the passing of the Act, then by virtue of this Act, the disposition would be valid and effective.

Held also that plaintiff, as representative of, would be entitled to share equally with other sons of S's mother (including the sixth defendant) who may be born before the death of the first defendant (testator's widow).

Where the question is one of construction, it has to be determined with reference to the terms of the document in each case, though, in

*Hindu Law—(Continued).**—24.—Will—(Continued).*

arriving at the true meaning of the document, one must have regard to any general rule of construction that bears on the matter. *Kudapa Venkayamma v. Kakarla Narasimma*, 31 M. L. J. 83=20 M.L.T. 221=4 L.W. 189=36 Ind. Cas. 160.

ABDUR RAHIM and SRINIVASA AIYANGAR, JJ.

*Reference:—*38 C. 468=21 M.L.J. 387 (P.C.), R.

(3) *Adoption by widow of her brother's son under her husband's authority.*

In a suit to contest the genuineness of a will executed by a Hindu and the adoption by his widow of her brother's son under power conferred by the will, *held* on the facts of the case that the will was genuine and the adoption valid. *Bhagwati Prasad Singh v. Nand Prasad Singh*, 33 Ind. Cas. 696 (P.C.).

LORD SHAW, SIR GEORGE FARWELL, SIR JOHN EDGE and MR. AMEER ALI.

(7) *Principles which should guide the Court in construing will—Intention of testator—Joint enjoyment of property with testator.*

The principles which should guide the Court in construing a will may shortly be summarized as follows: We are to give effect to the intention of the testator as expressed in his words. We are to acquaint ourselves with the circumstances in which he was placed; we are to have regard to the habits of life and thought of the people to whom he belonged and to the system of law under which he lived. Then we are to construe his language, and we cannot give effect to a supposed intention, however cogently suggested by extrinsic evidence unless there are words to be found in the document which, on a natural construction, convey it either expressly or by necessary implication.

Where a document contains words of gift which refer only to a gift of a joint estate with the testator, to be enjoyed during his lifetime and the whole tenor of the document contemplates that the plaintiff should deal with the properties as owner, after the decease of the testator and is not solely referable to an estate created by a testamentary disposition, the testator's intention as contained in the document cannot be taken to be that he intended the plaintiff to take his property as legatee under the document, although he had a general intention that the plaintiff should own his property which he did not carry out by this document. *Thirugnanapal v. Ponnammal Nodathi*, 32 Ind. Cas. 569.

COUTTS-TROTTER and SRINIVASA AIYANGAR, JJ.

*References:—*34 A. 405=12 M.L.T. 1=14 Bom. L.R. 827=16 C.W.N. 745; 11 C. 469 (485); 28 A. 488; 23 B. 271; 19 C. 452; 9 M. L.T. 139, R.

(8) *Will in favour of widow—Gift over—Construction—Power of appointment—Alienation—*

Hindu Law—(Continued).**—24.—Will—(Concluded).**

Administration suit—Maintainability. *Mahim Chandra Sarkar v. Hara Kumar Dasee*, 42 C. 561=30 Ind. Cas. 798. See Final Part, 1915, Col. 828.

(9) **Ancestral moveable property—Father cannot devise it by will.** *Parvatbal Sankar v. Bhagwant Pandhrinath Pathak*, 17 Bom. L. R. 646=39 B. 593=31 Ind. Cas. 280. See Final Part, 1915, Col. 828.

(10) **Will—Authority given to widow to adopt—Adoption by the testator—Subsequent will not referring to the earlier—Second will proved but first not—Second will void—Adoption by widow under authority from first will—Doctrine of dependent relative revocation.** *Yenkatharaya Pillai v. Subbammal*, 29 M.L.J. 851=20 C.W.N. 234=3 L.W. 177=19 M.L.T. 147=(1916) M.W.N. 97=14 A.L.J. 178=23 O. L.J. 366=39 M. 107=18 Bom. L.R. 372=32 Ind. Cas. 373 (P.C.). See Final Part, 1915, Col. 829.

(11) **Mitakshara joint family—Will executed by father—Separation—Debt contracted during minority—Ratification—Liability of minor.** See HINDU LAW (JOINT FAMILY), No. 13, 14 A.L.J. 521.

(12) **Property taken by sons under their father's will, nature of.** See HINDU LAW (JOINT FAMILY), No. 23, 33 Ind. Cas. 785.

—25.—Woman's Estate.

(1) **Widow—Maintenance, grant for—Purchase of property from income—Absolute interest, if acquired by purchase—Succession to such property—Joint purchase by a Hindu male and a female—Nature of interest acquired, whether joint tenancy or tenancy-in-common—Absolute estate, whether can be incorporated with a life estate, without transfer inter vivos or devise by will—Incorrect recitals and misapprehension of the nature of estate, if cut down absolute estate into life estate.**

Property purchased by a Hindu limited owner out of the savings from the income of the properties allotted to her for her maintenance, belongs to her absolutely in her own right as her *Stridhan* and is descendible on her heirs. It does not form an accretion to the property granted for maintenance and revert to the grantor's family on her death (a).

When a Hindu female and a male jointly purchase property, they take it as tenants-in-common and not as joint-tenants.

Per *Srinivasa Aiyangar, J.—Quere.*—Whether property to which a Hindu widow is absolutely entitled can be incorporated with property in which she holds only a limited interest, without a transfer *inter vivos* or a devise by will?

Neither an incorrect recital nor a misapprehension of the nature of interest possessed by a Hindu female owner can cut down her absolute

Hindu Law—(Concluded).**—25.—Woman's Estate—(Concluded).**

interest into a life estate. *Yeeraraghava Reddi v. Kota Reddi*, 3 L.W. 432=31 M.L.J. 466=20 M.L.T. 345=33 Ind. Cas. 592.

ABDUR RAHIM and SRINIVASA AIYANGAR, JJ.

References:—(a) 28 M. 1; 2 I.A. 256=1 C. 104, F.

(2) **Bequest to woman—Nature of estate taken—Presumption—Bequest of income only—Validity—Woman's estate—Power to alienate for discharging debts.** See HINDU LAW (WILL), No. 2, 1 Pat. L.J. 16.

Hindus.

Of Godhra governed by the custom of pre-emption—Suit to pre-empt a portion of the property sold. See PRE-EMPTION, No. 11, 18 Bom. L.R. 693.

Hindu Temple.

Dedication to public—Character of temple, inference as to, from particular acts and circumstances. *Peasapati Sitaramanujachari v. Kanduri Yellamma*, 2 L.W. 858=18 M.L.T. 543=(1915) M.W.N. 842=30 Ind. Cas. 822. See Final Part, 1915, Col. 831.

Hindu Transfers and Bequests Act.

See MAD. ACT I OF 1914.

Hindu Widows Remarriage Act.

See ACT XV OF 1856.

Hire.

Omission to return article after specified date—Remedy for breach of contract—Suit for damages. See CONTRACT, No. 21, 36 Ind. Cas. 276.

Hire-purchase Agreement.

Instrument described as a—Stamp duty. See STAMP ACT (1899), No. 18, 24 C.L.J. 93.

Historical Works.

Aboriginal tribes—Law governing inheritance—Reference to, in appeal—Propriety. See ACT X OF 1865 (SUCCESSION), No. 14, 20 C.W.N. 1082.

Holding out, Doctrines of.

Transfer of Property Act, S. 41—Real owner holding out another—Transfer of latter—Notice—Burden of proof, whether lies on the purchaser or owner—Bonamidar having interest in property, if notice or shifts *onus*. See LIMITATION ACT (1908), No. 182, 4 L.W. 200.

Holiday.

Tender of money on the last day of payment in the Court, application made for permission to make payment—Money tendered though not deposited on that date through mistake of Court or its officers—Next day—Payment made on the next first opening day of the Court, whether such a payment within time and sufficient compliance with the terms of the decree. See PRE-EMPTION, No. 12, 123 P.W.R. 1916.

Homestead.

(1) Transferability of—Ejectment of trespasser. See EJECTMENT, No. 6, 1 Pat. L.J. 502.

Horoscope.

Admissibility of, in evidence. See EVIDENCE ACT, No. 12, 3 L.W. 216.

Hotel Keeper.

Misrepresentation—Ability to discover truth—Hotel-keeper—Land lord and tenant—Right to sue for rent—Breach of contract—Distrainment. See CONTRACT ACT, No. 14, 112 P.L.R. 1916.

House.

Insolvent an agriculturist, ordered to be sold—Order illegal. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 22, 14 A.L.J. 1031.

House Drain.

Property in—Drain vesting in the Corporation, effect of. See BENGAL ACT III OF 1899 (CALCUTTA MUNICIPALITY), No. 2, 24 C.L.J. 368.

Hundi.

See NEGOTIABLE INSTRUMENTS.

See NEGOTIABLE INSTRUMENTS ACT, 1881.

(1) *Shahjog hundi*—Bill of exchange or promissory note—Payable after a year—Stamp as on a bond—Admissible in evidence on payment of penalty—Stamp Act, Ss. 6, 35—Appeal. *Jalan Chand v. Assaram*, 24 C.L.J. 22=33 Ind. Cas. 247. See Final Part, 1915, Col. 833.

(2) Suit on Dishonoured—Hundi drawn at one place and accepted at another—Acceptor and drawer made parties to suit. See CIV. PRO. CODE (1908), No. 57, 34 Ind. Cas. 191.

(3) Hundi silent as to interest—Rate of interest—Oral agreement to pay interest at 12 per cent.—Admissibility—S. 92, Evidence Act. See NEGOTIABLE INSTRUMENTS ACT (1881), No. 21, 1 Pat. L.J. 71.

(4) Payable after sixty one days—Maturity. See NEGOTIABLE INSTRUMENTS ACT (1881), No. 8, 14 A.L.J. 1166.

Husband and Wife.

See ACT IV OF 1869.

See BUDDHIST LAW.

See HINDU LAW.

See MAHOMEDAN LAW.

See MAINTENANCE.

(1) *Guardianship—Father's right, if can be taken away—Divorce suit—Appeal by wife—Adultery admitted—Costs of appeal.*

The Court though not precluded from making an order giving the divorced wife access to the children, is most reluctant to make such an order and never places the indulgence of the parents above the welfare of the children.

As a wife should not be precluded by want of means from establishing her case, either as a petitioner or respondent, the husband should make a deposit or give security for the estimated costs that might be incurred by her. But if she, being herself found guilty, actively

Husband and Wife—(Concluded).

brings the matter before the appellate Court, her husband cannot be called upon, as a matter of right, to provide for her costs. The Court may, in its discretion, make an order in favour of the wife. *Beatrice Alice De Ste Croix v. Phillip De Ste Croix*, 24 C.L.J. 226=44 C. 35.

SANDERSON C.J., WOODROFFE and MOOKERJEE, JJ.

(2) Wife's adultery—Decree nisi not granted on account of proved adultery of husband—Delay. See ACT IV OF 1869 (DIVORCE), No. 5, 18 Bom. L.R. 818.

(3) Revenue Registers—Land in name of—Wife's right to claim property as heir. See ESTOPPEL, No. 5, 30 Ind. Cas. 692.

(4) Gift to husband and wife at the time of marriage—Interest acquired whether joint tenancy or tenancy-in-common. See HINDU LAW (GIFT), No. 1, 3 L.W. 287.

(5) Wife voluntarily residing away from husband—Plea of unchastity—No proof, but mere suspicion—Duty of Court. See HINDU LAW (MAINTENANCE), No. 1, 30 Ind. Cas. 934.

(6) Gift by husband to wife—Rights of wife. See HINDU LAW (WILL), No. 3, 97 P.L.R. 1916.

(7) Permanent lease to wife alone—Deed containing no words of conveyance to children. See MALABAR LAW (HUSBAND AND WIFE), No. 1, 31 Ind. Cas. 854.

Hypothecation.

See MORTGAGE.

(1) *Mortgage of moveables—Possession not necessary to be transferred—Contract Act*, Ss. 108, 178.

The plaintiff advanced Rs. 2,000 in 1913, to V on the hypothecation of the Press machines and other accessories of a printing press belonging to V, who remained, as before, in possession of his Press. In 1914, V took D as his partner in the concern on payment of Rs. 3,000. In 1915, V again hypothecated the same property to plaintiff for a fresh advance of Rs. 1,000. D had no notice of either transaction. On V's death, the plaintiff claimed to recover his money by sale of the property hypothecated. D resisted the suit contending that the plaintiff's claim could, at the most, extend to V's share (which was one-half), in the concern:

Held, (1) that the plaintiff was entitled to succeed, for the rights which the plaintiff acquired over the property in 1913 remained wholly unaffected by the illusory partnership between V and D; and

(2) that he was therefore entitled to bring the whole of the property to sale.

In India, the mortgage of chattels, having the effect of immediately transferring the property thereunder from the mortgagor to the mortgagee, can be made by mere parol and without the transfer of possession.

If the true owner of property puts another in ostensible possession of it and holds him out to the world as being fully capable of disposing of

Hypothecation—(Concluded).

and conferring a good title to it, and such a person does dispose of it, the true owner has no claim against the *bona fide* purchaser for value. **Tehliram Girdharidas v. Longin D'Mello**, 18 Bom. L.R. 587.

BEAMAN, J.

(2) *Purchase of animals jointly by two persons—Each purchasing one-half—One of them advancing money to the other for purchase—Latter offering his half as security for money advanced—Offspring—Attachment by stranger—Validity—Hypothecation—How far enforceable in India—Pledge—Contract Act—Exhaustive—Offspring—Whether accretions—Transfer of Property Act, 1882, S. 70. Jot Singh v. Amirchand*, 10 P.R. 1915=28 Ind. Cas. 230=16 P.L.R. 1916. See Final Part, 1915, Col. 834.

Hypothecation Decree.

Moveable property—Moveable property converted into immoveable property—Substituted security. See LIMITATION ACT (1908), No. 214, 14 A.L.J. 1025.

Identification.

Of land. See EVIDENCE ACT, No. 80, U.B. R. (1916), 2nd Qr., p. 110.

Idols.

See HINDU LAW—RELIGIOUS ENDOWMENT.

See RELIGIOUS ENDOWMENTS.

See RELIGIOUS ENDOWMENTS ACT, 1863.

(1) Family temple—Idols and places of worship—Right to partition—Right of management by rotation. See HINDU LAW (RELIGIOUS ENDOWMENTS), No. 2, 9 S.L.R. 209.

(2) See RELIGIOUS ENDOWMENTS, No. 6, 34 Ind. Cas. 548.

Ignorance of Law.

Whether an excuse. See ABATEMENT, No. 1, 3 P.R. 1916.

Ijara Lease.

Suit for rent—Land situated in a Zemindari—*Ryoti* land—Jurisdiction of Civil Court to try. See MAD. ACT I OF 1908 (ESTATES LAND), No. 1, (1916) 2 M.W.N. 240.

Illegal Contract.

(1) If after a contract is made it becomes illegal to carry it out, it cannot be enforced. **S K.R. Cama and Co v. K.K. Shah**, 9 Bur. L. T. 99=33 Ind. Cas. 96.

FOX, C.J.

References:—28 Ind. Cas. 433; 17 Bom.L. R. 249; 40 B. 11, F.

(2) See LICENSE, No. 1, 14 A.L.J. 1035.

Illegal Order.

Attachment of debt payable outside jurisdiction—Attachment, effect of—Money paid under an, where to be refunded. See EXECUTION OF DECREE, No. 17, 24 C.L.J. 533.

Immoveable Property.

(1) Claim to grazing rights under village custom—Claim to interest in immoveable property—Not of Small Cause nature—Second appeal lies. See LANDLORD AND TENANT, No. 20, 12 N.L.R. 83.

(2) Declaratory suit—Title to. See LIMITATION ACT (1908), No. 200, 36 Ind. Cas. 292.

(3) Execution of document transferring standing tree—Nature of property moveable or immoveable. See REGISTRATION ACT (1908), No. 4, 30 Ind. Cas. 281.

(4) "Standing timber"—"Standing trees." See REGISTRATION ACT (1908), No. 2, 35 Ind. Cas. 713.

Impartible Estate.

Estate of Maharaja of Chota Nagpur—Custom of impartibility and primogeniture—Court of appeal, duty of—Conclusion of fact by Trial Court.

In the Chota Nagpur Maharaja's estates and in his family the custom of impartibility and primogeniture is established in all cases (a).

A Court of appeal must assume that a Judge knows the law which he is called upon to administer and that he applies it to the facts of the case before him; and if there is evidence to sustain the conclusion of fact at which he arrives then his decision is unimpeachable. In cases where a Judge states, and wrongly states, what the law is, and applies wrong legal principles to the facts of the case so stated by him, then in such cases, the Courts have held that the Judge has misdirected himself and that therefore the High Court on appeal intervenes and corrects the erroneous principles of law which the Judge has applied, and remands the case for rehearing with a correct exposition of the law. **Ram Charan Mahato v. Harihar Mahato**, 35 Ind. Cas. 392.

ATKINSON and J WALA PRASAD, JJ.

Reference:—20 C.W.N. 876, R.

Impossibility.

Term of contract impossible to perform—Period fixed for performance—Test of. See CONTRACT ACT, No. 56, (1916) 2 M.W.N. 131.

Impounding Documents.

Such as *bat chitas*—Jurisdiction—Civ. Pro. Code, (1908), O. VII, r. 14. See STAMP ACT (1899), No. 2, 35 Ind. Cas. 416.

Improvement (Calcutta) Act.

See BEN. ACT V OF 1911.

Improvement of Lands (Loans) Act.

See ACT XIX OF 1883.

Improvements.

See LANDLORD AND TENANT.

(1) Alienation by widow—Setting it aside by reversioner—Compensation for improvements. See HINDU LAW (WIDOW), No. 11, 77 P.L.R. 1916.

(2) Separate suit for recovery from *jenmi* of amount for repairs and, if maintainable.

Improvements—(Concluded).

See MALABAR LAW—MORTGAGE, No. 1, (1916) 2 M.W.N. 368.

(3) See MORTGAGE—GENERAL, No. 39, 30 Ind. Cas. 517.

Improvements, Compensation for Tenants' (Malabar) Act.

See MAD. ACT I OF 1900.

Improvement Trust Act.

See BOM. ACT IV OF 1898.

Inam.

- (1) *Inam burdened with a service, whether a public charitable trust—Service inam—Lease by minority of inamdars for 40 years—Remedy of the inamdar not joining in the lease.*

An Inam granted on condition of the grantees providing water for the use of travellers passing through that place is not a public charitable trust, and the leasing out of such an Inam for 40 years by a minority of the grantees does not entitle a grantee who has not joined in the lease to sue for a declaration that the lease is absolutely void as a whole and that he and the other grantees who have not joined in executing it are entitled to the possession of the whole Inam.

The only relief to which such a grantee is entitled is a declaration that the lease is not binding on his share of the Inam. *Kupparaju Venkatasubblah v. Shalk Silar Sahib*, 3 L.W. 157=19 M.L.T. 144=32 Ind. Cas. 947.

COUTTS-TROTTER and MOORE, JJ.

- (2) *Darimilla Inams in a Zamindari—Inam granted subsequent to Permanent Settlement—Zamindari resumed after 1802 and re-granted in 1836 on same peishcush—Lakraj lands, exclusion of, in the re-grant—Government, if can resume inam—Enfranchisement.*

Darimilla Inams or Inams granted subsequent to the Permanent Settlement are not resumable by Government.

Lakraj lands are lands exempt from the payment of public revenue.

Where a Zamindari in which the suit Inam was situated was resumed after the Permanent Settlement and re-granted to the Zamindar subsequently in 1836 on the same peishcush, and there was nothing to show that the inam consisted only of *Lakraj* lands which alone under the terms of the sanad granted in 1836 were excluded from the assets of the Zamindari.

Held that the enfranchisement of the Inam by the Government was *ultra vires* and not binding on the Zamindar. *Yalluri Narasimha Rao Pantulu Garu v. Secretary of State*, 3 L.W. 573=36 Ind. Cas. 219.

ABDUR RAHIM and SRINIVASA AIYANGAR, JJ.

- (3) *Enfranchisement of—Acquisition of title by prescription.*

An Inam granted for service became the hereditary property of the grantee and the condition restraining alienation applied only as between him and the Crown. A trespasser

Inam—(Continued).

before enfranchisement would acquire title by prescription. *Dinayahi Lakshmiipathy v. Pingali Narasimham*, (1916) M.W.N. 473=3 L.W. 590=34 Ind. Cas. 898.

SESHAGIRI AIYAR and PHILLIPS, JJ.

References:—26 M. 339, R.; 42 O. 244, D.

- (4) *Judi, payment of—Liability of tenant to pay customary rent to Inamdar—Limitation Act (IX of 1908), Art. 131—Recurring right—Demand and refusal—Mere omission to exercise right does not start limitation.*

Lands in alienated villages which are not in the actual possession of Inamdars and fall under the calculation of Government *Judi*, are liable in turn to pay customary rent, assuming that there has been no survey and assessment on contractual rent agreed upon by the Inamdars who are directly liable to Government for the *judi*.

The payment of *dhara* or assessment or customary rent is a recurring right within the meaning of the Indian Limitation Act, Art. 131. Such a recurring right can be time-barred; there must be a definite demand and refusal; mere omission on the part of the person having such right to exercise it will not start a period of adverse possession under the Article. *Ganesh Vinayak Joshi v. Sitabai Narayan Joshi*, 18 Bom. L.R. 950=41 B. 159.

BEAMAN and HEATON, JJ.

- (5) *Inamdar—Kadim Haks—Right of the Inamdar to pay the hak allowances direct to the haddars without intercession of Government. Chintaman Ganesh Oaka v. The Secretary of State for India*, 17 Bom. L.R. 682=30 Ind. Cas. 548. See Final Part, 1915, Col. 835.

(6) *Darimilla inams, incidents of—'Gadaba Tirastu' lands in defendants' occupation for a number of years—Right to evict—Onus of proof—Enhancement of Kattubadi—Meaning of 'resumption'—S. 3 (16) (c), Madras Estates Land Act—Jurisdiction of Civil Courts. Idubilly Sityyaddi v. Sri Rajah Viswaswara Nissanka*, 18 M.L.T. 142=30 Ind. Cas. 416. See Final Part, 1915, Col. 836.

(7) *Bariki Service Inam—Agreement to sell—Enfranchisement—Sale completed subsequently—Validity of sale—Enfranchisement, effect of, on rights of members of a joint family—Madras Act II of 1894, S. 10—Lands forming emoluments of office—Family title thereto, whether affected by the section—Service Inam, unenfranchised—Alienation—Subsequent enfranchisement, whether validates the alienation—Hindu Law—Mitakshara School—Property inherited from maternal grandfather—Character of property taken—Interest therein whether acquired at birth. Karri Ramayya v. Yilloori Jagannadham*, 2 L.W. 874=18 M.L.T. 360= (1915) M.W.N. 838=30 Ind. Cas. 889=39 M. 930. See Final Part, 1915, Col. 837.

(8) *Nature and origin of jaghir tenure—Distinction between Inam and Jaghir. See MAD. ACT I OF 1908 (ESTATES LAND), No. 5, 30 M.L.J. 600.*

Inam—(Concluded).

(9) Proof whether village as a whole granted as an—Estate. See *MAD. ACT I OF 1908 (ESTATES LAND)*, No. 3, 31 Ind. Cas. 791.

(10) Enfranchisement, effect of. See *CROWN GRANTS*, No. 1, 31 M.L.J. 483.

(11) Construction of grant—Grant burdened with service and grant in lieu of wages—Distinction—Grant when resumable. See *GRANT*, No. 1, 30 M.L.J. 132.

(12) Grant whether to temple or Archakas—Construction—S. 92, Civ. Pro. Code (1908)—Scheme. See *GRANT*, No. 3, 31 M.L.J. 202.

(13) Masjid inam—Mutawalli—Lease of wakf property for more than three years—Voidable only—Inam Settlement Register—Evidentiary value. See *MAHOMEDAN LAW (WAKF)*, No. 2, 4 L.W. 74.

(14) *Sunnad* granted to zamindar—Permanent settlement of revenue—Certain inams not specially reserved—Right of Government to resume or assess such lands to public revenue—Grant—Construction—Grant whether *ultra vires*. See *REG. XXV OF 1802 (MADRAS PERMANENT SETTLEMENT)*, No. 2, 31 M.L.J. 97.

Inamdar.

(1) Position of the, same as zamindar under Permanent settlement—Inamdar not a permanent lessee under Government. See *CROWN GRANTS*, No. 1, 31 M.L.J. 483.

(2) Ryotwari tenant's position different from Inamdar's. See *CROWN GRANTS*, No. 1, 31 M.L.J. 483.

(3) Suit to recover Kattubadi, not a cultivator—Civil Court. See *JURISDICTION OF CIVIL AND REVENUE COURTS*, No. 7, 30 Ind. Cas. 927.

Inam Estate.

Inam estate in Berar, by what law governed—Nature and incidents of such Inam grant—Conversion of Inam into free-hold—Berar Inam Rules, 1879, their nature and origin—Duty of Courts in administering law.

An *Inam* estate in Berar is governed by the *Inam Rules* of 1879. It is primarily a restricted tenure, but the Rules provide for its conversion, in certain cases, into an estate of free-hold governed by the personal law of the grantees. Whether a particular estate has been so converted or enfranchised is a question of fact in each particular case, the burden of proving which rests on the party who asserts it.

Berar is a territory which had been under many Sovereign powers, before it came under the management of the present Government of India; such as the Kings of Delhi, the Rulers of Satara, Gwalior, and Nagpur and the Nizam; and these Sovereigns, and in some cases their Ministers and Revenue authorities, had made grants of land and money at various times, for various purposes, and under varying conditions of tenure and devolution. It was natural, under

Inam Estate—(Concluded).

such circumstances, that there should have arisen a considerable amount of chaos and confusion over the legal rights of grantees and of the descendants of grantees long deceased. It became necessary for the Government of India to make rules for the settlement of *Jagir* and *Inam* claims throughout Berar, both by declaring the grants it was prepared to recognize, and treating each recognition as a fresh starting point to provide conditions for its future enjoyment and devolution. For this purpose the Berar *Inam Rules* were promulgated in the form of Resident's Book Circular XXXVII of 1879.

A *Jagir* or other *Inam* estate may be anything, from a mere grant for life in the royal share of the revenue, to an absolute estate in the soil; and the only correct method, for the judicial decision of claims made upon it, is to ascertain the meaning and effect of the grant in each case from the circumstances and objects with which, and the rules under which, the *sanad* was granted (a).

"So far as the Civil Courts are concerned, they are bound to give effect to the statutory law of the land, irrespective of the consequences that may ensue, and the surprise and possible hardship, which even a belated application of it may cause, amid conditions which have grown upon error. They cannot recognize and give effect to habits in disregard of that law as valid customs except so far as may be consistent with well-established rules of equity and recognized principles of judicial discretion. They will seriously regard that administration if they arbitrarily follow and sustain popular error." (*Per Stanyon, Esq., C.I.E., A.J.C.*) *Krishnaji v. Nilkanth*, 12 N.L.R. 150 = 36 Ind. Cas. 618.

STANYON, A.J.C.

References:—(a) 3 B. 186; 5 Bom. L.R. 993; 6 M.I.A. 426, R.

Inams Act.

See *MAD. ACT VIII* of 1869.

Inams Enfranchised Act.

See *MAD. ACT IV* OF 1862.

Incapacitated Person.

Guardian of an incapacitated defendant, if can be appointed Receiver. See *RECEIVER*, No. 6, 4 L.W. 285.

Income Tax Act.

See *ACT II* OF 1886.

Inconsistent Claim.

Plaint, amendment of—Set up by way of amendment. See *CIV. PRO. CODE* (1908), No. 356, 34 Ind. Cas. 541.

Incorporeal Right.

Assignment of an—Requirements of, under Hanafi Law. See *ACT XV* OF 1882 (*PRESIDENCY SMALL CAUSE COURTS*), No. 1, 4 L.W. 339.

Indemnity Bond.

Contract, breach of—Damages—No actual loss, if action premature—No action for damages on future loss of possession—Loss of title, substantial loss.

Plaintiff's deceased husband had started a *Kuri* fund and executed Ex. R to the members pledging certain property as security for the amount payable to them. Defendant took a transfer of the management of the fund from plaintiff after her husband's death and executed an indemnity bond, Ex. B with plaintiff property, as security against any damage resulting to the plaintiff or her property, including that bound by Ex. R. Two members subsequently obtained decrees on Ex. R and brought the property to sale. Plaintiff, while still in possession and enjoyment of the property sold, sued defendant for damages for breach of the contract of indemnity, and defendant's plea was that the suit was premature, as plaintiff had not lost possession of the property and had incurred no actual loss.

Held, a claim for damages could not be founded on future loss of possession or anything short of actual disturbance of it (a).

Apart from possession, title being impaired, there was substantial present loss, there was damage sustained, and the suit was not premature (b).

Per Sadasiva Iyer, J.—There is a distinction between a covenant containing an absolute promise to do an act and a covenant merely to indemnify for the loss which may be incurred on breach of the promise to do an act. In the former case, an action for breach of contract can be sustained before actual loss is incurred by the promisee. *Bhavani alias Rukmani Amma v. Anantha Kamthi*, 20 M.L.J. 263 = (1916) 2 M.W.N. 244 = 31 M.L.J. 556 = 4 L.W. 357 = 35 Ind. Cas. 789.

OLDFIELD and SADASIVA AIYAR, JJ.

References:—(a) (1883) 11 Q.B.D. 695, F. (b) (1814) 4 M. and S. 53, F.

Infants.

(1) *Infants, if may be adjudicated insolvents under the Presidency Towns Insolvency Act (III of 1909)—Contract Act, Ss. 68 and 247.*

Infants cannot be adjudicated insolvents under any circumstances.

Ss. 68 and 247 of the Contract Act provide special remedies against the property of an infant, but that does not make an infant a debtor. *Re Sitai Prasad*, 20 O.W.N. 1065 = 43 C. 1157.

GRAVES, J.

(2) *Purchase by manager of, with infant's money—Plea of action to defraud said infant.* See CIV. PRO. CODE (1908), No. 147, 30 Ind. Cas. 212.

Inferior Courts.

Power to make comment upon judgment of superior Court—Duty of Lower Court to treat such judgment with proper deference. See SUBORDINATION OF COURTS, No. 1, 30 Ind. Cas. 292.

Inherent Jurisdiction of Civil Courts.

See LAND ACQUISITION ACT, 1894, No. 10, 18 Bom. L.R. 826.

Inherent Power of Court.

(1) *Illegal ex parte order, subject to revocation at instance of party affected.*

Where an *ex parte* order has been made to the prejudice of a litigant who has not been afforded an opportunity to be heard, the order is subject to the implication that it may be revoked at the instance of the party affected thereby and the Court has inherent power to give such directions as the justice of the case may require. *Syam Mandal v. Sati Nath Banerjee* 24 C.L.J. 523.

MOOKERJEE and CUMING, JJ.

(2) *Money paid over under illegal order must be returned to Court.*

The money which has been paid out of Court under an illegal order made without jurisdiction must be brought back into Court. *Surrendra Nath Goswami v. Bangsibadan Goswami*, 24 C.L.J. 533 = 36 Ind. Cas. 457.

MOOKERJEE and CUMING, JJ.

(3) *Extent of.* See CIV. PRO. CODE (1908), No. 98, 4 L.W. 400.

(4) *Time fixed for deposit of money—Extension of time on application after expiry of time fixed.* See CIV. PRO. CODE (1908), No. 282, 9 Bur. L.T. 83.

(5) See CIV. PRO. CODE (1908), No. 65, 150 P.W.R. 1916.

(6) See LAND ACQUISITION ACT (1894), Nos. 1 and 2, 31 M.L.J. 827.

(7) *Order passed under mistake.* See REVIEW, No. 5, 32 Ind. Cas. 527.

Inheritance.

See BUDDHIST LAW—INHERITANCE.

See CUSTOMS—PUNJAB—INHERITANCE.

See HINDU LAW—INHERITANCE.

See MAHOMEDAN LAW—INHERITANCE.

See MALABAR LAW—INHERITANCE.

(1) *Sonless occupancy tenant—Succession by widow—Daughter's son, right of—Co-sharing in cultivation not necessary—Agra Rent Act (XIV of 1886)—Agra Tenancy Act (II of 1901), effect of.*

On the death of an occupancy tenant his daughter or his daughter's son will succeed in the absence of the widow, whether they have co-shared in cultivation or not; the daughter and the daughter's son are not collaterals the restriction as to co-sharing in cultivation being applicable to collaterals only.

Where an occupancy tenant having a daughter and a daughter's son was succeeded by his widow, while the Agra Rent Act (XIV of 1886) was in force, and the widow died after the passing of the Agra Tenancy Act (II of 1901), it must be held that the right of reversion vested in the daughter's son or his mother when the occupancy tenant died and that that right, having once vested in them was not affected by the amendment in the law introduced by the

Inheritance—(Concluded).

Agra Tenancy Act (II of 1901). *Harbans v. K. Bishambhar Singh*, 33 Ind. Cas. 330.

BAILLIE, S.M. and TWEEDY, J.M.

References:—S.D. No. 3 of 1907, *overruled*; 32 A. 314, *Rel.*

(2) **Re-marriage of widow—Right to husband's estate—Widow's chastity after, effect.** See **HINDU LAW (WIDOW)**, No. 32, 32 Ind. Cas. 338.

(3) **Dower; claim for—Cause of action for dower distinct from that for share in—*Res judicata*.** See **MAHOMEDAN LAW—DOWER**, No. 3, 19 O.O. 171.

Injunction.

(1) **Temporary injunction, subsequently dissolved—Order to be obeyed when it lasts—Order binding on party though it prohibits receiving payment from Government and Government authorised to pay by statute—Order operates in personam—Government's duty to ascertain and obey law—Question of construction, question for Courts.**

Where, in a suit for dissolution of partnership and accounts, a Receiver of the partnership assets was appointed and a temporary injunction was granted restraining the defendants *inter alia* from receiving certain payments from Government, and the Government which was no party to the suit made payments to one of the defendants in alleged exercise of power reserved to it by statute, and subsequently the injunction was dissolved, the plaintiff's case having failed.

Held—That an injunction, although subsequently discharged because the plaintiff's case failed, must be obeyed while it lasts.

That although the injunction could not bind the Government not to pay, or make the Government responsible for that obedience to the law which the Court was entitled to expect, the man who received in breach of the order was guilty of a contempt, in no way cured by the payment by Government.

The non-existence of any right to bring the Crown into Court such as exists in England by petition of right, and in many of the Colonies by the appointment of an officer to sue and be sued on behalf of the Crown, does not give the Crown immunity from all law, or authorise the interference by the Crown with private rights at its own mere will. There is a well established practice in England in certain cases where no petition of right will lie, under which the Crown can be sued by the Attorney-General (a).

It is the duty of the Crown and of every branch of the executive to abide by and obey the law. If there is any difficulty in ascertaining it, the Courts are open to the Crown to sue and it is the duty of the executive in cases of doubt to ascertain the law in order to obey it, not to disregard it.

The Government in this case having made the payment with notice of the Court's order:

Held—that, although with regard to the payments made under the statutory powers, the action of the executive must be justifiable, the question whether any particular sum mentioned

Injunction—(Continued).

in the contract in suit was payable as for "labour and supply" (so as to be within the Government's power to pay under the statute) was a question of construction and therefore of law for the Courts.

That the proper course in the present case for the executive would have been either to apply to the Court to determine the question of construction of the contract and to pay accordingly, or to pay the whole amount over to the Receiver and to obtain an order from the Court on the Receiver to pay the sums properly payable according to the true construction of the contract. **The Eastern Trust Company v. McKenzie Mann & Co., Ltd.**, 20 C.W.N. 457 = 35 Ind. Cas. 378 (P.C.).

LORD CHANCELLOR, LORD ATKINSON, LORD PARMOOR, SIR GEORGE FAREWELL and SIR ARTHUR CHANNEL.

References:—(a) (1911) 1 K.B. 410 (1910); (1912) 1 Ch. 173 (1911), R.

(2) **Co sharers—Wrongful use of joint land by a sharer—Suit for injunction—Proof.**

One joint owner has no right to deal with the joint property otherwise than with the consent of the other joint owners. But it is not necessary for one of several co-sharers who objects to the use by the other co-sharers of the joint property, to show that he is suffering or is likely to suffer substantial injury by the user of which he complains (a). **Ghasitu v. Sodhan Singh, 32 Ind. Cas. 690.**

WALSH, J.

References:—(a) 18 A. 115 = A.W.N. (1895) 213, F.; 9 A. 661, *Not F.*

(3) **Temporary disobedience of injunction decree—Executability of decree—Party disobeying whether can be ordered to execute security bond.** See **CIV. PRO. CODE (1908)**, No. 451, 3 L.W. 161.

(4) **Temporary injunction—Breach—Refusal to commit—Appeal—Subsequent dismissal of suit if affects Court's jurisdiction to pass orders on committal application previously presented—Attachment order if should precede committal order.** See **CIV. PRO. CODE (1908)**, No. 630, 3 L.W. 430.

(5) **Suit for declaration that decrees obtained by defendant against plaintiff was satisfied and for restraining execution, if maintainable.** See **CIV. PRO. CODE (1908)**, No. 115, 31 M.L.J. 429.

(6) **Action for injunction whether a 'real' action—Co-owner in sole actual occupation—Suit for injunction against trespassers—Maintainability.** See **CO-OWNERS**, No. 3, 3 L.W. 542.

(7) **British Indian Court if may issue injunction to restrain proceedings in foreign Court.** See **FOREIGN COURT**, No. 2, 20 C.W.N. 1213.

(8) **Injunction obtained without reasonable and probable cause—Suit for damages.** See **HINDU LAW (MARRIAGE)**, No. 1, 14 A.L.J. 754.

Injunction—(Concluded).

(9) Alienation by widow—Injunction when may be granted against her. See **HINDU LAW (WIDOW)**, No. 6, 53 P.W.R. 1916.

(10) Prayer for—Whether a prayer for consequential relief. See **LIMITATION ACT (1908)**, No. 201, 23 C.L.J. 561.

(11) Injunction to restrain alienation and registration of document.—Validity. See **MAHOMEDAN LAW (WAKF)**, No. 2, 14 A.L.J. 554.

(12) Other remedies not availed of—Effect—No right to injunction. See **SPECIFIC RELIEF ACT**, No. 45, 9 S.L.R. 174.

(13) Award of larger relief than in plaint—Legality, against community. See **SPECIFIC RELIEF ACT**, No. 51, 35 Ind. Cas. 106.

(14) Perpetual—Right to use water decreed in previous suit—Owner filling up tank. See **SPECIFIC RELIEF ACT**, No. 48, 35 Ind. Cas. 40.

(15) See **TRADE MARK**, No. 1, 36 Ind. Cas. 965.

In pari delicto.

Parties in *pari delicto* if entitled to declaratory relief. See **SPECIFIC RELIEF ACT**, No. 23, 20 C.W.N. 760.

Insolvency.

- (1) *Cross examination—Adverse party—Evidence Act, S. 137—Presidency Towns Insolvency Act (III of 1909), cl. 18, Sch. II, proceedings under—Purchaser of part of insolvent's property, if proper or necessary party—Cross-examination by such person, effect of—Notes of public examination of insolvent, if admissible against creditor.*

A purchaser from a person who subsequently is adjudicated an insolvent is not a necessary or proper party to the proceedings under cl. 18 of the second schedule to the Presidency Towns Insolvency Act and has no right to intervene therein when his purchase is not challenged. He, not being an adverse party, has no right to cross-examine the applicant for establishing the claim against the estate of the insolvent. The cross-examination held in contravention should be eliminated from the record.

The notes of the public examination of the insolvent, though admissible against him under S. 27 (6) of the Presidency Towns Insolvency Act, cannot be used against a creditor who had no opportunity to cross-examine him. **Jarwa Bai v. Pitambar Nilambar Shah**, 24 C.L.J. 149 = 36 Ind. Cas. 689.

SANDERSON, C.J., WOODROFFE and MOOKERJEE, JJ.

- (2) *Appointment of Receiver to realise assets and distribute among creditors—Suit by Receiver for recovery of debt due to insolvent, whether maintainable.*

Where the managing partner of a firm which had suspended payments entered into an agreement with the creditors, in pursuance of which both parties executed a deed appointing eight persons as receivers to realise the assets of the firm and distribute them among the creditors

Insolvency—(Continued).

pro rata, and the receivers so appointed sued to recover a debt due to the firm :

Held, that the tenor of the document and the purpose for which it was executed pointed to the conclusion that the property vested in the receivers and that the insolvent had nothing whatever to do with it thereafter, and therefore, the receivers had *locus standi* to maintain the suit. **Panna Lal v. Dhumal Mal**, 95 P.W.R. 1916 = 34 Ind. Cas. 156.

JOHNSTONE, C.J. and SHADI LAL, J.

- (3) *Joint Hindu family—Business started by father alone—Whether son can be adjudicated insolvent for father's debts—Contract Act, S. 248.*

In a joint Hindu family consisting of the father and the son, the father started a piece goods trade and carried on the business without the aid of ancestral funds. In the course of the business he executed certain pro-notes during the minority of the son. On the petition of his creditors both the father and son were adjudicated insolvents. On appeal by the son :

Held, per **Abdur Rahim, J.**, that the son could not be adjudicated insolvent because ;

- (1) There is no presumption of Hindu Law that the business carried on by the head of a Hindu family although started by himself for the first time is, without anything more being shown, the business of the joint family.

- (2) Even on the assumption that the business was the joint family business the appellant would not be personally liable but only his share in the property acquired out of the proceeds of the trade would be liable for the debts.

Phillips, J.—As the son took an active part in conducting the family business his conduct is sufficient to show that he is a consenting party to the manner in which the business was carried on. He must therefore be considered as a partner, and, under S. 248 of the Indian Contract Act, he becomes liable on attaining majority for all obligations incurred since he became a partner unless he repudiates the partnership by public notice. **Palaniappa Chetty v. Official Assignee of Madras**, 20 M. L.T. 565 = 1917 M.W.N. 150 = 36 Ind. Cas. 787.

ABDUR RAAIM, OFFG. C.J. and PHILLIPS, J.

- (4) *Quers—Whether leave is necessary for an application to execute the decree by attachment of the insolvent's property. In the matter of Ko Shwe Gya*, 9 Bur. L.T. 352.

YOUNG, J.

- (5) *Deposit of an Insurance Policy—Effect of a mere deposit at time of execution of promissory note—Lender not ranking as a secured creditor in distribution of promisor's estate.*

Where an Insurance Policy was deposited with the payee of a promissory note by way of collateral security. **Official Assignee v. T. M. T. Thompson**, 8 Bur. L.T. 157 = 30 Ind. Cas. 602. See Final Part, 1916, Col. 844.

- (6) *Insolvent—Sale in execution of decree before order of adjudication, effect of—Order of*

Insolvency—(Concluded).

adjudication, effect of. **Achambhit Lal, (Munshi) v. Ohhanga Mal**, 18 O.C. 268=32 Ind. Cas. 429. See Final Part, 1915, Col. 844.

(7) Annulment of adjudication order—Applicant what to prove. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 35, 23 C.L.J. 220.

(8) Decree for maintenance of wife, not a debt provable in. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 12, 10 S.L.R. 28.

(9) Stay of proceedings against insolvent. See ACT III OF 1909 (PRESIDENCY TOWNS INSOLVENCY), No. 10, 18 Bom. L.R. 198.

(10) Transfer by insolvent prior to insolvency to wife—Transfer by wife to another after husband's adjudication—Effect. See ACT III OF 1909 (PRESIDENCY TOWNS INSOLVENCY), No. 16, 20 C.W.N. 554.

(11) See CIV. PRO. CODE (1908), No. 519, 10 S.L.R. 53.

(12) Application for attachment before judgment—Summons to defendant to furnish security—Money paid into Court—Subsequent, of defendant—Priority—Charge. See CIV. PRO. CODE (1908), No. 622, 39 M. 903.

(13) Of Manager of joint family—Entry of debt in schedule attached to petition—Saving of limitation as against other members. See HINDU LAW (JOINT FAMILY), No. 33, 36 Ind. Cas. 389.

(14) Infants it may be adjudicated insolvents. See INFANTS, No. 1, 20 C.W.N. 1065.

(15) See SPECIFIC RELIEF ACT, No. 28, 36 Ind. Cas. 1004.

Insolvency Act (Presidency Towns).

See ACT III OF 1909.

Insolvency Act (Provincial).

See ACT III OF 1907.

Insolvency Petition.

(1) Mention of debt in schedule of—Acknowledgment of debt—Saving of limitation. See LIMITATION ACT (1908), No. 67, 36 Ind. Cas. 389.

(2) Admission by partner in—Effect on other partners. See PARTNERSHIP, No. 9, 36 Ind. Cas. 389.

Insolvency Proceedings.

(1) Pendency of—Leave of Court for application to arrest insolvent—Effect of refusal of discharge on protection order. See ACT III OF 1909 (PRESIDENCY TOWNS INSOLVENCY), No. 8, 9 Bur. L.T. 252.

Inspection.

Temple Committee—Suit for declaration of supervisoryship and for production and, of accounts—Limitation—Limitation Act, Arts. 190, 124, 131 and 144—Right to declaration of control lost—Right to production of accounts. See RELIGIOUS ENDOWMENTS ACT (1863), No. 1, 4 L.W. 186.

Instalment.

(1) Instalment decree—Effect of not certifying payments—Limitation. See CIV. PRO. CODE (1908), No. 490, 14 A.L.J. 192.

Instalment—(Concluded).

(2) Instalment bond—Failure to pay instalment—Provision to call up whole amount 90 days after demand—No demand—Remedies available—Construction of bond. See MORTGAGE (GENERAL), No. 23, 62 P.R. 1916.

(3) Repayment in kind by—Default—Penalty—Contract Act, 1872, Ss. 37, 74. See EVIDENCE ACT, No. 59, 35 Ind. Cas. 111.

Instalment Bond.

(1) Tender of payment without interest of instalments over due.

Where, in an instalment bond it was stipulated that if three instalments were in arrears the whole money would become due, and the tender was made after three instalments had fallen due, of the principal amount alone without the addition of interest. *Held* that it was not a proper tender. **Thiruvannamalai Serval v. Varadarajulu Naidu**, 31 Ind. Cas. 304.

SRINIVASA AIYANGAR, J.

(2) Instalment mortgage bond—Suit for whole amount on default as to an instalment—Acceptance by creditor of part of over-due instalment—Starting point of limitation. See LIMITATION ACT (1908), No. 153, 33 Ind. Cas. 606.

Instalment Decree.

(1) For money—Order directing delivery of possession of land on failure to pay two consecutive instalments—Application for delivery of, possession presented more than 3 years from default—Bar of limitation. See EXECUTION OF DECREE, No. 20, 36 Ind. Cas. 978=8 P.R. 1917

(2) See EXECUTION OF DECREE, No. 34, 32 Ind. Cas. 693.

Insurance.

(1) *Marine Insurance Policy*—'Covering note'—Nature of document—Agreement to issue a policy—Admissibility to prove—Effect of stamping—Enforcement of rights under covering note—Procedure—Goods shut out—Damage—Loss—'Sling and craft risk'—Whether include damage to goods shut out—Custom.

A covering note does not purport to be a policy of Marine Insurance. Where a covering note is issued and accepted, neither party considers that a policy has been issued, but the insurance Agents have agreed to issue a policy for the adventure specified on condition that the agreed premium is paid in cash before the departure of the vessel from the harbour. The covering note is admissible to prove the agreement.

The stamping of a document cannot alter its inherent nature or create fresh liabilities under it.

The technically correct procedure for the owner of goods to pursue when goods covered by a 'Covering Note' have been lost, is at once to go to the Insurance Agents, pay the premium and demand a policy.

Where no premium has been paid or tendered, it is doubtful whether the goods can be said to be insured.

Where a covering note provided for insurance of goods including 'sling and craft risks' for

Insurance—(Concluded).

voyage by a particular steamer from Karachi to Mombasa and the voyage was abandoned at a very early stage, and where, on the return journey or after the goods had actually reached the wharf of departure, goods were damaged.

Held, that the term 'sling and craft risks' did not cover the return journey of goods that have been shut out.

Held, also that no custom has been proved that, after the loss of goods in the return journey, the shipper can, by a special premium, demand a policy covering such journey. **Lutafali v. The Royal Exchange Corporation**, 9 S.L.R. 116=32 Ind. Cas. 510.

CROUCH, A.J.C.

(2) *Life insurance—Refusal by insurer to accept premiums, effect of—Court Fees Act (VII of 1870), S. 5—Additional Court-fees, levy of after decision of case whether allowable.*

Once the insurer refuses to accept premiums, the insured is not bound to go on tendering successive premiums in order to save the right to recover the amount insured; he can sue for damages at that time or refuse to treat the contract as at an end, as the insurer's refusal to accept premium is a continuing refusal (a).

The provisions of the Court Fees Act relating to the levy of additional fees apply only to cases which are pending and cannot be enforced in cases which have been finally decided (b). **Shangal Life Insurance Co., Ltd. v. Mrs. Helen Constance Brown**, 9 Bur. L.T. 43=32 Ind. Cas. 534.

TWOMEY and ORMOND, JJ.

References:—(a) (1900) 1 Ch. D. 952=69 L. J. Ch. 420=82 L.T. 144=40 W.R. 347, R. (b) 7 A. 529=A.W.N. (1885) 140, F.

(3) *Execution of decree—Power of Court dealing with—Adding premia paid by decree-holder for insurance of mortgaged property subsequent to decree. See EXECUTION OF DECREE, No. 34-d, 32 Ind. Cas. 751.*

(4) *Insurance policy—Unascertained sum of money due thereunder—Succession certificate—Whether necessary for its collection—Nominee under the policy—His position. See SUCCESSION CERTIFICATE ACT (1889), No. 3, 33 Ind. Cas. 157.*

Insurance Policy.

Right to certificate for amount due under. See SUCCESSION CERTIFICATE ACT (1889), No. 7, 3 L.W. 466.

Intention.

(1) *Whether question of, with which a transfer of property has been made is one of law or fact. See ACT III OF 1901 (PROVINCIAL INSOLVENCY), No. 4, 102 P.R. 1916*

(2) *Gift by widow—Gift with power of alienation—Construction of document—Of parties. See HINDU LAW (WIDOW), No. 28, 34 Ind. Cas. 596.*

(3) *Mortgagee purchasing part of the mortgaged property—Merger. See LIMITATION ACT (1908), No. 214, 14 A.L.J. 1025.*

Intention—(Concluded).

(4) *Execution and registration of lease deed—Passing of title—Of parties. See TITLE, No. 3, 30 Ind. Cas. 210.*

(5) *Improvement by mortgagee—To add costs to mortgage money. See TRANSFER OF PROPERTY ACT, No. 100, 30 Ind. Cas. 234.*

(6) *Modification of will—Oral will to be very distinct, etc.—Present and future, to modify the will. See WILL, No. 12, 112 P.W.R. 1916.*

(7) *Proof of testator's—Admissibility of oral evidence. See WILL, No. 17, 30 Ind. Cas. 391.*

Interest.

See ACT XXXII OF 1839.

See COSTS.

See HINDU LAW.

(1) *Money realised under decree afterwards reversed on appeal must be refunded with interest.*

When a decree-holder withdraws money under a decree which is afterwards reversed on appeal, he is bound to restore the amount with interest at the rate of 6 per cent. per annum from the date of the withdrawal to the date of repayment into Court (a). **Ashutosh Gossami v. Upendra Prasad Mitra**, 21 C.L.J. 467=21 O.W.N. 564.

MOOKERJEE and CUMING, JJ.

References:—(a) (1871) L.R. 3 C.P. 465; (1875) L.R. 18 Eq. 659; (1871) L.R. 6 Ch. App. 558; (1877) L.R. 4 I.A. 137=3 C. 161, R.

(2) *Post-diem interest—Duty of Court to give contract rate of interest from date fixed for payment till date of realisation.*

The Court is not bound to fix the rate of interest from the date fixed for payment up till the date of realisation according to the provisions of the deed sued upon. It is not competent to parties to contract themselves out of the provisions of the Law in such a manner as to deprive the Courts of their discretion to fix the rate of interest awarded from the date fixed for payment to the date of realisation. **Babu Narendra Bahadur v. The Oudh Commercial Bank, Limited**, 30 Ind. Cas. 323.

STUART, A.J.C.

(3) *Award of post-diem interest.*

Post diem interest can be allowed, even if that interest were not chargeable under the terms of a deed. **Mahadeo Prasad v. Mussamat Tikol**, 36 Ind. Cas. 685.

STUART, A.J.C.

References:—19 A. 39=23 I.A. 138=1 C.W. N. 52=6 M.L.J. 214=7 S.W. P.C.J. 88=9 Ind. Dec. (N.S.) 25 (P.C.), R.

(4) *Interest, payment, when saves bar of limitation—Evidence to prove such payment, Parties—Debtor—Party to such arrangement—Limitation Act (1908), S. 19—Contract of guarantee—Consideration—Actual release of claim necessary and not mere promise. Nagappa Chetty v. Ramanathan Chetty*, 29 Ind. Cas. 422=(1916) 2 M.W.N. 264=4 L.W. 553, See Final Part, 1915, Col. 849.

(5) *Mortgage suit—Interest, suspension of—Delay in payment caused by improper act or*

Interest—(Continued).

omission of the creditor—Penalty—Damages. **Gopaswar Saha v. Jadab Chandra Chandra-ray**, 22 C.L.J. 352=20 C.W.N. 689=43 C. 632=32 Ind. Cas. 637. See Final Part, 1915, Col. 849.

(6) Interest and compound interest on payments and advance made and balance. See ACCOUNTS, No. 2, 103 P.W.R. 1916.

(7) Arrears of cess—Right to. See BEN. ACT IX OF 1880 (CESS), No. 2, 23 C.L.J. 603.

(8) Award of, or damages on arrears of rent—Mandatory provision. See BEN. ACT VIII OF 1885 (TENANCY), No. 35-b, 36 Ind. Cas. 955.

(9) Stipulation to pay, on arrears of rent "at 75 per cent. with full damages" if by way of penalty—Contract Act (IX of 1872), S. 74—Mere high rate if sufficient to demand interference. See BEN. ACT VIII OF 1885 (TENANCY), No. 36, 21 C.W.N. 112.

(10) Court of Wards Manager's power to remit, on arrears of rent. See MAD. ACT I OF 1902 (COURT OF WARDS), No. 1, 31 Ind. Cas. 468.

(11) On arrears of canal dues. See ACT VIII OF 1873 (NORTHERN INDIA CANAL AND DRAINAGE), No. 1, 32 Ind. Cas. 556.

(12) Civ. Pro. Code, O. XXXIV. r. 2. See AMENDMENT OF DECREE, No. 2, 31 Ind. Cas. 320.

(13) See CIV. PRO. CODE (1908), No. 447, 34 Ind. Cas. 144.

(14) On costs—Judgment not allowing—Decree if can include. See CIV. PRO. CODE (1908), No. 74, 35 Ind. Cas. 218.

(15) Compensation for pre-emptor remaining out of possession of pre-empted property. See CIV. PRO. CODE (1908), No. 287, 170 P.W.R. 1916.

(16) Stipulation for payment of, and damages—Unconscionable bargain—Award of reasonable compensation. See CONTRACT ACT, No. 95, 36 Ind. Cas. 404.

(17) See CONTRACT ACT, No. 92, 35 Ind. Cas. 624.

(18) Penalty—At 75 per cent. in a mortgage by poor and ignorant men—Reasonable compensation. See CONTRACT ACT, No. 99, 34 Ind. Cas. 609.

(19) Provision regarding payment of, on default—Compound interest—Relief against penal clause—Assessment of compensation—Conduct of parties. See CONTRACT ACT, No. 98, 30 Ind. Cas. 323.

(20) Interest—Usufructuary mortgage—Applicability of rule of damdupat. See DAMDUPAT, No. 1, 12 N.L.R. 1.

(21) Suit on pro-note—Oral evidence to show agreement for different rate of, from that provided in pro-note—Proof of repugnant or inconsistent terms. See EVIDENCE ACT, No. 61, 36 Ind. Cas. 957.

Interest—(Continued).

(22) Suit on batchita—No mention of rate of—Evidence as to interest, admissibility of. See EVIDENCE ACT, No. 74, 36 Ind. Cas. 612.

(23) Alienation by guardian—Sanction of District Court—Agreement to pay interest not sanctioned—Right to reasonable interest—Suit by minors to avoid the alienation—Duty of minors. See GUARDIANS AND WARDS ACT, No. 15, 24 P.R. 1916.

(24) Mortgage by Hindu father—High rate of interest—Legal necessity—Burden of proof—Interest whether may be reduced. See HINDU LAW (ALIENATION), No. 15, 14 A.L.J. 772.

(25) Joint Hindu family—Mortgage by a member at a high rate of, power of Court to vary the rate—Creditor's duty to establish family necessity justifying the high rate—Second, appeal. See HINDU LAW (JOINT FAMILY), No. 10, 19 O.C. 169.

(26) Tender of payment without, of instalments overdue. See INSTALMENT BOND, No. 1, 31 Ind. Cas. 304.

(27) Labourer—Rendering of services by pannial—Whether amounts to payment of. See LIMITATION ACT (1908), No. 73, 33 Ind. Cas. 134.

(28) Money decree not bearing—Payment—Application for execution. See LIMITATION ACT (1909), No. 74, 35 Ind. Cas. 177.

(29) Payment of, not as such, if could be taken as payment of principal—Payment in debtor's handwriting. See LIMITATION ACT (1908), No. 75, 35 Ind. Cas. 638.

(30) Saving of limitation—Payment of interest—Proof necessary—Debiting interest in account book if sufficient—Payment in reduction of debt if saves limitation. See LIMITATION ACT (1908), No. 72, 9 P.W.R. 1916.

(31) Suit for money on thavanai account—Custom of Natukottai Chetties—Fixing of rate of. See LIMITATION ACT (1908), No. 130, 36 Ind. Cas. 497.

(32) Hypothecation bond—Principal payable after 11 years—Interest every year—Condition that principal and interest shall both become due immediately in default of payment of interest—Cause of action if arises on date of first default. See LIMITATION ACT (1908), No. 152, 4 L.W. 77.

(33) Payment of interest as such—Labour in lieu of interest if can save limitation. See LIMITATION ACT (1908), No. 69, 3 L.W. 552.

(34) Rate of—Presumption. See LIMITATION ACT (1908), No. 131, 148 P.W.R. 1916.

(35) See MAHOMEDAN LAW (DOWER), No. 2, 14 A.L.J. 1056.

(36) Interest on mortgage—Rate allowable. See MORTGAGE (GENERAL), No. 18, 100 P.W.R. 1916.

(37) Period fixed for redemption of mortgage—Liability to pay interest thereafter. See MORTGAGE (GENERAL), No. 4, 5 P.R. 1916.

(38) Mortgage by certificated guardian—Sanction to raise loan granted by District

Interest—(Concluded).

Judge but subsequently revoked—Money lent without notice of revocation and applied by guardian for minor's benefit—Effect of the revocation of sanction of the mortgage—Rate of. See MORTGAGE (GENERAL), No. 28, 21 C.W.N. 63.

(39) Oral agreement putting mortgagee in possession in lieu of—Evidence of such agreement, admissibility of—Evidence Act, S. 92. See MORTGAGE BY CONDITIONAL SALE, No. 1, 19 O.C. 166.

(39-a) See MORTGAGE (REDEMPTION), No. 25-a, 32 Ind. Cas. 729.

(40) Tender of amount due on the mortgage—What constitutes tender—Cessation of—Account for gross receipts. See MORTGAGE (REDEMPTION), No. 16, 9 Bur. L.T. 117.

(41) Interest—No stipulation in promissory note—Contemporaneous agreement—Provision for interest—Validity. See NEGOTIABLE INSTRUMENTS ACT (1881), No. 20, 12 N.L.R. 9.

(42) Hundi silent as to interest—Rate of interest—Oral agreement to pay interest at 12 per cent.—Admissibility—S. 92, Evidence Act. See NEGOTIABLE INSTRUMENTS ACT (1881), No. 21, 1 Pat. L.J. 71.

(43) Partner contributing excess sum towards capital—Interest. See PARTNERSHIP, No. 2, 23 C.L.J. 148.

(44) Decree, execution of—Mesne profits. See RES JUDICATA, No. 24, 14 A.L.J. 1171.

(45) Liability of surety to pay interest. See SURETY, No. 1, 23 C.L.J. 256.

(46) Mortgage—Deposit—Interest stops from what date—Deposit falling short by 9½ pacs—Effect—Fractions of day—Calculation of interest—Interest for day of deposit—*Bona fide* mistake in calculating the days for which interest payable—Effect. See TRANSFER OF PROPERTY ACT, No. 116, 30 M.L.J. 607.

(47) Deposit of money in Court after suit—Abatement of. See TRANSFER OF PROPERTY ACT, No. 117, 31 M.L.J. 548.

(48) Suit by mortgagee for interest—Principal not becoming due—Maintainability. See TRANSFER OF PROPERTY ACT, No. 95, 3 L.W. 587.

(49) After deposit, liability for—Duties of person entitled to the money—Failure to state clearly to whom money is to be paid, effect of. See TRANSFER OF PROPERTY ACT, No. 112, 19 O.C. 145.

(50) Mortgage—No tender of amount—Right to. See TRUST ACT, No. 6, 32 Ind. Cas. 97.

(51) Contract with alien enemy—Payment of interest under contract entered into before outbreak of war—Trading license granted to alien enemy—Suspension of interest after the outbreak of war. See WAR, No. 1, 18 Bom. L. R. 190.

(52) Demonstrative legacy—Interest whether payable thereon—Time from which interest payable—Ss. 311, 312, Act X of 1865 (Succession). See WILL, No. 8, 43 C. 201.

Interest Act.

See ACT XXXII OF 1839.

Interest (Usury Laws Repeal) Act.

See ACT XXVIII OF 1855.

Interlocutory Order.

(1) See CIV. PRO. CODE (1908), No. 676, 31 Ind. Cas. 978.

(2) Applicability of S. 105, Civ. Pro. Code, to orders and. See CIV. PRO. CODE (1908), No. 60, 4 L.W. 411.

(3) Revision when lies from an. See REVISION, No. 1, 76 P.L.R. 1916.

(4) See REVISION, No. 2, 149 P.W.R. 1916.

Interrogatories.

(1) Method of administration—Power to settle interrogatories. See CIV. PRO. CODE (1908), No. 391, 43 C. 300.

(2) Object to discover nature of opponent's evidence—Discovery of particulars of documents. See CIV. PRO. CODE (1908), No. 391-a, 36 Ind. Cas. 882.

Irregularity.

(1) Omission to give notice, no irregularity but illegality vitiating proceeding.

The omission to give notice, as required by O. XXI, r. 22 of the Code of Civil Procedure, is not a mere irregularity which makes the proceeding voidable, but is a defect which goes to the root of the proceeding and renders it void for want of jurisdiction (a).

Such omission renders proceedings inoperative even though a stranger may have acquired title in course thereof. *Syam Mandal v. Sati Nath Banerjee*, 24 O.L.J. 523.

MOOKERJEE and CUMING, JJ.

References :—(a) 20 C. 370 ; 21 C. 19 ; 32 B. 572, R.

(2) Attachment in execution of two decrees of two Courts—Sale by lower Court—Rights of purchaser—*Bona fides*—Notice—Burden of proof. See CIV. PRO. CODE (1882), No. 17-a, 32 Ind. Cas. 41.

(3) Crim. Pro. Code, S. 476—Proceedings taken while a suit is pending—If material. See CIV. PRO. CODE (1908), No. 231, 20 M.L.T. 252.

(4) Execution sale, setting aside of—Material. See CIV. PRO. CODE (1908), No. 514, 35 Ind. Cas. 411.

(5) Sale without attachment, validity of. See CIV. PRO. CODE (1908), No. 456, 36 Ind. Cas. 292.

(6) Court-auction—Sale—In the conduct of—*Bona fide* purchaser not protected—Major judgment-debtor—Treated as minor—Vitiates sale—Notice—Execution. See SETTING ASIDE SALE, No. 1, 20-M.L.T. 479.

(7) Execution sale—Irregularity in proclamation—Application to set aside sale—Points to be proved. See CIV. PRO. CODE (1908), No. 497-a, 32 Ind. Cas. 990.

Irrigation.

(1) Mortgage in possession—Duty to keep mortgaged property in repair—Reasonable expenditure on—Impossibility to ascertain sums spent—Right to amount spent therefor. See MORTGAGE (GENERAL), No. 33, 1 Pat. L.J. 589.

Irrigation Cess Act.

See MAD. ACT VII OF 1865.

Irrigation Right.

Suit for declaration of irrigation right—Preferential right over that of defendant—Plea of total denial of plaintiff's right—Finding in favour of plaintiff's right to irrigation without preferential right—Dismissal of suit in toto improper—Sufficient cause of action.

In a suit for declaration, the plaintiffs claimed that they were entitled to a right to draw water from a tank and further that they were entitled to exercise that right before the defendant could draw water for irrigation of his own crops. There was also a claim for damages on account of the damage to certain crops because the defendant had refused to allow the plaintiffs to set up their irrigation lift. The defence set up was a denial of the plaintiffs' right to draw any water from the tank in question; and there was also a denial that the plaintiffs had been obstructed or that they had suffered any damage. Both the lower Courts dismissed the suit *in toto* though they found that the plaintiffs were entitled to draw water from the tank in proportion to the extent of the cultivation, although without any preference over the right of the defendant. It was also found that the plaintiffs had failed to prove that they had been obstructed in such a way as to cause them any damage.

Held that there was a sufficient cause of action for a declaratory suit in the case; and that the Courts below ought to have declared the right of the plaintiffs to the extent to which they found they were entitled. **Bakhtawar Singh v. Dharam Singh**, 34 Ind. Cas. 9.

LINDSAY, J.C.

Island.

Arising in the sea within territorial limits—Title in Crown—Crown opposed by squatters—Crown if must prove that squatters had not acquired title by adverse possession—*Onus*. See LIMITATION ACT (1908), No. 209, 31 M.L.J. 324.

Jaghir.

Nature and origin of Jaghir tenure—Distinction between Inam and Jaghir. See MAD. ACT I OF 1908 (ESTATES LAND), No. 5, 30 M.L.J. 600.

Jalkar.

(1) Suit for rent of—Limitation. See BEN. ACT VIII OF 1865 (TENANCY), No. 94, 39 Ind. Cas. 110.

(2) Suit to recover possession of—Limitation. See LIMITATION ACT (1908), No. 255, 34 Ind. Cas. 841.

Jenmi.

(1) See MALABAR LAW (MORTGAGE), No. 1, (1916) 2 M.W.N. 358.

(2) Order for sale in Melkanomdar's suit, title whether extinguished thereby—*Res judicata*—Prior suit by Melkanomdar, whether bars the Jenmi's suit. See TRANSFER OF PROPERTY ACT, No. 123, 4 L.W. 184.

'Jeroyati.'

Meaning of. See MAD. ACT I OF 1908 (ESTATES LAND), No. 11, 3 L.W. 485

Jodi.

Meaning of 'Jodi'—Assignment of—Rights of assignee. See MAD. ACT II OF 1864 (REVENUE RECOVERY), No. 1, 3 L.W. 273.

Joinder of Parties.

(1) See CONTRACT ACT, No. 45, 34 Ind. Cas. 138.

(2) Suit by one of several landlords. See LANDLORD AND TENANT, No. 30, 9 Bur. L.T. 110.

(3) Joinder of party claiming adversely to mortgagor, irregular—Claim of person so joined, dismissed—Appeal. See MORTGAGE SUIT, No. 1, 20 C.W.N. 1279.

Joint and Several Liability.

See RENT, No. 2, 24 C.L.J. 371.

Joint Contract.

If includes a surety. See LIMITATION ACT (1908), No. 81, 32 Ind. Cas. 608.

Joint Decree.

(1) Partners holding a joint decree—Payment to two out of three partners when valid—Definiteness of shares in the decree debt—Effect—Joint Hindu family—Joint decree debt of the family—Manager's power to give discharge. See CIV. PRO. CODE (1908), No. 420, 3 L.W. 579.

(2) Liability of plaintiff and defendant under—Plaintiff paying and suing defendant for recovery of whole sum—Nature of defence open. See PLEADINGS, No. 5, (1916) 2 M.W.N. 214.

Joint Hindu Family.

Tender of patta, when valid—Manager of, if competent to tender patta. See MAD. ACT VIII OF 1865 (RENT RECOVERY), No. 2, 4 L.W. 654.

Joint Holding.

Surrender by one tenant—Deed stamped and registered as conveyance—Effect. See LANDLORD AND TENANT, No. 66, 32 Ind. Cas. 232.

Joint Landlords.

Dispute between, as to collection of rent—Collector's order declaring particular person as landlord—Revision. See MAD. ACT I OF 1908 (ESTATES LAND), No. 7-a, 36 Ind. Cas. 212.

Joint Liability.

See RENT, No. 2, 24 C.L.J. 371.

Joint Possession.

See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 11-a, 32 Ind. Cas. 732.

Joint Promisees.

Co-mortgagees—Payment to one if discharges the debt. See MORTGAGE (GENERAL), No. 3, 3 L.W. 22.

Joint Promisors.

One of two joint promisors whether can plead minority of the other as a bar to promisee's claim. See CIV. PRO. CODE (1882), No. 29, 14 A.L.J. 534.

Joint Property.

'Estate' of lunatic—Properties in which he has beneficial interest—Whether included in the term 'estate'. See ACT IV OF 1912 (LUNACY), No. 2, 33 Ind. Cas. 106.

Joint Purchase.

(1) By Hindu male and a female—Nature of interest acquired—Whether, joint tenancy or tenancy in common. See HINDU LAW (WOMAN'S ESTATE), No. 1, 3 L.W. 422.

(2) Suit to recover money paid to defendant—Limitation. See LIMITATION ACT (1908), No. 136, 66 P.W.R. 1916.

Joint Tenancy.

In Bihar and Orissa—Liability for rent—Presumption. See LANDLORD AND TENANT, No. 23, 1 Pat. L.J. 190.

Joint Tenants.

(1) Joint holding of *mufi* by brothers—Death of one brother—Succession of other brother to entire holding—Effect

Where two brothers are recorded as holding a *mufi* in equal shares, and there is no partition of the land each brother having a share in each and every field, and after the death of one brother the other succeeds to the whole holding, there are no two successions as the latter does not succeed to the former. *Jagijwan Bakhsh v. Ashfaq Husain*, 33 Ind. Cas. 260.

HOLMS, S.M.

(2) Two persons acquiring jointly ex-proprietary rights—One dying without heirs—Succession by survivorship. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 16, 31 Ind. Cas. 864.

Judgment.

See CIV. PRO. CODE (1908), S. 33.

See CIV. PRO. CODE (1908), O. XX, rr. 1 to 5.

See CIV. PRO. CODE (1908), O. XLI, rr. 30 to 34.

See ESTOPPEL.

See EVIDENCE.

See FOREIGN COURT.

See LETTERS PATENT.

See RES JUDICATA.

(1) Disposing of the appeal very short, not giving the facts is defective and good ground for revision—No finding on the pleas of the defendant—Judgment based on far-fetched theories.

Judgment—(Continued).

See PUN. ACT XVI OF 1887 (TENANCY), No. 18, 4 P.W.R. 1916 (Rev.).

(2) Statement as to an admission in, of Court of First Instance—Absence of affidavit denying the same by Vakil who appeared in Court below—Statement 'not to be lightly treated by appellate Court. See ADMISSION No. 1, 31, M.L.J. 269.

(3) Amendment of judgment—Error in judgment. See AMENDMENT OF DECREE, No. 2, 169 P.W.R. 1916.

(4) Contents of—Duty of appellate Court. See CIV. PRO. CODE (1908), No. 671, 9 Bur. L. T. 59.

(5) Interest on costs—Not allowing—Decree if can include. See CIV. PRO. CODE (1908), No. 74, 25 Ind. Cas. 218.

(6) Judgment or order written and pronounced by Judge after he gave over charge of his office—Validity. See CIV. PRO. CODE (1908), No. 406, 80 P.R. 1916.

(7) Of appellate Court, contents of—Second appeal, grounds of—Findings of fact—Consideration of evidence on record—Disposal of all grounds of appeal. See CIV. PRO. CODE (1908), No. 672, 108 P.L.R. 1916.

(8) Notice of delivery of—Limitation Act, S. 5. See CIV. PRO. CODE (1908), No. 405, 9 Bur. L.T. 250.

(9) *Reductio ad absurdum*—Defective, and decree. See CIV. PRO. CODE (1908), No. 287, 170 P.W.R. 1916.

(10) Reversal of, of Lower Court—Duty of appellate Court to give reasons for its judgment. See CIV. PRO. CODE (1908), No. 674, 30 Ind. Cas. 292.

(11) Practice—Appellate Court—Contents of—Second appeal—Findings of fact—Interference. See EVIDENCE, No. 5, 34 Ind. Cas. 942.

(12) Age—Certificate by a Medical man to private patient—Former, regarding age—Whether relevant—Value—Minority—Party leading the same—Burden of proof. See EVIDENCE ACT, No. 7, 33 Ind. Cas. 142.

(13) Judgment not *inter partes*—Admissibility in evidence—Recitals in judgment if admissible. See EVIDENCE ACT, No. 8, 20 C.W.N. 643.

(14) Suit for possession—Admissibility of recital in, not *inter partes*. See EVIDENCE ACT, No. 5, 36 Ind. Cas. 882.

(15) Value as authority. See HINDU LAW (JOINT FAMILY), No. 30, 32 Ind. Cas. 291.

(16) Judgment in criminal case when admissible. See LANDLORD AND TENANT, No. 14, 23 C.L.J. 563.

(17) What is a. See LETTERS PATENT (CALCUTTA), No. 3, 20 C.W.N. 594.

(18) Judge on leave—Delivery of judgment—Dissenting judgments—Appeal. See LETTERS PATENT (CALCUTTA), No. 4, 23 C.L.J. 593.

Judgment—(Concluded).

(19) Judgments *inter partes*—Later adjudication supersedes earlier. See **RES JUDICATA**, No. 10, 31 M.L.J. 219.

(20) Restitution—Defendant, or order—Restitution when to be had. See **RESTITUTION**, No. 1, 24 C.L.J. 467.

Judl.

Payment of—Liability of tenant to pay customary rent to inamdar. See **INAM**, No. 4, 18 Bom. L.R. 950.

Judicial Decision.

Settlement Courts decree based on admission. See **ODDH ACT XXII OF 1886 (RENT)**, No. 22, 34 Ind. Cas. 755.

Judicial Proceedings.

(1) Proceedings under the Land Acquisition Act until the matter comes before the Land Acquisition Judge or only administrative and not judicial proceedings. **Best and Company, Ltd. v. The Deputy Collector of Madras**, (1916) 2 M.W.N. 348=20 M.L.T. 388=4 L.W. 535=36 Ind. Cas. 621.

ABDUR RAHIM, O.C.J., and SESHAGIRI IYER, J.

(2) Position of District Judge in proceedings under the Lunacy Act, partly judicial and partly administrative—Inquiry under the Act, nature of. See **ACT IV OF 1912 (LUNACY)**, No. 4, 19 O.C. 353.

(3) Previous judicial proceedings how far admissible in evidence—Value of trial Judge's finding on question of fact. See **HINDU LAW (RELIGIOUS ENDOWMENTS)**, No. 1, 20 O.W.N. 802.

(4) Application for leave to sue whether a stage in a judicial proceeding. See **SANCTION TO PROSECUTE**, No. 1, 43 C. 597.

Judicial Separation.

Cruelty of what kind requisite for divorce. See **ACT IV OF 1869 (DIVORCE)**, No. 4, 8 L.B. R. 385.

Jungle Lands.

See **BURDEN OF PROOF**, No. 6-b, 32 Ind. Cas. 370.

Jurisdiction.

- 1.—GENERAL.
- 2.—OF CIVIL COURTS.
- 3.—OF CIVIL AND REVENUE COURTS.
- 4.—OF DISTRICT JUDGE.
- 5.—OF MUNSIF.
- 6.—OF REVENUE COURTS.
- 7.—OF SMALL CAUSE COURTS.
- 8.—OF SUB-JUDGE.

See **LETTERS PATENT**.

See **RES JUDICATA**.

—1.—General. •

(1) Estimated value of the suit admitted by defendant, effect of—Consent of parties as to valuation of suit, effect of, on jurisdiction of Court—Market value of the property in suit.

Jurisdiction—(Continued).**—1.—General—(Continued).**

Where, after the case has proceeded to trial and evidence recorded at considerable length and the stage of argument had been reached, it appeared necessary to the Munsif to have an inquiry made as to the value of the property in suit, and on the value ascertained through a commissioner being found to exceed the pecuniary limits of his jurisdiction, the Munsif returned the plaint for presentation to a competent Court, held, that, as the defendant had deliberately admitted the estimated value of the suit and as there had been no reckless or dishonest valuation for the purpose of working a fraud upon the law, the defendant in view of his pleadings would not be heard to say that the Munsif had no authority to dispose of the suit.

Held further, that, although parties cannot by their consent invest a Court with a jurisdiction which has not been conferred upon it by law, yet the converse which is to be deduced from an admission regarding the valuation of a suit is not a consent given to jurisdiction where none exists, but relates to the facts of the market value (a). **Etizad Husan (Mir) v. Munshi Beni Bahadur**, 18 O.C. 364=33 Ind. Cas. 619.

LINDSAY, J.C.

Reference:—(a) 35 B. 24, R.

(2) Pecuniary value of suit—Trial by Court of higher grade—Irregularity—Civ. Pro. Code, S. 15—Defendant objecting to institution of same suit in Court of lower grade—Objection by him to trial by higher Court—Not maintainable—Estoppel—Suits Valuation Act, S. 8—Valuation by plaintiff.

If a suit were within the limits of the pecuniary jurisdiction of a Court of lower grade, the trial by the higher Court would only be an irregularity contravening S. 15, Civ. Pro. Code, and the defendant is estopped from objecting to an irregularity which he himself has invited by objecting in a previous suit to the trial of the suit by the lower Court.

It is the value put by the plaintiff that *prima facie* determines jurisdiction, and the contrary principle that the jurisdiction of a Court of lower grade must not be ousted by an exaggerated claim is not applicable to a case like the present one where the plaintiff would have gone to the lower Court if the defendant had allowed him to do so. **Khiantomal wd. Lalchand v. Nawab Fateh Mahomed wd. Mahomed Khan**, 9 S.L.R. 164=32 Ind. Cas. 629.

PRATT, J.C. and CROUCH, A.J.C.

(3) Vacating order passed without jurisdiction. For **Srinivasa Aiyangar, J.—Sembic**:—A party can take advantage of the procedure prescribed for challenging order passed with jurisdiction, to vacate that order on the ground that it was passed without jurisdiction. **Mulambath Kunhammad v. Parakkat Kathiri Kutti**, 31 M.L.J. 827=5 L.W. 472.

AYLING and SRINIVASA AIYANGAR, JJ.

Jurisdiction—(Continued).**—1.—General—(Continued).**

- (4) *Money paid out of Court under illegal order made without jurisdiction—Must be brought back into Court.*

The money which has been paid out of Court under an illegal order made without jurisdiction, must be brought back into Court. *Surendra Nath Goswami v. Bangelbadan Goswami*, 24 O.L.J. 533=36 Ind. Cas. 457.

MOOKERJEE and CUMING, JJ.

- (5) *Practice — Decision on jurisdiction — Admission before appellate Court—Course to adopt.* *Karuppa Mooppan v. R. Sadagopa Charlar*, (1915) M.W.N. 784=32 Ind. Cas. 759. See Final Part, 1915, Col. 857.

- (6) Long practice if can confer. See ACT XV OF 1863 (PRESIDENCY SMALL CAUSE COURTS), No. 5, 4 L.W. 402.

- (7) Divorce proceedings — Place where husband and wife last resided together. See ACT IV OF 1869 (DIVORCE), No. 1, 76 P.R. 1916.

- (8) Suit for declaration of title—Monies in hands of third person—Recovery not payable in same suit—Declaration, if an incidental relief—Suit, whether cognizable by the Presidency Small Cause Courts. See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), No. 14 L.W. 339.

- (9) Decree for delivery of property, mesne profits and costs—Transfer of jurisdiction—Execution application to what Court to be made — Application not presented to "proper Court"—Whether a step-in-aid of execution and saves limitation. See CIV. PRO. CODE (1908), No. 77, 31 M.L.J. 90.

- (10) Error of law as to depending on finding of fact—Documentary evidence—Misconstruction—Revision. See CIV. PRO. CODE (1909), No. 233, 31 Ind. Cas. 209.

- (11) Promissory note—Place of execution different from that of delivery—Institution of suit at the latter place — Validity — Proper forum. See CIV. PRO. CODE (1908), No. 62, 2 P.R. 1916.

- (12) Suit for maintenance in Poona Court—Defendant residing in Native State—Prayer that maintenance be made a charge on property within jurisdiction of Poona Court—Jurisdiction. See CIV. PRO. CODE (1908), No. 52, 18 Bom. L.R. 67.

- (13) Suit instituted under the District Court transferred to Subordinate Judge empowered—Subsequent notification limiting, of Subordinate Judge. See CIV. PRO. CODE (1908), No. 171, 31 Ind. Cas. 397.

- (14) Jurisdiction upon what depends. See CIV. PRO. CODE (1909), No. 14, 43 C. 144.

- (15) Temporary Court without assignment of definite local jurisdiction—Execution of decree of such Court—Attachment of immoveable property in places not assigned to its local jurisdiction — Validity — Decree-holder's remedy—Jurisdiction of such Court within the com-

Jurisdiction—(Continued).**—1.—General—(Concluded).**

pound of its own Court-house. See CIV. PRO. CODE (1908), No. 70, 31 M.L.J. 22.

- (16) Suit for damages for breach of betrothal tried by wrong Court—How dealt with by appellate Court. See CIV. PRO. CODE (1908), No. 59, 93 P.R. 1916.

- (17) Omission to obtain leave for suit for other reliefs on same cause of action—Subsequent suit barred, to grant leave. See CIV. PRO. CODE (1908), No. 324, 9 Bur. L.T. 93.

- (18) Promissory note—Execution in one place and assignment in another—Suit by assignee in Court within whose, assignment, is made—Maintainability. See CIV. PRO. CODE (1908), No. 61, 31 M.L.J. 816.

- (19) Acceptance of portion of decretal amount from several judgment-debtors, effect of—Uncertified payment—Execution Court, if can investigate fact of payment. See EXECUTION OF DECREE, No. 19, 24 C.L.J. 462.

- (20) Attachment of debt payable outside—Attachment, effect of—Money paid under an illegal order, where to be refunded. See EXECUTION OF DECREE, No. 17, 24 O.L.J. 533.

- (21) Suit in foreign Court—Defendant native of British India—Appearance to avoid apprehended arrest — Objection to jurisdiction — Pleading also on merits — Submission to jurisdiction whether voluntary. See FOREIGN COURT, No. 1, 3 L.W. 90.

- (22) Suit on Hundi—Hundi passed up-country and not made payable in Bombay—Jurisdiction of Bombay High Court. See LETTERS PATENT (BOMBAY), No. 1, 18 Bom. L.R. 57.

- (23) Computation of time—Suit filed in wrong Court—Whether plaintiff entitled to add time during recess of wrong Court. See LIMITATION ACT (1908), No. 6, 14 A.L.J. 310.

- (24) Suit for dissolution of partnership—Jurisdiction—S. 254 (5) and (6), Contract Act. See PARTNERSHIP, No. 3, 42 P.R. 1916.

- (25) Object to, when can be entertained in appeal. See PRELIMINARY DECREE, No. 1, 9 Bur. L.T. 119.

—2.—Of Civil Courts.

- (1) *Civil Courts—Act III of 1895—Trespass alleged—Cause of action in the plaint.*

Where the plaintiff alleges that the defendants are in unlawful possession of the property to which the plaintiff is entitled as carpenter and sues to recover possession with mesne profits from the trespassers, Civil Courts have jurisdiction to decide the same.

Act III of 1895 is not intended to take away the jurisdiction of Civil Courts where trespass is alleged against the defendant.

In disposing of the question of jurisdiction, the Court is confined to the allegations contained in the plaint. *Kotiah v. Reddamma*, (1916) M.W.N. 273=33 Ind. Cas. 658.

SESHAGIRI AIYAR, J.

Jurisdiction—(Continued).**—2.—Of Civil Courts—(Continued).****(2) Jurisdiction of Civil Court—Title deed, adjudication of validity of.**

A notice of ejectment was successfully contested in the Revenue Court on the basis of a document declared to be a *Shankalapatta*. The landlord, thereupon instituted the present suit in the Civil Court for a declaration (1) that the defendant had no superior or under-proprietary right in the land and (2) that the *patta* set up was null and void against the plaintiffs and that the defendant could not acquire any right in the land under it.

Held, that it is competent for a Civil Court to adjudicate in a case of this kind upon the validity of a document of title. The jurisdiction to give a final adjudication upon the validity of a document of title rests with the Civil Court. **Debi Bakhsh v. Ram Dhanl**, 19 O.C. 58=35 Ind. Cas. 446.

LINDSAY, J.C.

(3) Jurisdiction of Court to correct its own mistake — Order passed without hearing parties—Fresh order after hearing setting aside the same—If ultra vires—Interference by the High Court where the lower Court though acting without jurisdiction has done substantial justice—Agent's Court—Applicability of the provisions of the Civ. Pro. Code regarding re-hearing and review—Agency rules—Rules 10, 18 and 20.

In a case where a finding was called for by the High Court, the agent to the Governor at Vizagapatam passed an order on 6th March 1913 without hearing the parties, accepting the finding returned by Special Assistant Agent. On the 12th March 1913 the Agent passed another order dismissing two petitions by the counter-petitioner wherein he had set forth his objections to the finding and asked for a hearing. Finally on the 22nd May 1913 after notice to the parties and after hearing both sides, the Agent passed a third order reversing the finding returned.

Held (1) that it is an elementary rule of law that a party is entitled to be heard before an order is made to his prejudice and that the first order of the Agent having been passed without notice to the parties was illegal and was rightly set aside.

(2) That every Court has an inherent jurisdiction to rectify the mistakes it has inadvertently committed and that the High Court should not interfere where an initial injustice has been corrected and substantial justice has been done by the lower Court.

Spencer, J.—The order of the 22nd May was not without jurisdiction on the ground of its being a review of the former order, as the ordinary procedure provided in the Civ. Pro. Code for setting aside *ex parte* orders is not a review, and though the Civ. Pro. Code is not part of the Agency Rules, it may be reasonably assumed that the Agent who is vested with the same powers as a District Court took the steps which a District Court would take under the Civ. Pro. Code in similar circumstances.

Jurisdiction—(Continued).**—2.—Of Civil Courts—(Continued).**

Phillips, J.—Even if the order of 22nd May was passed without jurisdiction it would be manifestly unjust to set it aside and restore the order of the 6th March which was passed without hearing the parties.

When a party can have a mistake corrected by the Court which made the mistake, he should adopt that course rather than resort to the appellate Court. **Sri Raghunatha Doss v. Sri Sri Sri Yikrama Doss**, 31 M.L.J. 319=4 L.W. 240=(1916) 2 M.W.N. 203.

SPENCER and PHILLIPS, JJ.

(4) Civil Court—Jurisdiction—Declaration—Mharki Vatan—Hereditary Offices Act (Bom. Act III of 1876), Ss. 25, 36, 64—Revenue Jurisdiction Act (X of 1876), S. 4, cl. (a).

It is competent to a Civil Court to grant a declaration that the plaintiffs are Vataendars of a *Mharki Vatan*. **Raoji v. Dagdu**, 18 Bom. L.R. 779=41 B. 23=36 Ind. Cas. 562.

BATCHELOR, A.C.J. and SHAH, J.

(5) Suit for possession or damages against perpetual hereditary lessees—Settlement decree, construction of.

The predecessor-in-title of the defendants obtained a decree from the Settlement Court against the predecessor-in-interest of the plaintiffs for confirmation of their right to possess and occupy the village subject to the payment of the rent assessed after deduction of 10 per cent on account of *Dahiyak*. The decree gave to the Taluqdar the power to assess and vary the rent. The plaintiffs brought the present suit for possession and mesne profits on the allegation that the defendants had failed to accept the enhanced rent fixed by the Taluqdar which had the effect of terminating their rights to remain in possession of the village.

Held, that the defendants being perpetual hereditary lessees and no under proprietors, under the decrees of the Settlement Court, a suit for possession or damages against them is not maintainable in the Civil Court. **Sheonath v. Raja Muhammad Abdul Hasan Khan**, 19 O. U. 339=36 Ind. Cas. 664.

KANHAIYA LAL and KENDALL, A.J.Cs.

(6) Enhancement of power of Judge—Delay in publication of notification—Validity of order made before notification.

An application was made to the Court of a Munsif to execute a decree passed by another Court. At the time of the application the Munsif had no authority to dispose of it, as the application related to a matter beyond his pecuniary jurisdiction. Subsequently the pecuniary jurisdiction of his Court was raised with retrospective effect from date prior to the application now in question. The question was whether an order passed by the Munsif on the application, before the publication of the notification raising the jurisdiction of his Court, was lawful. *Held* that, as the powers of the Munsif were raised with retrospective effect relating to a date prior to the application in question the

Jurisdiction—(Continued).**—2.—Of Civil Courts—(Continued).**

order made by the Munsif was legal, although the notification raising his powers was published sometime thereafter. The delay in issuing the notification could not affect his authority on the date to which it related retrospectively. *Raza Husain v. Gaya Prasad*, 30 Ind. Cas. 205.

STUART, A.J.C.

(7) *Objection taken late in pleadings—Duty of Court to take cognisance of objection.*

A Court is bound to take cognisance of the plea which challenges the jurisdiction of the Civil Court, though the objection is taken at a very late stage of the suit. *Abdus Salam v. Abdul Rahman*, 30 Ind. Cas. 209.

LINDSAY, J.C.

(8) *Oldfield, J.*—It is for the party, who seeks to oust the jurisdiction of the ordinary Civil Courts, to establish right to do so (a). *District Board, Tanjore v. Kannuawami Thondaman*, 35 Ind. Cas. 121.

OLDFIELD and SADASIVA AIYAR, JJ.

References:—39 M. 21; 25 Ind. Cas. 891, 27 M.L.J. 233, R.

(9) *Suit to determine class of tenancy—No objection to jurisdiction—Decision on merits—Estoppel.*

Suit for a declaration that the defendants and certain others had no under-proprietary rights either as *bird*-holders or as perpetual lessees of certain land. The defendants in contesting the suit relied upon certain lease having certain mutation entries. The Court found that the document was not genuine and the entries had been inserted by fraud. In the result the Court passed a decree in favour of the plaintiff. The defendants thereupon appealed and the appeal was dismissed. Hence the present application by the defendants for review of the judgment of the appellate Court. The objection put forward against the judgment was that it decided a question which it was not competent to the Civil Court to decide. It was contended that the Court had no jurisdiction to determine the class to which a particular tenant belonged and that it was left to the Revenue Court to determine such question. It was argued that it was a good case for review on the ground of an error apparent on the face of the record and in any case that there was other sufficient reason within the meaning of O. XLVII, r. 1, sub-r. 1, Civ. Pro. Code. *Held* that it could not be contended that Civil Courts had no jurisdiction to decide questions relating to the genuineness of documents of title and to give effect to such decisions. It was not open to parties, who like the defendants in the present case had submitted such a document to the judgment of the Civil Court, to turn round and seek to repudiate a finding unfavourable to themselves by alleging that the Court had no authority to come to it, the Revenue Courts having no exclusive jurisdiction to deal with questions on the genuineness or otherwise of documents of title. *Held* also that the judgment was not open to review on the

Jurisdiction—(Continued)**—2.—Of Civil Courts—(Continued).**

ground of an apparent error, and there was no other sufficient cause for review. It was competent to the Court to find that the defendants were not perpetual lessees upon the grounds put forward by them. *Ram Autar v. Raja Muhammad Abul Hassan Khan*, 36 Ind. Cas. 83.

LINDSAY, J.C. and STUART, A.J.C.

(10) *Jurisdiction, Ecclesiastical and Civil, in Lower Burma—Civ. Pro. Code (1908), S. 9—Kathanabaing, Wisaya v. Zaw Ta*, 27 Ind. Cas. 112=8 Bur. L.T. 62=8 L.B.R. 145. See Final Part, 1915, Col. 859.

(11) *Shamlat land originally granted in muafi to Ala lambardar—Suit for joint possession of—Cognisability by Civil Court. Shamir Khan v. Mussammat Ghulam Fatima*, 44 P.R. 1915=100 P.W.R. 1915=29 Ind. Cas. 655=5 P.L.R. 1916. See Final Part, 1915, Col. 860.

(12) *Peonuary, in.* See ACCOUNTS, SUIT FOR, No. 1, 12 N.L.R. 174.

(13) See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), No. 5, 4 L.W. 402.

(14) See BEN. ACT VIII OF 1885 (TENANCY), No. 53, 1 Pat. L.J. 479.

(15) See BEN. ACT VIII OF 1885 (TENANCY), No. 61, 35 Ind. Cas. 76=21 O.W. N. 209.

(16) *Compensation for removal of fixtures by Calcutta Municipal authority—Whether payment of compensation is a condition precedent to such removal—Court by which claim to such compensation is cognizable.* See BEN. ACT III OF 1899 (MUNICIPAL), No. 3, 18 Bom. L. R. 878.

(17) See BEN. ACT V OF 1911 (CALCUTTA IMPROVEMENT), No. 1, 24 C.L.J. 246.

(18) *Pagoda land—Boundaries not defined—Jurisdiction.* See BUR. ACT II OF 1876 (LOWER BURMA LAND AND REVENUE), No. 2, 8 Bur. L.T. 264.

(19) *Trespass, suit for, whether cognisable by Civil Court.* See O.P. ACT XI OF 1898 (TENANCY), No. 7; 1 Pat. L.J. 525.

(20) *Suit for pasturage dues—Jurisdiction.* See MAD. ACT I OF 1908 (ESTATES LAND), No. 11, 3 L.W. 485.

(21) *Suit for rent—Land situated in a Zamindari—Ryoti land—Ijara lease to try.* See MAD. ACT I OF 1908 (ESTATES LAND), No. 1, (1916) 2 M.W.N. 240.

(22) *A's land attached as B's for arrears due by B—A paying arrears under protest to avoid sale—Suit against landlord and B for recovering amount paid by him—Jurisdiction.* See MAD. ACT I OF 1908 (ESTATES LAND), No. 34, 3 L.W. 517.

(23) *Distinction between Jagir and Inam—Grant by the Nawab of the Carnatic for subsistence—Whether Jaghir or Inam—Acquisition of *kudicaram*—Effect—Suit for eviction—*

Jurisdiction—(Continued).**—2.—Of Civil Courts—(Concluded).**

Jurisdiction. See MAD. ACT I OF 1908 (ESTATES LAND), No. 5, 30 M.L.J. 600.

(24) Application for mutation of names—Reference to arbitration—Suit in Civil Court based on title—Jurisdiction. See U.P. ACT III OF 1901 (LAND REVENUE), No. 5, 14 A.L.J. 85.

(25) Re-union of mahals—Claim for re-union by person having acquired properties in more than one mahal—To question validity of re-union. See U.P. ACT III OF 1901 (LAND REVENUE), No. 16-b, 36 Ind. Cas. 654.

(26) Suit to contest notice of ejectment, dismissal of—Suit for declaration of status as under-proprietor before actual ejectment, maintainability of—Oudh Rent Act, S. 108, cls. (8) and (10). See OUDH ACT XXII OF 1886 (RENT), No. 1, 19 O.C. 67.

(27) Suit by mortgagor for redemption—Plea of occupancy right—Cognisability by Civil Court. See PUN. ACT XVI OF 1887 (TENANCY), No. 13, 59 P.R. 1916.

(28) Reference to Deputy Commissioner under S. 9 (3), Punjab Alienation of Land Act—Further proceedings—Civil Courts *functi officio*. See PUN. ACT XIII OF 1900 (ALIENATION OF LAND), No. 9, 55 P.R. 1916.

(29) See PUN. ACT I OF 1913 (PRE-EMPTION), No. 2, 124 P.R. 1916.

(30) Order recording petition of compromise—To decide whether suit has been settled out of Court when one party denies the settlement—Absence of authority of persons negotiating compromise. See CIV. PRO. CODE (1908), No. 565, 36 Ind. Cas. 375=21 C.W.N. 366.

(31) Jurisdiction—Civil Court—Zamindar's land—Trespass for non-cultivation purposes—Suit for ejectment—Maintainability in Civil Court. See EJECTMENT, No. 10, 33 Ind. Cas. 70.

(32) Government waste land—Land let out by person having no title—Suit for rent—Jurisdiction. See LANDLORD AND TENANT, No. 15, 9 Bur. L.T. 55.

(33) Commissioner—Taking of accounts—Power to decide questions of law—Court's jurisdiction to decide the questions. See QUESTION OF LAW, No. 1, 18 Bom. L.R. 798.

(34) Impounding documents such as *hat-chitas*—Jurisdiction—Civ. Pro. Code, 1908, O. VII, r. 14. See STAMP ACT (1899), No. 2, 35 Ind. Cas. 415.

—3.—Of Civil and Revenue Courts.

(1) *Jurisdiction of a Civil or Revenue Court—Suit to recover income of the mortgaged land from one of the representatives of the original mortgagor to whom mustajeri was given—Reference by the Commissioner under S. 100 of Act XVI of 1887—Return of plaint.*

Held, that a suit by the mortgagee of revenue, paying land for recovering from one of the representatives of the original mortgagor its

Jurisdiction—(Continued).**—3.—Of Civil and Revenue Courts—(Ctd.).**

income, on the ground that the latter agreed to pay it to the former after realizing its rents from the tenants, is cognizable by a Civil and not a Revenue Court.

Held, also that the decree of the *Munsif* cannot be restored but the plaint should be returned to the plaintiff to present it in a Revenue Court, inasmuch as the decree of the *Munsif* was reversed by the District Judge on the ground that the suit was cognizable by a Revenue Court and the decree given by the Assistant Collector was reversed by the Collector, and that by registering the decree of the Collector in the Appellate Civil Court what the Chief Court can only do would leave the dissatisfied party no further remedy except a second appeal to that Court in which the registered decree could not be challenged on a question of fact. *In re Sardar Sher Singh v. Mazrulla*, 64 P.W.R. 1916=128 P.L.R. 1916=35 Ind. Cas. 293.

CHEVIS, J.

(2) *Jurisdiction of Civil or Revenue Court—Suit for declaratory decree by a person aggrieved by an entry in a Record of Rights—Landlord and tenant—S. 45 of the Punjab Land Revenue Act (XVII of 1887) and S. 77 (3) (1) of the Punjab Tenancy Act (XVI of 1887).*

Plaintiff, an occupancy tenant, sued for a declaration to the effect that he was liable to pay cash rent only with respect to his tenancy. The Assistant Collector dismissed plaintiff's suit, but on appeal the Collector held it to be a Civil suit.

On a reference under S. 99 of the Punjab Tenancy Act, *held*, that the suit was cognizable by a Revenue Court. *Kala v. Kala Khan*, 2 P.W.R. 1916 (N.W.F.P.).

BARTON, J.C.

References:—6 Judicial Record N.W.F.P.; 89 P.R. 1895, F.; 73 P.R. 1910=103 P.W.R. 1910, Diss.; 25 P.R. 1880, R.

(3) *Jurisdiction—Civil and Revenue Courts—Income derived from land occupied by dwelling-houses, suit for—Lambardar and co-sharer—Agra Tenancy Act (II of 1901), S. 164.*

Where a suit was brought against the lambardar in the Civil Court by certain co-sharers for their share of the income derived from land occupied by dwelling-houses or appurtenant thereto, *held*, that the suit was cognizable by the Civil Court and could not be maintained as one for profits in the Revenue Court under S. 164 of the Tenancy Act. *Digbijal Singh v. Hira Devi*, 14 A.L.J. 419=98 A. 322=34 Ind. Cas. 276.

PIGGOTT and WALSH, JJ.

(4) *Jurisdiction of Civil and Rent Courts—Suit against Ziladar and Mukhtar for rent collected—Limitation prescribed by Oudh Rent Act, applicability of, to suits in Civil Courts—Application for opportunity to file*

Jurisdiction—(Continued).

—3.—Of Civil and Revenue Courts—(Ctd.).

documents at some later date, disposal of—
—Oudh Rent Act, S. 108-a, cl. (5).

Held, that a suit by a landlord against his *Ziladar* and *Mukhtar* for recovery of sums collected as rent of shops and for the price of grain realized as bazar-dues was not entertainable in the Rent Court and was rightly brought in the Civil Court.

Held further, that the suit not being entertainable in a Rent Court no period of limitation prescribed in the Oudh Rent Act could apply so as to bar the entertainment of the suit by a Civil Court.

Where on the date of issues the plaintiff made an application asking that a date might be fixed to allow the filing of documentary evidence and the Court simply ordered the application to remain with the record, *held*, that it was the duty of the Court to decide on the date when the application was filed what was to be done with reference to the request made for the reception of documentary evidence. *Musammatt Piyari v. Rani Jagannath Kuari*, 19 O.C. 314.

LINDSAY, J.C.

(5) *Civil Court—Suit for declaration of class of tenancy—Cognizance by Revenue Court.*

A suit cannot be brought in a Civil Court for a declaration of the class of tenancy in a case in which the relationship of landlord and tenant is not disputed. *Raja Muhammad Abul Hazan Khan v. Ram Autar*, 36 Ind. Cas. 91.

HOLMS, S.M. and CAMPBELL, J.M.

(6) *Partition of revenue paying land—Power of Civil Court acting through Commissioner to make division—Consent of parties, effect of—Civ. Pro. Code, 1908, S. 54 and O. XX, r. 18—U.P. Land Revenue Act, III of 1901, S. 233.*

It is not competent for the Civil Court, acting through an Amin or a Commissioner, to make a division of revenue paying land, though the parties to the proceedings may consent to such division. It is the Collector alone that has got power to make a division of such land (*vide* Civ. Pro. Code, 1908, S. 54, O. XX, r. 18 and U.P. Land Revenue Act III of 1901, S. 233). *Abdus Salam v. Abdul Rahman*, 30 Ind. Cas. 209.

LINDSAY, J.C.

(7) *Suit to recover kattubadi—Inamdar not a cultivator—Civil Court.*

A suit by a proprietor to recover *kattubadi* from an Inamdar must be brought in the Civil and not in the Revenue Court, if the Inamdar is not a cultivator. *Madapaty Venkateswara Row Pantulugaru v. Nandam Rajagopalam*, 30 Ind. Cas. 927.

SESHAGIRI AIYAR, J.

References:—9 Ind. Cas. 642=(1911) 1 M.W. N. 233=9 M.L.T. 315, F.

(8) *Jurisdiction—Civil and Revenue Courts—Suit for assessment of rent—Adverse proprietary possession—Strong prima facie proof—Effect—Oudh Rent Act (XXII of 1886), Chap. VII-A, inapplicability of.**Jurisdiction—(Continued).*

—3.—Of Civil and Revenue Courts—(Ctd.).

Where in a suit by a proprietor against a cultivator in rent-free possession, to have him assessed to rent as a rent-free tenant, the defendant makes out a very strong *prima facie* case of adverse proprietary possession for many years, Chap. VII-A of the Oudh Rent Act (XXII of 1886) is not applicable to the case, and until the title of the defendant is set aside by the Civil Courts, it should not be disturbed by the Revenue Courts. *Buddhu Lal v. Ram Sarup*, 33 Ind. Cas. 250.

HOLMS, S.M. and CAMPBELL, J.M.

(9) *Jurisdiction—Suit for contribution of revenue—Bengal Estates Partition Act (V of 1897), Ss. 10, 95—Bengal Revenue Sales Law (XI of 1859)—Assessment of revenue—Conflict between assessment at batwara proceedings and that at proceedings to have separate account opened.*

A suit for contribution for revenue paid by the plaintiff which the defendant was bound to pay can be brought only in a Civil Court.

Where the amount of a person's share of revenue assessed in *batwara* proceedings under Ss. 10 and 95 of the Estates Partition Act differs from that assessed at a proceedings taken for the opening of a separate account under the Revenue Sale Law, a Civil Court is bound to accept the assessment at the *batwara* proceedings as conclusive and binding upon it. *Ramsunram Prosad Sahu v. Muset, Sarbraim Chowdhraim*, 33 Ind. Cas. 731.

EDWARD CHAMIER, C.J. and JWALA PRASAD, J.

(10) *Revenue Courts—Decision of—Value and effect of—Subsequent suit in Civil Court regarding same matter—Maintainability of.*

The Assistant Collector's finding in an ejectment suit that a person is under-proprietor in the land, is nothing more than a decision that he has made out a *prima facie* claim thereto and does not bear a subsequent suit the Civil Court for a declaration that he has no under-proprietary rights. *Krishnapal Singh v. Mussammatt Ram Dulari*, 34 Ind. Cas. 753.

HOLMS, S.M.

(11) In Burma there are no Revenue Courts and there can be no case of *res judicata* by reason of the order of the Revenue Officer. *Maung Kaw La v. Maung Ke*, 35 Ind. Cas. 356.

MAUNG KIN, J.

(11-a) *Civil and Revenue Courts, jurisdiction of—Under-proprietors—Joint possession—Mesne profits re Khudkasht.*

Where the parties are under-proprietors holding specific shares in a certain area within the mahal, a suit between them for joint possession or for mesne profits in respect of *Khudkasht* land wrongfully withheld is not excluded from the jurisdiction of the civil Court. S. 108, cls. 6 to 13 of the Oudh Rent Act specifies the clauses of suits, other than suits regarding the division or appraisal of produce, which under-proprietors to tenants are required to file in the Revenue Court. The

Jurisdiction—(Continued).**—3.—Of Civil and Revenue Courts—(Ctd.).**

heading to cls. 6 to 13 of S. 108 as compared with the heading to the classes of suits mentioned in cls. 15 to 18 indicates the differentiation made by Oudh Rent Act between under-proprietors on the one hand and lambardars, co-sharers and muafidars on the other hand. A suit for damages against a mortgagee, who retains possession over the mortgaged property in spite of redemption albeit he be a co-sharer of the mortgagor in the under-proprietary rights forming the subject-matter of the mortgage is, therefore cognizable by the Civil Court. *Sri Ram v. Ram Pargash*, 34 Ind. Cas. 732.

KANHAIYA LAL, A.J.C.

References:—28 A. 161 = (1905) A.W.N. 233; D.; 26 A. 588 = A.W.N. (1904) 106; 27 A. 153 = A.W.N. (1904) 199; 34 A. 150 = 13 Ind. Cas. 79 = 8 A.L.J. 1312, R.

(11-b) Jurisdiction of Revenue Courts to determine validity of documents—Finality of finding—Civil Courts.

As far as the Revenue Courts are concerned, the question of their jurisdiction to determine the validity of documents appears to be *re integra*. The Revenue Court must for the purpose of deciding question of tenancy decide whether or not a document can be acted upon or should be treated as void or voidable. Subject to the result of any appeal that may be made, such a finding will be final unless the Revenue Court specially reserved authority of the Civil Court. *Nathwa v. Jagdish Narain*, 32 Ind. Cas. 905.

REYNOLDS, S.M. and TWEEDY, J.M.

(12) Civil and Revenue Courts—Jurisdiction—Suit for ejectment—Land let for pasturage. *Abdul Qayum v. Fida Husain*, 13 A.L.J. 854 = 30 Ind. Cas. 551. See Final Part, 1915, Col. 864.

(13) See BUR. ACT II OF 1876 (LOWER BURMA LAND REVENUE), No. 4, 35 Ind. Cas. 277.

(14) See MAD. ACT I OF 1908 (ESTATES LAND), No. 2, 35 Ind. Cas. 121.

(15) See U. P. ACT III OF 1901 (LAND REVENUE), No. 6, 33 Ind. Cas. 205.

(16) Question of proprietary title—Jurisdiction. See U. P. ACT III OF 1901 (LAND REVENUE), No. 11, 14 A.L.J. 23.

(17) Imperfect partition—No notice issued—Land appertaining to another party wrongly included in partition—Suit in Civil Court raising question of title—Jurisdiction. See U.P. ACT III OF 1901 (LAND REVENUE), No. 19, 14 A.L.J. 293.

(18) Direction by Revenue Court to file a suit in a Civil Court within a time fixed—Jurisdiction of Civil Court—Limitation. See U. P. ACT III OF 1901 (LAND REVENUE), No. 12, 18 O.C. 343.

(19) Suit for injunction restraining defendant from building on occupancy land—Jurisdiction. See PUN. ACT XVI OF 1887 (TENANCY), No. 12, 104 P.W.R. 1916.

Jurisdiction—(Continued).**—3.—Of Civil and Revenue Courts—(Ctd.).**

(20) See LANDLORD AND TENANT, No. 65, 35 Ind. Cas. 302.

(21) See LANDLORD AND TENANT, No. 61, 34 Ind. Cas. 304.

(22) See RES JUDICATA, No. 21, 34 Ind. Cas. 354.

(23) See RES JUDICATA, No. 25, 34 Ind. Cas. 162.

(24) Agreement by Zemindar to hold ryotli land on ryotwari patta—Rent suit—Jurisdiction. See ZEMINDARI, No. 1, 30 M.L.J. 545.

—4.—Of District Judge.

Commissioners—, over them—Nature and extent of. See RULES OF THE HIGH COURT, No. 1, 34 Ind. Cas. 855.

—5.—Of Munsif.

Officiating as Sub-Judge and reverting as Munsif and again officiating as Sub-Judge to hear certain kind of cases given on former occasion. See OUDH ACT XIII OF 1879 (CIVIL COURTS), No. 1, 35 Ind. Cas. 759.

—6.—Of Revenue Courts.

• **(1) Jurisdiction to determine class of tenancy.** The determination of the class of tenancy to which a person belongs is exclusively within the cognisance of the Revenue Courts. *Ram Aare v. Muhammad Abdul Hasan Khan*, 30 Ind. Cas. 218.

LINDSAY, J.C. and KANHAIYA LAL, A.J.C.

(2) Power of partition officer to convert private property into wakf—Giving of particular designation.

It is not open to a partition officer to convert private property into *Wakf* property by giving it a particular designation and his proceedings, in regard to the distribution of and title to the land are not conclusive as between a party to the partition and strangers. *Parmeshri Das v. Giridhari Lal*, 30 Ind. Cas. 240.

LINDSAY, J.C. and KANHAIYA LAL, A.J.C.

(3) See BEN. ACT VIII OF 1885 (TENANCY) No. 53, 1 Pat. L.J. 479.

(4) Decision of Revenue Court—Revision to High Court if competent. See MAD. ACT I OF 1908 (ESTATES LAND), No. 42, 3 L. W. 158.

(5) Ejectment of trespasser through Revenue Court. See OUDH ACT XII OF 1886 (RENT), No. 18, 30 Ind. Cas. 257.

(6) Jurisdiction—Civil suit—Matter triable by Revenue Court, one of the questions to be decided—Proper course—Procedure. See PUN. ACT XVI OF 1887 (TENANCY), No. 14, 111 P.R. 1916.

(7) Estates Land Act, ss. 12 and 213—Breach of the provisions of that Act—Jurisdiction—Suit, whether cognisable by the Revenue Court,

Jurisdiction—(Concluded).**—8.—Of Revenue Courts—(Concluded).**

See CIV. PRO. CODE (1908), No. 194, 30 M.L.T. 281.

(8) Jurisdiction—Rent Court—Trespass upon Zemindar's land—Cultivation by trespasser—Suit on ejectment—Maintainability in Rent Court. See EJECTMENT, No. 10, 33 Ind. Cas. 70.

(9) See JURISDICTION OF CIVIL COURTS, No. 5, 19 O.C. 339.

—7.—Of Small Cause Courts.

(1)—*Suit for damages for act amounting to offence against property—Non-cognisability by Small Cause Court—Act IX of 1987, Sch. II (ii) as amended by Act VI of 1914.*

A suit for damages on the allegation that the plaintiff's net had been forcibly torn and the fish collected by him in an enclosure allowed to escape is excluded from the jurisdiction of the Small Cause Court by the provisions of item (ii), Art. 35 of Sch. II to the Provincial Small Cause Courts Act, as amended by VI of 1914 inasmuch as the allegation on which the suit is based makes out an offence against property under Chap. XVII of the Indian Penal Code. *Adu Malo v. Nagar Bashi Malo*, 33 Ind. Cas. 728.

D. CHATTERJEE and BEACHCROFT, JJ.

(2)—*Suit for rebuilding a wall or payment of damages—Non-cognisability by Small Cause Court—Suit instituted in proper Court—Return of plaint for presentation to Small Cause Court.*

A suit for an order requiring the defendant to rebuild a wall or pay Rs. 200 as damages is not cognizable by a Court of Small Causes inasmuch as the relief with regard to the re-building of the wall cannot be granted by that Court.

If the suit has been instituted in a Court having jurisdiction to try it, it is not competent to the Court after finding that the plaintiff is not entitled to the relief as to rebuilding of the wall, to return the plaint for presentation to a Small Cause Court, for the jurisdiction of a Court depends upon the nature of the suit as brought and not upon the character which it would ultimately assume. *Dukkh v. Ghuru*, 33 Ind. Cas. 768.

RAFIQUE, J.

—8.—Of Sub-Judge.

Jurisdiction of Munsif officiating as, and reverting as Munsif and again officiating as Sub-Judge to hear certain kind of cases given on former occasion. See OUDH ACT XIII OF 1879 (CIVIL COURTS), No. 1, 35 Ind. Cas. 759.

Jus tertii.

Suit for possession—Plea of—By defendant. See TITLE, No. 4, 30 Ind. Cas. 503.

Justice, Equity and Good Conscience.

Agreement to sell land—Suit to enforce agreement not governed by Specific Relief Act—Rules applicable to suit. See SPECIFIC PERFORMANCE, Nos. 11 & 12, 30 Ind. Cas. 365.

Kabuliat.

(1) *Kabuliat, terms of—Right to bring suits jointly or separately—Suit by co-sharer landlord—Maintainability—Bengal Tenancy Act (VII of 1885), S. 52—Inapplicability of.*

Where in a *kabuliat* dated prior to the Bengal Tenancy Act (VIII of 1885), there is a clear provision for the different co-sharers being entitled to bring suits either jointly or separately for their shares, and also for payment of rent either jointly or separately, neither the landlords nor the tenants are under the necessity of calling in the aid of the provisions of S. 52 of the Bengal Tenancy Act. Consequently a suit by a co-sharer landlord for rent and also for additional rent under the *kabuliat* praying to have the rent, enhanced at the rate agreed upon for the land as found by measurements under Chap. X of the Act, is maintainable the other co-sharer landlords being made parties to the suit. *Ahmad Ali v. Biswaswar Mukhoti*, 33 Ind. Cas. 211.

CHATTERJEE and BEACHCROFT, JJ.

References:—3 O.W.N. 225; 7 O.W.N. 670, Rel.; 30 C. 270 (P.C.); 18 C.W.N. 942; 17 C. 695; 25 C. 917, D.

(2) Condition in—Renewal of lease, Covenant for—Terms of conditions, non-specification—Effect. See LANDLORD AND TENANT, No. 55, 33 Ind. Cas. 450.

(3) See RAZINAMA, No. 1, 18 Bom.L.R. 976.

(4) Execution of, for enhanced rent, effect of. See UNDER-PROPRIETARY RIGHT, No. 1, 30 Ind. Cas. 387.

Kanom.

See MALABAR LAW.

(1) *Suit by kanomdar against the jenmi and a subsequent purchaser for specific performance of contract to sell—What amounts to notice—Ss. 3, 40 and 54 of the Transfer of Property Act.*

In a suit by a *kanomdar* for specific performance of a contract to sell property, against the *jenmi* and a subsequent purchaser:

Held, that where the subsequent purchaser knew that the property was in the possession of the plaintiff, as *kanomdar*, and abstained from making any enquiries of him, he must be deemed to have notice of the agreement to sell in favour of the *kanomdar*.

Cases, as to when a person is said to have notice under S. 3, Transfer of Property Act, considered.

A contract for sale gives the obligee contracting purchaser the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, though not amounting to an interest therein, which may be enforced against a transferee with notice. *Annalath Chathu v. Yengadan Pakker*, (1916) 2 M.W.N. 31—20 M.L.T. 127—34 Ind. Cas. 906.

SADASIVA AIYAR and MOORE, JJ.

(2) Suit for rent—Expiry of *kanom*—Accrual of rent after the expiry—Limitation. See LIMITATION ACT (1908), No. 179, (1916) 2 M.W.N. 117.

Kanungo.

Acquisition of property by—Not opposed to public policy. See CONTRACT ACT, No. 20, 14 A.L.J. 969.

Kanwin Property.

Kanwin and payin property—Transfer of Property Act, S. 123. See BUDDHIST LAW (GIFT), No. 1, 9 Bur. L.T. 87.

Karnavan.

(1) See MALABAR LAW (ALIENATION), No. 1, (1916) 2 M.W.N. 312.

(2) Malabar tarwad, becoming a *stani*—Succeeding *karnavan* incapable of business management—*Karar* vesting management in *stani*. See MALABAR LAW (TARWAD), No. 1, 99 M. 918.

Kastedar.

See RAJINAMA, No. 1, 18 Bom. L.R. 976.

Katlari Dues.

Suit to recover—Jurisdiction of Small Cause Court. See BEN. ACT VIII OF 1885 (TENANCY), No. 91-d, 36 Ind. Cas. 600.

Kattubadi.

(1) Suit for enhanced—Second appeal. See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 22, 31 Ind. Cas. 871.

(2) Suit to recover—Inamdar not a cultivator—Civil Court. See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 7, 30 Ind. Cas. 927.

Kayaathas.

In Bengal—Status of. See HINDU LAW (ADOPTION), No. 8, 20 C.W.N. 901.

Kazi.

Powers of. See MAHOMEDAN LAW (WAKF), No. 5, 14 A.L.J. 741.

Khasra.

Evidentiary value of. See BEN. ACT V OF 1897 (ESTATES PARTITION), No. 2-a, 36 Ind. Cas. 513.

Khewat Land.

Sale of—Whether sale would convey *shamilat* as well. See SHAMILAT, No. 2, 36 Ind. Cas. 601=3 P.R. 1917.

Khojas.

Alienation — Custom — Khojas of Chiniot, District Jhang—Burden of proof—Settlement deed, validity of.

Held, that the burden of proving that the power of alienation of a *Khoja* resident of Chiniot is restricted by custom, is upon him who alleges this, inasmuch as the *Khojas* of the town are generally traders or merchants and do not depend upon agriculture for their livelihood.

A deed whereby a *Khoja* of Chiniot had settled some landed and house property upon his wife was held to be valid and operative. *Amir Din v. Musammam Sahibau*, 87 P.W.R. 1916=90 P.R. 1916=83 Ind. Cas. 762.

SHADI LAL and LESLIE JONES, JJ.

Khoti Lands.

Transfer by Khoti tenants of lands without permission of the Khot—Khot's right to re-enter upon the lands.

A *Khoti* tenant in the Kolaba District cannot transfer his occupancy holding without the permission of his *Khot*; if he does so, the *Khot* is entitled to re-enter upon the lands to the prejudice of the transferee. *Harl Ganu Bhagade v. Gangadhar Yithal Gulayni*, 18 Bom. L.R. 446.

SCOTT, C.J. and HEATON, J.

Khoti Settlement.

See BOM. ACT I OF 1880.

Labour.

Labour in lieu of interest if can save limitation. See LIMITATION ACT (1908), No. 69, 3 L.W. 552.

Labour and Emigration (Assam) Act.

See ACT VI OF 1901.

Laches.

(1) See CIV. PRO. CODE (1908), No. 436, 31 Ind. Cas. 87.

(2) See SPECIFIC PERFORMANCE, Nos. 11 and 12, 30 Ind. Cas. 365.

Lakhiraj.

Value of road-cess return to show status as *lakhirajdar*. See LAND ACQUISITION ACT (1894), No. 15, 20 C.W.N. 816.

Lakhiraj Lands.

What are—*Darimila Inams—Resumption*. See INAM, No. 2, 3 L.W. 573.

Lambardar.

(1) *Right of, to lease out banjar land—Consent of the whole proprietary body, if necessary—Considerations for the Court in a suit by a co-sharer to set aside such lease.*

As a rule, a *Lambardar* cannot give out *Banjar* land on lease without the consent of the whole proprietary body. But there may be cases where the granting of such a lease does not injuriously affect the interests of the villagers or of the proprietary body, and is, on the contrary, to the interests of both. Such leases will not be set aside at the instance of a co-sharer who stood by and allowed the lessee without any protest to spend large sums of money in clearing the land. It would be unfair to view a new tenancy of this nature in the same light as one where the grant seriously curtails the villagers' right of grazing and *nistar*; or where the lease has been granted not in the interests of the proprietary body but is prejudicial to them (a).

The *Lambardar's* power to act on behalf of the whole body of landlords, in relation to an act obviously done in their interests, must be treated very differently to one done with the intention of his own ultimate gain or to one tinged with fraud. *Kedarnath v. Maroti*, 12 N.L.R. 136.

FRIDEAUX, O.A.J.C.

Reference:—(a) 2 C.P.L.R. 103, R.

Lambardar—(Concluded).

- (2) *Failure to collect rent—Gross negligence and misconduct—Liability to pay amount of profits.*

Where the Lambardar of a village failed to collect rents of a certain share and allowed the tenants of that share to cultivate the holdings therein without paying any rent, and it was found that he was guilty of gross negligence and misconduct, he was held liable in a suit by the co-sharer to pay his proportionate amount of profits. *Baij Nath v. Sheo Gobind*, 30 Ind. Cas. 303.

STUART, A.J.O.

Reference:—1 O.C. 183, R.

- (3) Any one of two, alone entitled to eject tenant when. See OUDH ACT XXII OF 1886 (RENT), No. 38, 35 Ind. Cas. 760.

(4) Suit by co-sharer against, for profits—Dismissal of suit for default—Subsequent suit for certain years including years covered by previous suit—Bar to suit. See CIV. PRO. CODE (1908), No. 377, 30 Ind. Cas. 568.

(5) Suit for profits against co-sharer who is not. See CO-SHARER, No. 2, 19 O.C. 326.

(6) Decision of Revenue Court that plaintiff as co-sharer not entitled to sue for ejectment—Suit as See RES JUDICATA, No. 20, 35 Ind. Cas. 512.

Lambardar and Co-sharers.

- (1) *Suit for profits—Co-sharers—Lambardar—Sir and khud kasht held by co-sharers—In estimating profits should be taken into account—Agra Tenancy Act (II of 1901), S. 164.*

In a suit by the co-sharers against the lambardar for their share of profits, the sir and khud kasht held by the co-sharers should be taken into account in estimating, what is due, to the plaintiffs. *Ganga Singh v. Ram Sarup*, 14 A.L.J. 252=38 A. 223=33 Ind. Cas. 119.

RICHARDS, C.J. and RAFIQ, J.

Reference:—34 A. 98=8 A.L.J. 1245, *Expl.*

- (2) *Lambardar—Representative of proprietary body—One of several lambardars—Authority to mortgage or alienate tenants' land—Consent of other lambardars—Necessity to validate transaction—Alienation by one of them—Whether renders it valid to the extent of his share—Effect.*

In an ordinary village, unless the contrary is proved, the lambardar is regarded as the representative of the whole proprietary body with regard to the tenants.

Where there are more lambardars than one in a village, one of them cannot, by his consent alone, validate a mortgage so as to make it binding on the whole body of the proprietors. In matters affecting the proprietary body, all the lambardars have to work conjointly, acts done on behalf of the proprietary body requiring the consent of all the lambardars.

Where the person giving the consent happens to be the mortgagee or alienee, he cannot reap the advantage arising from the exercise of his powers as lambardar, to the disadvantage or detriment of the other co-proprietors.

Lambardar and Co-sharers—(Concluded).

'The law giving the lambardar power to act for the proprietary body is for the protection of third parties and not for that of the lambardar so far as his interests are antagonistic to the interests of his co-sharers.

One of two or more proprietors in an undivided mahal cannot make a valid mortgage of land held by a tenant, even to the extent of his own share in the mahal, without the consent of his co-proprietors (a).

Any thing the landlord is required or authorized to do under the Tenancy Act must be done by the whole proprietary body or by an agent acting on their behalf (b). *Ganpatrao v. Pandurang*, 12 N.L.R. 24=33 Ind. Cas. 758.

PRIDEAUX, A.J.O.

References:—(a) 11 C.P.L.R. 144, R. (b) 18 C.P.L.R. 113, R.

(3) *Adverse possession—Co-owner—His possession whether adverse to other co-owner—Nature of possession of lambardar—Permissive as against other co-sharers—Presumption.* *Dina v. Bishambhar Singh*, 11 N.L.R. 164=31 Ind. Cas. 464. See Final Part, 1915, Col. 870.

(4) *Lease of raiyati land by Lambardar Gaontia—Validity.* See C.P. ACT XVIII OF 1881 (LAND REVENUE), No. 5, 24 C.L.J. 83.

Land.

(1) See U.P. ACT II OF 1901 (AGRA TENANCY), No. 21-b, 32 Ind. Cas. 395.

(2) *Meaning—Grove Land—Whether 'land.'* See U.P. ACT II OF 1901 (AGRA TENANCY), No. 39, 34 Ind. Cas. 155.

(3) See LAND ACQUISITION ACT (1894), No. 3, 35 Ind. Cas. 97.

(4) See LANDLORD AND TENANT, No. 36, 33 Ind. Cas. 147.

(5) *Possession by trespassers—Effect—Adverse ab initio to all persons.* See LIMITATION ACT (1908), No. 260, 113 P.R. 1916.

Land Acquisition.

See BEN. ACT V OF 1911 (CALCUTTA IMPROVEMENT), No. 1, 24 C.L.J. 246.

Land Acquisition Act (I of 1894).

- (1) *Award—Review—Power of Court.*

Where, on an application for review, the District Judge in the exercise of his jurisdiction under the Land Acquisition Act, altered his previous award and gave certain claimants a share in the compensation money awarded for the land acquired, to which they were clearly entitled, but whose claims were negatived under the previous award. *Held* (per *Srinivasa Aiyengar, J., Ayling, J., dissenting*, that the District Judge had no jurisdiction to review his award. *Mulambath Kunhammad v. Parakt Khirji Kutti*, 31 M.L.J. 827.

AYLING and SRINIVASA AIYANGAR, JJ.

- (2) *Award made without hearing interested party—Power of Court to change or modify award after hearing party.*

In cases where an award is made without hearing a party interested and without giving

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him an opportunity of being heard, the Court may have the power, even apart from the provisions of O. IX, Civ. Pro. Code, to change or modify the award after hearing the party interested. Nature of proceedings under Land Acquisition Act explained. **Mulambath Kunhammad v. Parakat Kathiri Kuttal**, 31 M. L.J. 327=5 L.W. 472.

AYLING and SRINIVASA AYYANGAR, JJ.

(2-a) Guardian of lunatic obtaining Court's permission to take out compensation money in deposit with Land Acquisition Judge—Latter if may refuse to pay. See ACT IV OF 1912 (LUNACY), No. 1, 20 C.W.N. 975.

(2-b) Proceedings under—Claim to compensation by Zamindar as against person holding under a lakhiraj title—Onus of proof—Land Acquisition Court if may determine conflict of title. See BEN. ACT XI OF 1859 (REVENUE SALE LAW), No. 6, 20 C.W.N. 1028.

(2-c) Proceedings under the Act—Costs—Mode of calculation. See COSTS, No. 6, 126 P.R. 1916.

(3) S. 3 (a)—“Land,” meaning.

No doubt the definition in S. 3 (a), Act I of 1894, includes in the word “land” things attached to the earth, but that Act does not contemplate the acquisition of things attached to the land without the land itself. It is only the land including the rights which arise out of it, and not merely some subsidiary right, which is capable of acquisition under the Act. **Dasarath Sahu v. The Secretary of State for India in Council**, 35 Ind. Cas. 97.

MULLICK and KINGSFORD, JJ.

Reference:—35 C. 525, R.

(4) Ss. 6 (3) and 23. See BEN. ACT V OF 1911 (CALCUTTA IMPROVEMENT), No. 1, 24 C.L.J. 246.

(5) S. 9, Cls. 1 to 4 and S. 18—Publication of necessary notifications—No application for reference—Completion of acquisition proceedings—Right of owner to sue for ejectment.

Plaintiff sued to recover certain land acquired by the Government on behalf of a Municipal Board. It was shown that the necessary declaration under S. 6 of Act I of 1894 was duly made and published and the public notice required by S. 9, Cls. 1 and 2 was also duly published. The plaintiff did not apply, under S. 18 of the Act to make a reference to the District Judge. Held, that the defendants acquired title to the land in suit under the provisions of the Land Acquisition Act and they were not liable to be ejected on the plaintiff's suit. **Musammatt Shahjahan Begam v. Secretary of State for India in Council**, 36 Ind. Cas. 265.

PIGGOTT and LINDSAY, JJ.

References:—20 C. 576; 34 C. 470=11 C.W. N. 366=5 C.L.J. 699, R.

(6) S. 18—Application to Collector to make reference to Court—Grounds of objection—How to be stated—Proceedings of Collector

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making or refusing to make a reference—Revision—Interference by High Court.

When an owner says in his application “I object to the award of the Collector and I wish a reference to be made to the Court,” and then adds in connection with one item of the property that the compensation paid for the different classes of land is very low, and also adds in connection with another item of the property that the compensation for the wells and other buildings is too low. Held that the application does give grounds for the reference (a).

A Collector, making a reference, or refusing to make a reference, is acting judicially and therefore his proceedings are subject to revision by the High Court. **Secretary of State v. Jivan Baksh**, 67 P.R. 1916=36 Ind. Cas. 218.

JOHNSTONE, C.J.

Reference:—(a) 30 B. 275, Not F.

(7) S. 18—Order rejecting application for reference to Court—Not open to revision. **Rafindin v. Secretary of State for India**, 65 P.R. 1915=144 P.W.R. 1915=51 Ind. Cas. 76, See Final Part, 1915, Col. 75.

(8) S. 18. See No. 5, *supra*.

(9) Ss. 18 and 19—Collector refusing to make reference—Order, if may be revised by the High Court—Civ. Pro. Code, S. 115—Mandamus.

*Proceedings under the Land Acquisition Act until the matter comes before the Land Acquisition Judge are only administrative and not judicial proceedings.

The Land Acquisition Collector exercising his power under Ss. 18^a and 19 of the Land Acquisition Act is not a Court and is certainly not a subordinate Court within the meaning of S. 115 of the Civ. Pro. Code and is not amenable to the revisional jurisdiction of the High Court. But a *mandamus* may issue in a proper case directing him to do a particular act. **Best & Company, Limited v. The Deputy Collector of Madras**, (1916) 2 M.W.N. 348=20 M.L.T. 388=4 L.W. 536=36 Ind. Cas. 621.

ABDUR RAHIM, O.C.J. and SESHAGIRI Aiyar, J.

(10) Ss. 18, 31 (2)—Compulsory acquisition—Compensation—Special Collector—Apportionment—Payment to some claimants—Reference by Collector at the instance of other claimants—Tribunal of Appeal, jurisdiction of, to hear reference—Award of additional amount to claimant—Refund by the claimants who are paid off, cannot be ordered by Tribunal—Suit for refund—City of Bombay Improvement Trust Act (Bom. Act IV of 1898), S. 48 (11).

The plaintiff was the lessor of a piece of land compulsorily acquired by the City of Bombay Improvement Trust. In the compensation proceedings before the Special Collector the plaintiff took no part; and the amount of compensation was amicably settled between the Improvement Trust and the lessees at Rs. 85,000. The amount was apportioned as

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follows: Rs. 51,083 to the lessees; Rs. 2,804 to the lessor; Rs. 30,000 to the mortgagees of the lessor and Rs. 1,113 to the Municipal Commissioner. The lessees and the mortgagees received their amounts from the Collector; but the plaintiff being dissatisfied with the apportionment made to him, moved the Collector to make an apportionment reference, under S. 18 of the Land Acquisition Act, to the Tribunal of Appeal. The result of the reference was that the plaintiff was declared entitled to receive a sum of Rs. 2,960-10 out of the moneys received by the lessees; but the Tribunal held that it had no jurisdiction to make an order asking the lessees to refund the amount to the plaintiff. To recover that amount the plaintiff filed the present suit. It was objected (1) that the plaintiff was estopped by his conduct from questioning the payments of compensation moneys; (2) that the Special Collector had no jurisdiction to make the reference under S. 18, as payment had already been made and no amount could be deposited with the Tribunal under S. 31 (2); and (3) that the present suit was not maintainable as the plaintiff had not appealed from the order of the Tribunal of Appeal as provided in S. 48 (11) of the City of Bombay Improvement Trust Act, 1898.

Held (1) that the plaintiff, by not adducing any evidence before the Collector and by his mortgagees accepting the sum of Rs. 30,000, had not accepted the award either expressly or by implication;

(2) that deposit of the amount in Court was not a condition precedent to the making of the reference by the Collector under S. 18, and that the Tribunal of Appeal had jurisdiction to entertain the reference;

(3) that the suit was not premature although the plaintiff did not avail himself of the right of appeal given to him by S. 48 (11) of the City of Bombay Improvement Trust Act, 1898.

(4) that the Court had inherent jurisdiction to entertain the suit. *Gangadas v. Haji Ali Mahomed*, 18 Bom. L.R. 826 = 36 Ind. Cas. 433.

KAJJI, J.

(11) *Ss. 18, 31 (2)—Reference—Party not pressing claim before Special Judge—Re-opening question in Civil Court—Res judicata.*

When a party to a reference under the Land Acquisition Act does not press his claim to any part of the compensation before the Special Land Acquisition Judge, he is not entitled to come again to the Civil Court and re-open the question. *Ranjit Sinha v. Sajjad Ahmad*, 32 Ind. Cas. 922.

HOLMWOOD and IMAM, JJ.

References:—2 C.L.J. 359 = 10 C.W.N. 991, *F*.

(11-a) *S. 19. See No. 9, supra.*

(12) *S. 23—Land described as Banjar Qadim and used for brick-making—Its probable future use—Principles on which compensation is to be awarded.*

Held, that in cases of acquiring land under the Land Acquisition Act, the persons interested

Land Acquisition Act (I of 1895)—(Continued).

are entitled to have the price of their lands fixed with reference to their situation, and the probable use to which the lands are most likely to be put in the near future, and not merely in accordance with their present use or disposition.

So where a piece of land (in Hoshiarpur city) described as *banjar qadim* was acquired for a school of which the rent was Rs. 40 a year, and it had been used for purposes of brick-making and had been dug up considerably during the ten years before acquisition, but the advent of the Railway had made it a very suitable site for building purposes situated as it was on the main road between the Railway Station and the city; and had it not been acquired by the Government its probable use in the near future would have been for the building purposes, its value was assessed according to the rate of the building sites near the city and compensation at Rs. 350 per *kana* was awarded. *Secretary of State v. Nanak*, 61 P.W.R. 1916 = 126 P.L.R. 1916.

RATTIGAN and BEADON, JJ.

References:—21 P.R. 1905 = 14 P.W.R. 1905, *F*.

(13) *S. 23—Owner—Injury—Compensation—Damages.*

An owner of land acquired for public purpose is entitled to be compensated for injury done to his other lands, even if the loss is more than counterbalanced by the advantages he gains from the execution of a certain project (a). He is also entitled to damages for diminished facilities of communication and access to his other lands. *Nathar Hussain Meera v. Deputy Collector, Uellampatti*, 31 Ind. Cas. 259.

WALLIS, C.J. and SRINIVASA AYYANGAR, J.

Reference:—(1867) 2 O. P. 638, *F*.

(14) *S. 23. See No. 4, supra.*

(15) *S. 30—Reference to Civil Court if lies after payment of compensation to one party by Collector—Order by Civil Court directing Government to pay compensation to party found entitled to it and to realise the amount wrongly paid from the other party, propriety of—Facts to be proved by claimant in order to be entitled to compensation—Road-less return, value of, to show status as lakhirajdar.*

The appellant who was the first party claimed that he had a *lakhiraj* title to a land acquired under the Land Acquisition Act. The second party claimed as *putnidars* and *dar-putnidars*. The Collector made an award in favour of the first party and the amount of compensation was actually paid to him. On a reference to the Civil Court under S. 30 of the Act, the Subordinate Judge found in favour of the second party and directed the Government to pay the compensation to them and to realise the amount previously paid to the first party from him.

Held—That, though the Land Acquisition Act clearly contemplates that when there is a

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dispute as to apportionment the reference to the Civil Court under S. 30 should be made before any payment has been made, still there is nothing in the Act that prohibits the Land Acquisition Collector from making the reference after payment of compensation to one of the parties. When such a reference has been made, it is undesirable that the party who succeeds in showing that the Collector's order was wrong should have to resort to a regular suit to compel the opposite party to refund the compensation to which he has been held not to be entitled, nor can the rights of the opposite party be in any way prejudiced by the reduction of litigation.

That the omission of the appellant to file any road cess return with regard to the land went strongly against his claim to have asserted a *lakkiraj* title to it.

The High Court varied the decree of the Subordinate Judge and ordered the first party to pay the amount of compensation received by him to the second party with interest at 6 per cent. per annum from the date of withdrawal.

Held, further, that a claimant in a Land Acquisition proceeding can get no share of the compensation without establishing either title to or possession of the land acquired. **Satish Chandra Singha v. Ananda Gopal Das**, 20 C. W.N. 816.

CHAUDHURI and NEWBOULD, JJ.

(16) S. 30—*Acquisition of land by Government—Right to compensation—Possession for 12 years by non-payment of rent—Title by adverse possession.*

On the acquisition of a piece of land under the Land Acquisition Act, it was found that the person in possession had taken possession of it on the death of the last male owner and held possession for more than 12 years without payment of rent. He asserted that he held the land under another person and not under the rival claimant who was the reversionary heir of the last male owner.

Held, that the person in such possession was entitled to the full compensation paid for its compulsory acquisition, having acquired the right to hold the land rent-free by twelve years' adverse possession. **Rajbans Sahay v. Rai Mahabir Prasad**, 20 C.W.N. 828=1 Pat. L. J. 253.

CHAPMAN and ATKINSON, JJ.

(17) S. 31. See No. 10, *supra*.

(18) Ss. 31, 54—*Order allowing withdrawal of money deposited under S. 31, if appealable.* **Biawas Nath Sinha v. Bidhumukhi Das**, 19 C.W.N. 1290=31 Ind. Cas. 677. See Final Part, 1915, Col. 77.

(19) S. 32—*Bhagdares and Narvadares Act (Bom. Act V of 1862), S. 3—Compulsory acquisition—Unrecognised sub-division of a narva holding.* The Assistant Collector of Kalra v. Yithaldas Vallavadas, 17 Bom. L.R. 1140=40 B. 254=33 Ind. Cas. 464. See Final Part, 1915, Col. 77.

Land Acquisition Act (I of 1894)—(Concluded).

(20) S. 32. See DECLARATORY SUIT; No. 2, 63 P.R. 1916.

(21) Ss. 35, 36 (2)—*Culturable land in the hands of tenants—Temporary acquisition for digging Kanhar—Principle on which compensation should be awarded.* Secretary of State for India in Council v. Abdul Salam Khan, 37 A. 347=30 Ind. Cas. 245. See Final Part, 1915, Col. 77.

(22) S. 36. See No. 21, *supra*.

(23) Ss. 49 (1), 51—*Godowns necessary as residence for servants—Whether can be acquired—Order directing their acquisition whether appealable.*

Godowns used as residence of servants are necessarily part and parcel of the building and a most important part of that building for the purpose of letting it out to gentlemen as a place of residence. Such portions of the building cannot be acquired under this Act unless the whole premises are acquired, and an appeal lies against an order directing their acquisition. **Dalchand Singhi v. Secretary of State**, 43 C. 665.

HOLMWOOD and IMAM, JJ.

Reference:—39 C. 393, D.

(24) S. 53—*Special tribunal constituted under Bengal Act V of 1911 whether a 'Court'—Power to call for records of other Courts.* See BEN. ACT V OF 1911 (CALCUTTA IMPROVEMENT), No. 2, 20 C.W.N. 360.

(25) S. 54—*Civ. Pro. Code (1908), S. 109—Land acquisition—Award, appeal from—Award made by Judge on original side of Chief Court, whether appealable.* Collector of Rangoon v. Chandrama, 28 Ind. Cas. 260=8 L.B.R. 163, See Final Part, 1915, Col. 78.

(26) S. 54. See Nos. 18, 23, *supra*.

Land Allocation, Bundlekhand, Act.

See U. P. ACT II OF 1903.

Land, Alienation of, Act.

See PUN. ACT XIII OF 1900.

Land and Revenue Act.

See BUR. ACT II OF 1876.

Land Encroachment Act.

See MAD. ACT III OF 1905.

Land (Estates) Act.

See MAD. ACT I OF 1908.

Land Improvement Loans Act.

See ACT XIX OF 1883.

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See BURDEN OF PROOF.

See KABULIAT.

See LEASE.

See RENT.

(1) *Muchilika fixing rent—Lesser payment—No evidence—Letter accepting lesser payment admissible—Evidence Act, S. 92.*

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Where the *muchilika* by the tenant fixes the rent, it is not open to him to let in oral evidence to prove that the contract, has been varied; and any length of payment of a lesser rent will not help the tenant.

Where the zamindar has sent a communication to the tenant in which it is stated that the reduction hitherto made in the rent will not be granted after the date of that letter, the letter can be regarded as agreeing to discharge the tenant from liability to pay the contract rate for a particular period and to accept in lieu thereof a smaller sum, and no consideration is necessary for its remission. This plea will not offend against S. 92 of the Evidence Act. *The Maharaja of Bobbili v. Appala Naidu*, (1916) M.W.N. 149=32 Ind. Cas. 703.

AYLING and SESHAGIRI AIYAR, JJ.

(2) *Lease for a year certain—Provision for yearly payments in case of holding over—Construction of lease—Holding over, whether constitutes the lessee a trespasser or creates a tenancy from year to year—Notice to quit, if necessary—Transfer of Property Act, Ss. 106, 111 and 116.*

A lease stipulated for a year certain and provided for yearly payments in case the lessee held over after the expiry of the year. There was also a provision for delivery of possession on demand.

Held that, on the expiry of the first year of the tenancy, the lessee continued to hold as tenant from year to year and that he could not be evicted without a notice to quit at the end of the first year and before the next year of the tenancy commenced (a).

Held further that the provision for delivery of possession on demand did not constitute a contract to the contrary within the meaning of S. 106 of the Transfer of Property Act, as it did not mention the time at which the demand should be made and that the provision for the payment of rent annually could not be split up (b). *Birl Umma v. Aliath Shamu Menon*, 3 L.W. 189=19 M.L.J. 128=(1916) M.W.N. 192=32 Ind. Cas. 709.

SESHAGIRI AIYAR and PHILLIPS, JJ.

References:—(a) (1904) 1 K.B. 441; (1906) 2 K.B. 599; (1893) 1 Q.B. 736, F. (b) (1902) 1 K.B. 157; 8 Ind. Cas. 362, D.

(3) *Bengal Tenancy Act (VIII of 1885)—Suit for rent—Non-occupancy raiyat—Lease for a term—Suspension of portion of rent during the term—Stipulation for payment of rent at full rate after expiry of term—Agreement, if invalid—Acceptance of rent at reduced rate after expiry of the term, if deprives landlord of his right to claim rent at the stipulated rate—Waiver—Intention of parties.*

Where, in a *kabuliyat* for a term executed by a non-occupancy raiyat, a certain rent was settled, out of which a portion was kept in suspension and the balance was stated to be the rent payable for the term, and it was further stipulated that, if after expiry of the term the raiyat continued in occupation without taking a fresh settlement, he would be liable to pay rent at

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the full rate; and after the expiry of the term the raiyat remained in occupation without taking a fresh settlement and rent was then realised from the tenant at the reduced rate for a few years, and thereupon the landlord sued for rent at the full rate.

Held—That the agreement did not contravene the provisions relating to non-occupancy raiyats and was not invalid.

Held also, that the landlord, by accepting the rent at the reduced rate, was not deprived of his right to claim rent at the rate stipulated in the *kabuliyat* and was entitled to receive rent at the full rate (a).

Held further, that evidence that, since the execution of the *kabuliyat*, the tenant paid rent at a lower rate than that stated in the *kabuliyat* was admissible to shew the intention of the parties that the *kabuliyat* was not intended to be acted upon or that there had been a waiver of the terms of the lease (b). *Kallash Chandra Saha v. Darbarial Sheikh*, 20 C.W.N. 347=32 Ind. Cas. 251.

N. R. CHATTERJEA and NEWBOULD, JJ.

References:—(a) 41 C. 493=18 C.W.N. 66; 16 C.W.N. 496, F. (b) 6 C.W.N. 242, F.

(4) *Tenant put in possession by landlord—Subsequent dispossession by trespasser—Landlord's right to sue for possession—Form of decree—O. XXI, r. 36, Civ. Pro. Code (1908).*

Where a landlord had put his tenant into possession and the latter is subsequently dispossessed by a trespasser, the landlord cannot, during the term of the tenancy, bring a suit for actual possession, but might be given a decree against the trespasser for "formal" possession of his reversionary interest in the form indicated in O. XXI, r. 36, Civ. Pro. Code. *Thiruvengada Konan v. Venkatachala Konan*, 30 M.L.J. 258=39 M. 1042=32 Ind. Cas. 198.

SADASIVA AIYAR and NAPIER, JJ.

References:—(1912) M.W.N. 669; 18 A. 440 (F.B.), Rel. on; 29 M.L.J. 233, D.; 31 A. 271; 10 C. 1076, R.

(5) *Estoppel—"At the beginning of the tenancy", meaning of—Evidence Act, S. 116:*

Once a person is the tenant of another person, he cannot be allowed to deny that the person, whose tenant he was, was the owner when the tenancy was created. He can no doubt admit that his landlord was the owner at the commencement of the tenancy and allege and prove by evidence that the landlord's estate has subsequently come to an end; but he cannot deny that at the commencement of the tenancy the person with whom he entered into the contract was the owner of the property. The words "at the beginning of the tenancy" are expressly inserted in S. 116 of the Evidence Act to show that the tenant is not prevented from showing that after the tenancy commenced, the estate of the landlord devolved on some other

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person; and the defendant or the person through whom he claims is not entitled to deny that the plaintiff or the person through whom he claims is the owner, during all the time that the relation of landlord and tenant subsists and right up to the time that that relationship ceases to exist. *Ganpat Rai v. Multan*, 14 A. L.J. 263=38 A. 226=33 Ind. Cas. 97.

RICHARDS, C.J. and RAFIQ, JJ.

Reference:—18 A.L.J. 991, F.

(6) *Rent, enhancement of—Improvement by landlord—Bengal Tenancy Act (VIII. of 1885), S. 29, Provisos (1), (2), S. 30 (c)—Sum in addition of interest—Damages, claim for.*

S. 3 of the Evidence Act lays down a rule of common sense. It expresses the rule in terms which allow full effect to be given to circumstances or conditions of probability or improbability (a).

The requirements of the first clause of the proviso to S. 29 of the Bengal Tenancy Act are fulfilled if two elements are proved, namely, first, that there was an agreement to pay rent which is higher than the previous rate, and, secondly, that rent has been paid at a higher rate.

The enhancement of rent claimed for improvement under Cl. (c) of S. 30 of the Bengal Tenancy Act should include a sum in addition to the interest payable upon the capital spent.

The tenants agreeing to pay certain rent per bigha in consideration of the improvement, may be taken *prima facie* as their own estimate of what would be fair under S. 30, Cl. (c) of the Bengal Tenancy Act; and the Court might well adopt this as the basis for a decree, till, at any rate, the tenants showed that their estimate was erroneous.

Where improvement has been effected, an agreement for enhancement of rent at more than two annas in the rupee is valid. But this enhanced rent can continue only so long as the improvement exists and substantially produces its estimated effect in respect of the holding.

The claim for damages in this case was negatived. *Ganes Dutt Singh v. Lachmi Narain Singh*, 23 C.L.J. 209=34 Ind. Cas. 789.

MOOKERJEE and N.R. CHATTERJEA, JJ.

References:—(a) 29 C. 323=6 C.W.N. 495; 39 C. 245, R.

(7) *Burden of proof—Admission of a previous tenancy and plea of subsequent purchase—S. 109, Evidence Act.*

Where the defendant-appellants admitted they were formerly tenants in respect of a certain land of the plaintiff-respondents but alleged a subsequent purchase of the land from the latter.

Held that the burden of proving the subsequent sale was rightly laid on the defendant appellants.

Held that the provisions of S. 109 of the Evidence Act cannot be overridden by the

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rules of any Court. *Mi Kyan Me v. Mi Ein Chon*, 8 Bur. L.T. 292=33 Ind. Cas. 600.

SAUNDERS, J.C.

(8) *Non-transferable raiyati holding—Sale in execution of money decree—Purchaser allowed by raiyat to take a portion of the holding—Surrender by raiyat of whole holding—Raiyat continuing in occupation—Purchaser if may be ejected.*

Where a purchaser (in execution of a money-decree) of a non-transferable raiyati holding being resisted by the raiyat, by arrangement with the latter, was given a portion of the holding, the raiyat retaining the rest; and subsequently the raiyat expressly surrendered the whole holding to his landlord, though it appeared that, even after such surrender, he went on occupying the portion retained by him under the arrangement:

Held—That the arrangement between the purchaser and the raiyat was in substance a sale of a portion of the holding.

That the surrender being obviously illusory, the original tenancy subsisted and protected the purchaser from ejectment by the landlord. *Nobo Kishore Saha v. Dhananjoy Saha*, 20 C.W.N. 610=33 Ind. Cas. 611.

N. R. CHATTERJEA and RICHARDSON, JJ.

(9) *Civ. Pro. Code (1908), S. 144—Restitution—Suit in ejectment—Decree in landlord's favour and possession taken—Tenant ultimately successful—Restitution, application for—Mesne profits also claimed—Set off for rent due, if claimable by landlord—Tenant, if bound to pay rent for period of landlord's possession.*

A landlord sued his tenants in ejectment and having obtained a decree in the First Court on 23rd December 1907, took delivery of the properties through Court in 1908. The tenants having ultimately succeeded in second appeal on the ground that they had occupancy rights in the holding and were not liable to be ejected, applied for restitution and claimed also mesne profits for the period during which the landlord remained in unlawful possession. The landlord contended that he was entitled to set off against the mesne profits claimed the rent payable to him by the tenants for that period.

Held that there was no obligation on the part of the tenants to pay rent to the landlord during the time the latter was in unlawful possession of the holding and that in any event he was not entitled to a set off as the tenants were entitled to be placed in the possession they were previously in, irrespective of any other rights accruing to any of the parties during the period of litigation. *Lakshmi Narainmha Rao v. Seetharamaswami*, 3 L.W. 405=19 M.L.T. 336=34 Ind. Cas. 2.

SADASIVA AYYAR and MOORE, JJ.

References:—17 W.R. 267, D.; 12 C.W.N. 642, F.

(10) *Registration Act (1908), Ss. 17 and 49—Unregistered lease—Admissibility in evidence to prove tenancy on terms—Payment of*

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rent—Tenancy from year to year, inference as to—Holding over—Use and occupation, compensation for—Liability to pay on holding over—Transferability—Transfer of Property Act, S. 6—Assent to tenant's continuance, if inferable from passive failure to eject—Intention to hold adversely, if necessarily follows holding over—Tenancy by sufferance, fiction of, if obtains in India—Provincial Small Cause Courts Act (IX of 1887), S. 25—Revision—Interference only discretionary.

An unregistered lease for three years is inadmissible in evidence to prove the tenancy or its terms.

A tenancy from year to year can be inferred from the fact of payment of rent by the tenant to the landlord and its receipt by the latter, the annual rent due under such a tenancy being ascertainable from the amount of rent paid and received.

A tenant holding over is liable to pay compensation for use and occupation of the demised premises.

Mere passive failure to take steps to eject a tenant whose lease term has expired, will not, by itself, constitute an assent on the landlord's part to the tenant's continuing in possession as tenant from year to year.

An intention to hold adversely to the landlord need not necessarily follow from a holding over, though the running of time under Art. 139, Limitation Act, against the landlord will not be interrupted in such a case.

The fiction of a tenancy by sufferance, which said to arise under the English Law on a tenant's holding over, has no place in the Indian Law after the enactment of the Transfer of Property Act (a).

The claim for use and occupation against a person who has ceased to be the lessee owing to the expiry of the lease term and the non-creation of a new relationship of lessor and lessee, not being one based on an express or implied contract but sounding in damages due and payable to the owner by a person without any rightful claim thereto, is a mere right to sue and is not transferable under the provisions of S. 6 of the Transfer of Property Act, 1882, whatever may be the English Law as to such rights (b).

The compensation for use and occupation, which is loosely described in the English cases as 'rent,' 'fair rent, and occupation rent,' is looked upon by the English Courts as based on an implied contract to pay a fair rent. But it is not advisable to extend to India the whole of the English Law of implied contracts, many of which being already dealt with in the Indian Contract Act under the head of 'Relations resembling those created by contract.'

The interference of the High Court under S. 25 of the Provincial Small Cause Courts Act,

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IX of 1887, is a matter of discretion. *Govindasami Pillai v. Ramasami Aiyar*, 3 L.W. 408 = 30 M.L.J. 492 = (1916) 2 M.W.N. 79 = 34 Ind. Cas. 6.

SADASHIVA AIYAR and MOORE, JJ.

References:—(a) 33 M. 260, R. (b) 2 Q.B.D. 387; (1880) 43 L.T.R. 317, R.; 38 M. 308, F.

(11) *Permanent tenancy—Its forfeiture by denying landlord's right—His option to condone first forfeiture and base his suit on the subsequent denial—Parties bound by their pleadings—Compensation for materials—Art. 143 of Act IX of 1908.*

Held, that although the rights of permanent tenancy become forfeited by the tenant's denying his landlord's title, it is open to him to condone the first forfeiture and afterwards to bring a suit within 12 years under Art. 143 of Act IX of 1908, from the time when another separate and distinct act occasioning forfeiture has occurred, particularly where the tenant has failed to plead that his adverse possession commenced from the date of the first denial.

Held, also, that as an ordinary rule materials belong to the tenant, and therefore, in the absence of any proof to the contrary, the landlord is bound to pay the value of the materials before he can get possession. *Locha Ram v. Jindwadda Khan*, 56 P.W.R. 1916 = 141 P.L.R. 1916 = 35 Ind. Cas. 235.

LESLIE JONES, J.

(12) *Permanent tenancy—Its forfeiture on denying landlord's title—Limitation Act (IX of 1908), Art. 143—Plaintiff bound by his plaint.*

Held, that, a permanent tenant of immoveable property forfeits his rights and his possession becomes adverse, from the date he denies his landlord's title; and consequently a suit for possession brought by the landlord 12 years after the denial is barred by limitation under Art. 143 of Act IX of 1908.

Held, also, that a plaintiff must be bound by the allegations made in his plaint. *Locha Ram v. Jindwadda Khan*, 57 P.W.R. 1916 = 36 Ind. Cas. 555.

LESLIE JONES, J.

(13) *Occupancy holding, non-transferable—Sale by landlord in execution of rent-decree, under Civ. Pro. Code, prevented by deposit by purchaser from registered tenant—Withdrawal of deposit by landlord, if amounts to recognition of purchaser as tenant.*

Prior to the passing of the Bengal Tenancy (Amending) Act of 1907, a co-sharer-landlord obtained a decree for rent against the registered tenant of a non-transferable occupancy-holding in favour of himself and his other co-sharer. He took out execution under the Civ. Pro. Code and not under the provisions of the Bengal Tenancy Act. The plaintiff who had purchased the holding in execution of a money-decree against the registered tenant deposited the decretal amount in Court for payment to the decree-holder-landlord, alleging in his

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petition that he had acquired a right to the holding by purchase and that he made the deposit to protect his right and reserved his right to realise the amount deposited by him from the former tenant or his heir as the tenants of the holding. The decree was thereupon treated as satisfied and the attachment was withdrawn, and the amount deposited was withdrawn by the landlord.

Held—That, upon such deposit, the landlord could not, as in a case under the Bengal Tenancy Act, contest the right of the purchaser to make the deposit, and the withdrawal of the deposit did not amount to a recognition of the purchaser by the landlord. *Surendra Narain Mahata v. Jugal Kishore Ghosh*, 20 C.W.N. 849=34 Ind. Cas. 76.

CHAUDHURY and NEWBOULD, JJ.

References:—6 O.L.J. 601; 15 C.L.J. 388 at p. 391, D.

(14) *Ejectment—Lessor not a de facto landlord—Lessee not given possession—Principle of Binad Lal Pakrashi's case, if applicable—Judgment in criminal case, when admissible.*

The principle laid down in *Binad Lal Pakrashi's case* (a), *vis.*, that an agricultural tenant, who enters upon the land, whether it be firm or alluvial, and holds under a *de facto* proprietor *bona fide*, is entitled to be treated as a raiyat, although the *de facto* proprietor is subsequently proved to be not the real owner, is an encroachment upon the ordinary rule of law that a grantor is not competent to confer upon the grantees a better title than what he himself possesses, and must be cautiously applied and is not to be extended. It is not applicable to *zerai* lands. In order to make the principle applicable, the lessor must be the *de facto* landlord in possession and must have placed the lessee in possession of the land.

A person, who obtained a lease of agricultural land from one who had no title to it and was not put in possession of it, has no enforceable claim even as against one who fails to establish his alleged title.

A judgment in criminal case is admissible in evidence to show what order was made, who the parties to the dispute were, what the land in dispute was and who was held entitled to possession (b). *Krishna v. Mahomed*, 23 O.L.J. 563=31 Ind. Cas. 789=21 C.W.N. 93.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 20 O. 708, R. (b) 29 C. 187, R.

(15) *Lessor and lessee—Land let out by person having no title—Suit for rent, maintainability of—Jurisdiction.*

A person who lets out land to another can recover rent from him, though he has no title in law to the land, and Civil Courts have jurisdiction to entertain suits for such rent even though the land be Government waste land. *Ahamut v. Kalu*, 9 Bur. L.T. 55=31 Ind. Cas. 886.

ORMOND, J.

Reference:—8 Bur. L.T. 191 (F.B.), R.

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(16) *Rent, suit for—Sale of portion of occupancy holding—Lease from purchaser taken by original raiyat—Landlord, right of—Settlement by landlord of the holding—Settlement-holder's right as against the original tenant—Estoppel.*

A sale of a portion of an occupancy holding does not cause a forfeiture of the tenancy (a).

So far as the landlord is concerned, the tenancy continues unaffected and he is entitled to look for payment of rent to his recorded tenant.

There is no abandonment of the holding, if the original tenant after parting with a portion of the holding remains in actual possession of it as an under-raiyat from the purchaser.

The disputed land belonged to A. In execution of a decree for money obtained against him, B purchased a portion of the holding. Thereupon the representative of the original tenant took sub-leases from the purchaser in respect of a portion only of the land acquired by him. The plaintiff took a settlement from the superior landlord of the disputed land which constituted the occupancy holding of A. He subsequently sued to eject B as a trespasser and obtained a decree against him. When he attempted to execute this decree, he was opposed by the defendant, the representative of the original tenant. The objection was allowed. The plaintiff then brought the present suit to recover rent from the defendant as his under-raiyat:

Held, that the relationship of landlord and tenant between the plaintiff and the defendant did not subsist and the claim for rent was not maintainable.

That the original tenancy still continued and the landlord was not competent to create a valid occupancy holding in favour of the plaintiff.

That the defendant was not estopped from questioning the title of the plaintiff. *Kallim Sheikh v. Mocham Mandal*, 24 O.L.J. 113=36 Ind. Cas. 719.

MOOKERJEE and ROE, JJ.

References:—(a) 42 O. 172 (224)=20 C.L.J. 52 (90) (F.B.), R.

(17) *Diluvion—Jote, total extinction of—Kabuliat—Tenant, if liable to pay rent.*

Rent is paid by a tenant for the use of land, and if for no fault of his own, the lands are washed away, he cannot, on general principles, be held liable to pay rent (a).

A *kabuliat* contained a stipulation to the effect—"cultivation or non-cultivation, profit or loss in respect of the jote shall be ours. We shall not be competent to make any objection to the rent settled:"

Held, that the lessees thereby agreed not to make any objection to pay rent only on the grounds stated, *vis.*, non-cultivation, and similar grounds which pre-suppose the existence of the lands, and not where the lands are entirely washed away; and as such they were not precluded by the terms of the *kabuliat* from pleading non-liability to pay rent if all the lands of the jote were washed away.

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Rajendra Kumar Roy v. Maharaja Nahindra Chandra Nandi, 24 C.L.J. 162=84 Ind. Cas. 464.

N.R. CHATTERJEE and RICHARDSON, JJ.

References:—(1863) Marshall 558; (1864) W. R. Gap. No. Aot X Mulings 42, R.

(18) *Tenant, if can contest landlord's title—Tenancy, expiration of—Possession—Estoppel—Evidence Act, Ss. 115, 116, if exhaustive.*

According to the law of England, a person who has been let into possession as a tenant is estopped from denying his lessor's title without first surrendering possession (a).

The position, however, is different when the tenant had possession before he took the lease (b).

Per *Mookerjee, J.*—Enjoyment by permission is the foundation of the rule that a tenant shall not be permitted to dispute the title of his landlord. Two conditions are essential to the existence of the estoppel, first, possession, secondly, permission; when these conditions are present, the estoppel arises, and the estoppel prevails so long as such possession continues.

The above doctrine was also unquestionably the law in this country before the Indian Evidence Act was passed (c).

The law has not in this respect been altered by the Indian Evidence Act, and now, as before, a tenant, who has been let into possession, is estopped from denying the landlord's title without first surrendering possession (d).

Ss. 115 and 116, Evidence Act, are not exhaustive, and there may be rules of estoppel applicable, other than what is contained in those sections (e).

S. 116 of the Act cannot imply that, after the expiration of the tenancy, the tenant is free to dispute the title of the landlord, although he retains possession which he had obtained by the permission of the landlord (f). **Bhaiganta Bewa v. Himmat Udyakar**, 24 C. L.J. 103=20 C.W.N. 1335=35 Ind. Cas. 7.

SANDERSON, C.J. and MOOKERJEE, J.

References:—(a) (1815) 4 M. & S. 347; (1824) 2 Bingham 54; (1832) 9 Bingham 41; (1893) 2 Q.B. 168; (1848) 5 C.B. 396, R. (b) (1861) 5 L. T.N.S. 20, R. (c) (1863) Marshall 377; (1871) 8 Bom. H.C. 175; (1866) B.L.R. Sup. Vol. 589; (d) 24 W.R. 85; 7 B.L.R. 723, Foot-note, *Rel.* (e) 28 M. 526; 34 B. 329, R. (f) 5 C. 669; 10 C.W.N. 717, F. (f) 2 M. 226; 12 M. 422, D.

(19) *Interest of non-occupancy raiyat—Heritability—Custom.*

In the absence of custom, a non-occupancy raiyat's interest is heritable. **Kalra Garhi v. Jangli Choudhri**, 1 Pat. L.J. 273.

MULLICK, J.

Reference:—9 C.L.J. 505, F.

(20) *Cultivators in the Seoni District—Right to free grazing of cattle on village waste—Wajib-ul-ars—Construction—Meaning of "agricultural cattle"—Claim to grazing*

Landlord and Tenant—(Continued),

rights under village custom—Claim to interest in immovable property—Not of Small Cause nature—Second appeal lies.

A claim to grazing rights under a village custom is a claim to an interest in immovable property. It is not one of a Small Cause Court nature and a second appeal lies in respect of it.

The term 'agricultural cattle' in the *wajib-ul-ars* means and includes animals employed in agricultural and in purposes subservient to agriculture including the domestic requirements of the tenant. This will cover bullocks and buffaloes used for ploughing or threshing, for the cartage of produce, for the private dairy purposes of the tenant, and for the conveyance of himself and his household. It will also include a reasonable number of animals for breeding for the purpose of keeping his agricultural stock constant, so that animals which die or become too old or ill to work can be replaced from his reserve without having recourse to fresh purchases. But the *wajib-ul-ars* cannot be extended to allow free grazing of animals kept as the stock of a trading dairy farm, or bred for sale to cultivators or to butchers, or for the plying of carts or other conveyances for hire.

"The only cattle which would not be classed as agricultural cattle within the meaning of the *wajib-ul-ars* would be such cattle as are bred for sale, or hire, or are used for breeding calves for sale or for producing milk, ghee, etc., for sale. In fact if the tenant engages in any trade besides that of agriculture and uses cattle for that trade . . . the cattle so used would be non-agricultural cattle and would be liable for grazing fees."

The provision in the *wajib-ul-ars* regarding the right to graze cattle free on the village waste must be construed as limited to a reasonable number of animals kept by the cultivator for the purposes of his holding in the village, and not exceeding the number which would ordinarily be kept for the purposes of good husbandry for, and in connection with, a similar holding.

Each case must be decided according to its own facts, subject to such general rules as can be based upon the *wajib-ul-ars*. **Nanhu v. Narbadaprasad**, 12 N.L.R. 83=34 Ind. Cas. 695.

STANYON, A.J.C.

Reference:—1 C.P.L.R. 158, F.

(21) *Decree for rent—Mode of execution—Power of Court.*

It is not competent to a Court to direct in what manner the landlord shall execute his decree for rent, and he cannot be compelled to proceed first against the holding and then against the person of the tenant. **Maharajah Kesho Prasad Singh Bahadur v. Lalji Ray**, 1 Pat. L.J. 138=35 Ind. Cas. 635.

MULLICK, J.

(22) *Ejectment—Permanent lease—Covenant for re-entry upon an involuntary sale—Lease in perpetuity if forfeitable—Mortgage—Sale in execution of mortgage decree—Auction-purchaser, status of—Right of re-entry,*

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where reserved and where not—Lessor, remedy of—Forfeiture, when takes place—Election by lessor—Bengal Tenancy Act (VIII of 1885), Ss. 155, 188, Sch. III, Art. 1—Forfeiture, effect of, on under-lease—Limitation Act (1908), Sch.-I, Art. 142—Fractional landlord, suit by.

Per Curiam :—A covenant for re-entry by the landlord upon an involuntary sale is valid and operative in law.

Per Sanderson, C.J.—Where the execution sale is directly due to the voluntary act of the lessees in the execution of a mortgage and omission to pay the mortgage debt, the assignment cannot be said to be *ad invitum*.

Per Mookerjee, J.—An involuntary alienation may in one sense be attributed to a remote act of the party, quite as much as a voluntary alienation. But this does not place a voluntary and an involuntary alienation on the same footing (a).

Per Curiam.—S. 155 of the Bengal Tenancy Act, being applicable only to a suit for the ejectment of a tenant who has forfeited his tenancy by breach of a covenant, cannot be invoked by a purchaser of a permanent tenure in execution sale, which was forfeited by a condition in the lease.

A suit against such a purchaser for ejectment is not governed by Art. 1 of Sch. III of the Bengal Tenancy Act, but by Art. 142 of the first Schedule of the Limitation Act.

Such a purchaser, being a trespasser, can be ejected by a fractional landlord, and S. 188 of the Bengal Tenancy Act has no application (b).

Per Mookerjee, J.—A lease in perpetuity is forfeitable for breach of covenant, notwithstanding that it is permanent (c).

Where there is a covenant in the lease against alienation, but no right of re-entry is reserved in the landlord, the remedy of the latter is either by way of injunction against an apprehended breach, or by recovery of damages for a breach already committed.

Where the lease reserves a right of re-entry, the landlord is not entitled to the reliefs by injunction or damages, but may at his choice treat the lease as forfeited and exercise his right of re-entry.

Where, however, the landlord indicates his election to take advantage of the forfeiture, the forfeiture takes effect from the moment of breach, namely, from the date of alienation. The election is not a condition precedent to the right of action but the institution of the suit itself is a sufficient manifestation of the exercise of the option of the lessor to treat the lease as determined.

Where the lessee has created an underlease or any other legal interest, if the lease is forfeited, then the underlessee or the person who claims under the lessee, loses his estate as well as the lessee himself, but if the lessee surrenders, he cannot, by his own voluntary act in surrendering, prejudice the estate of the underlessee or the person who claims under him (d). **Dwarika Nath Roy Choudhury v. Mathura**

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Nath Roy Choudhury, 24 C.L.J. 40 = 21 C.W. N. 117 = 84 Ind. Cas. 833.

SANDERSON, C.J. and **MOOKERJEE, J.**
References :—(a) (1798) 8 T.R. 5 = (1799) 8 T.R. 900; (1855) 5 El. and Bl. 648 (679) = 103 R.R. 663 (681), R. (b) 7 C. 414, F. (c) 96 I.A. 148 (167) = 36 O. 1003 = 10 O.L.J. 284, F. (d) (1976) 2 Ch. D. 235 (253), F.

(23) *Joint tenancy in Bihar and Orissa—Presumption—Liability for rent—Frame of suit—Admission in compromise petition—Effect.*

In 1905 plaintiff (landlord) brought a suit against 3 defendants, who jointly held an occupancy holding, for rent for the years, 1309—1311 F.S., at the rate of Rs. 136-6-0 per annum. Defendants 1 and 2 appeared and filed a compromise petition accepting the rate claimed. A decree was accordingly passed at that rate, but the 3rd defendant subsequently brought a suit and got the decree set aside, so far as he was concerned, on the ground that he was not properly served. In a subsequent suit by the landlord against the three tenants, for the years 1316-1319 at the rate of Rs. 136-6-0, the third tenant was again not served.

Held that ordinarily a rent suit is not properly constituted unless it is brought against all the recorded tenants. As the third tenant was not served in the present suit, the suit cannot proceed, unless the plaintiff can show that there was a special contract between him and the other defendants 1 and 2 by which these defendants agreed to be responsible for the whole rent not only jointly but also severally.

There is no presumption that, in every joint tenancy in Bihar and Orissa, there is also a several promise by which each joint tenant agrees to be bound for the whole rent (a).

Held also that mere admission in the compromise petition of 1905 did not constitute a several promise by defendants 1 and 2 to be responsible for the whole rent at the rate of Rs. 136-6-0. **Jogewwar Rai v. Maharajah Kesho Prasad Singh, 1 Pat. L.J. 190.**

MULLICK, J.
References :—(a) 12 C.L.J. 642, Rel.; 6 C.W. N. 111; 11 O.W.N. 1026, R.

(24) *Kabuliyat containing stipulation to pay excessive rate of interest—Assurance by landlord at the time of execution of kabuliyat that covenant will not be enforced, effect of, on the document—Evidence Act, S. 92, Prov. 1.*

A *kabuliyat* for a period of one year provided that on default of payment of rent the arrears would carry interest at 75 per cent. per annum. The tenant held over after one year. On a suit for rent on the basis of the *kabuliyat*, the tenant pleaded that, before the *kabuliyat* was executed by him, the landlord assured him that the covenant for payment of interest at 75 per cent. would not be enforced. This allegation was found to be true.

Held—That under the circumstances the *kabuliyat* was not the real agreement between

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the parties, having been induced by fraudulent misrepresentation, and the tenant was not liable to pay interest claimed on the basis of the *kabuliyat*.

B. 92, Prov. I of the Evidence Act referred to. **Nadia Chand Sahi v. Brendra Chandra Dutt**, 20 C.W.N. 1067.

MOOKERJEE and RICHARDSON, JJ.

(25) *Permanent tenancy governed by Transfer of Property Act—Determinable by denial of landlord's title.*

A permanent tenancy under the Transfer of Property Act is determinable by denial of the landlord's title. **Bidya Nath v. Khikhlinda Koer**, 1 Pat. L.J. 157 = 35 Ind. Cas. 544.

MULLICK, J.

References:—19 C. 489; 24 C. 440, F.; 35 C. 82, R.; 17 C L J. 411, D.

(26) *Suit for ejectment—Lease of land for residential purposes—Law before the Transfer of Property Act—Onus to prove transferability—Presumption of transferability, if arises from long continued possession.*

The effect of the recent decisions is that, when a landlord sues a person on the allegation that he is a trespasser and that person sets up a transfer from a tenant, it is for the latter to prove, first of all, the tenancy and, secondly, the validity of the transfer.

With regard to tenancies of homestead land created before the Transfer of Property Act, the tendency of these decisions has been to establish that, in the absence of evidence to the contrary, the burden of proof being upon the tenant, these tenancies are non-transferable(a).

The only exception made to the above rule is when there has been an erection of pucca buildings or a standing by on the part of the landlord while the tenant spends a large sum upon the land (b).

Mere long continued possession cannot give rise to a presumption of transferability. **Ambica Prasad Singh v. Baldeolal**, 20 C.W.N. 1113 = 1 Pat. L.J. 253 = 36 Ind. Cas. 126.

MULLICK and KINGSFORD, JJ.

References:—(a) 12 W R 495 (1869) and 15 W.R. 271 (1871), doubted. (b) 32 C. 1023 = 9 C. W.N. 895; 25 C. 896 = 2 C.W.N. 405, Rel.

(27) *Suit for rent against tenant—Plea of eviction by title paramount—Apportionment of rent—Onus on lessor to show fair rent—S. 104, Evidence Act*

Where a tenant is sued for rent, he can set up eviction by title paramount to that of his lessor as an answer, and if evicted from part of the land, an apportionment of the rent may take place; but the onus is on the lessor to show what is the fair rent of the lands out of which the tenant is not evicted. **Surendra Narain Roy Chowdhury v. Dina Nath Bose**, 49 C. 554 = 96 Ind. Cas. 33.

MOOKERJEE and BEACHCROFT, JJ.

Reference:—12 W.R. 109, P.

(28) *Occupancy holder transferring part of his non-transferable occupancy holding without*

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the knowledge or consent of the landlord—Transfer, validity of—Non-payment of rent by tenant—Disclaimer—Suit by landlord for possession of the transferred portion.

The holder of a non-transferable occupancy holding cannot create by transfer a title good against his landlord.

In this case a tenant transferred by a deed of sale a portion of his non-transferable occupancy holding without his landlord's knowledge or consent and subsequently refused to pay the rent of the transferred portion to the landlords on the ground that it was sold and relinquished in favour of the purchaser; the tenant paid rent only for the portion of the holding which remained in his possession.

Held (i) it is open to the landlords to decline to accept an apportionment of the rent and to decline to recognise any division of the holding.

(ii) On the tenant refusing to pay the entire rent of the whole holding, the landlords may institute a rent suit and so bring the holding to sale in execution of any decree they may obtain. But this is not the only course open to the landlords. The landlords may be at liberty, if they so choose, to accept from the tenant the amount of rent tendered by him for the land he still held without prejudice to any right which they might have as proprietors in respect of the transferred portion.

(iii) Only one conclusion is possible from the transfer coupled with the subsequent refusal to pay the rent of the transferred portion; clearly, that would amount on the part of the tenant to a disclaimer of all right, title and interest in the transferred portion.

(iv) As to the landlords, such conduct on the part of the tenant put an end to the relationship of landlord and tenant. By such acts and conduct, the tenant made it as clear as possible that he had no further interest in the land. The land would therefore, be at the disposal of the landlords, unless any third person can make out a good title to possession as against them. **Kunja Kishore Pal Chowdhury v. Bama Sundari Dasee**, 43 O. 878 = 35 Ind. Cas. 781.

RICHARDSON and IMAM, JJ.

(29) *Transfer of Property Act, S. 108 (ii)—Ejectment—Tenant's right to compensation for buildings or for time to remove them after expiry of term—Equitable estoppel.*

The erection of buildings by a tenant on leasehold land without any objection by the landlord does not change the tenant's right of tenancy into a perpetual right of occupation though the landlord may have allowed and even recognised the tenant's right to free sale of houses erected on the land by them and accepted purchasers of the building as his tenants.

Nor is the tenant or a purchaser from him entitled to any compensation for the costs of the building on the ground that the landlord in permitting the sale, and recognising the purchaser as his tenant has encouraged the expectation on the part of the tenant that he would be entitled to compensation if suddenly

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ejected. To create an equitable estoppel against the landlord in such a case it is incumbent on the tenant to show that the landlord's conduct amounted by plain implication to a contract to change the right of tenancy into a perpetual right of occupation.

The rule established in India in such cases is that of S. 108 (h) of the Transfer of Property Act which provides that the lessee may remove at any time during the continuance of the lease all buildings which he has attached to the earth provided he leaves the property in the state in which he received it.

Semle.—The Court may give the tenant reasonable time after the termination of the lease in which to remove the buildings.

For such further time the landlord is entitled to damages for use and occupation or mesne profits at a fair and reasonable rate.

Case-law on the subject reviewed and discussed. **Moola Mahomed Bin Moolia Mahomed v. P. K. Ebrahim**, 9 Bur. L.T. 101=9 L.R.R. 433=35 Ind. Cas. 735.

FOX, C.J. and TWOMEY, J.

(30) Suit by one of several landlords—Joinder of parties

One of several landlords can maintain a suit for rent or in ejectment against a tenant without joining the other co-owners either as plaintiffs or as defendants. The only questions in a suit for rent are (a) whether the relation of landlord and tenant subsists between plaintiff and defendant and (b) whether the amount sued for is due. A suit for rent is not a suit for determination of title to immoveable property. **K. F. Mahomed Ebrahim v. K. E. Mahomed**, 9 Bur. L.T. 110=35 Ind. Cas. 337.

U KIN, J.

(31) Tenant executing the lease but not let into possession by the lessor—Whether can deny lessor's title—Estoppel—Evidence Act, S. 116—Fraud—Misrepresentation—Coercion.

Held by the majority (Chief Justice contra) that a tenant who has executed a lease but has not been let into possession by the lessor is estopped from denying his lessor's title, in the absence of proof that he executed the lease in ignorance of the defect in his lessor's title or that his execution of the lease was procured by fraud, misrepresentation or coercion.

Per Chief Justice.—A tenant who was let into possession was estopped from denying a landlord's title. A tenant who was not let into possession by the person seeking to eject him is not estopped from denying the plaintiff's title; he may show that the title is in some third person or in himself. But the execution of a lease or payment of rent by the defendant is a *prima facie* proof of the plaintiff's title which the Court dealing with the evidence will ordinarily treat as conclusive in his favour unless the fact is sufficiently explained. In most cases of this nature the presumption in favour of the plaintiff can only be displaced by the defendant showing that the attornment was made by him

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in ignorance of the plaintiff's title or was induced by fraud, misrepresentation or coercion. **Yenkatta Chetty v. Aiyanna Goundan**, 31 M. L.J. 712=20 M.L.T. 457=(1917) M.W.N. 55=5 L.W. 304=36 Ind. Cas. 817 (F.B.).

ABDUR RAHIM,*O C.J., SESHAGIRI IYER and PHILLIPS, JJ.

(32) Tenant, if can contest landlord's title—Adverse possession, title by—Lessee, if can acquire such title against his lessor—Non-payment of rent, if creates adverse possession.

A tenant cannot dispute the landlord's title without first going out of occupation, and thereby making it clear that he intended to dispute the title of his landlord (a).

Where a lessee enters into possession under a lease, he cannot acquire any title by adverse possession against his lessor pending the term of his lease, unless he distinctly asserts such a title to his knowledge and gives him notice that he asserted such a title (b).

Failure to pay rent to the lessor by the lessee does not alone operate to create in favour of the lessee a title by adverse possession. **Reajuddi Bepari v. Chand Baksha Hajl**, 24 C.L.J. 453=35 Ind. Cas. 28.

SANDERSON, C.J. and MOOKERJEE, J.

References.—(a) (1832) 9 Bin. 41, R. (b) 7 C.L.J. 615, P.

(33) Possession by tenant of lands adjacent to his own holding—Presumption—Unconscionable bargain—Undue influence.

Where a tenant is found in possession of land adjacent to other lands admittedly under his cultivation, and where it is shown that for the whole area of land held by the tenant he pays rent to the zemindar, and has for years cultivated the land acquired without objection from the zemindar's servant, that land must, until the contrary is proved, be presumed to be a part of his holding (a).

Where a harsh unconscionable bargain is entered into by the tenant for no apparent reason at all, the Court is justified in presuming that undue influence was brought to bear upon him by the *malik* who undoubtedly stands in a position from which such undue influence can be exercised. **Kasht Nath Ray v. Raja Durga Prasad Singh**, 1 Pat. L.J. 604.

ROE and JWALA PRASAD, JJ.

References.—(a) 12 C.L.R. 457; 3 C.W.N. 763, *Appr.*; 19 C.W.N. 140; 19 C.W.N. 143, *Ref. to*.

(34) Claim of under proprietary right by lessee—Assertion of title by adverse possession.

Where possession of land has continued in a person as lessee, no question of adverse possession or of limitation arises and the lessee cannot set up under-proprietary rights to the land inconsistent with that under which he entered into possession. **Ram Asro v. Muhammad Abul Hasan Khan**, 30 Ind. Cas. 218.

LINDSAY, J.C., and KANHAIYA LAL, A.J.C.

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- (35) *Right of landlord to claim wet rate from tenant for raising wet crop on dry land—Custom to pay enhanced rent.*

A custom to pay enhanced rent if wet crops are cultivated on dry lands (provided that the wet crops are not raised with the help of the improvements effected at the tenants' sole expense) is not illegal. **Muthu Chettiar v. Muthusami Pillai**, 30 Ind. Cas. 486.

OLDFIELD and SADASIVA AIYAR, JJ.

References:—17 M. 1; 31 M. 19=17 M.L.J. 511=3 M.L.T. 103, F.

- (36) *Grant of land—Grove tenure—Trees cut subsequently and land brought under cultivation—Resumption—Right to hold in rent free tenure—Date of cultivation—Commencement of the right—'Land'—Whether term includes groves—Oudh Rent Act, 1886, S. 107 H.*

Where the holding was given to a person's ancestor in grove tenure and the trees in the portion of the holding which had subsequently been assessed to rent in under-proprietary tenure were not cut down until the fasli year 1310.

Held that the person's title to hold the land as a cultivator in rent free tenure does not commence until the trees were removed and the land cultivated.

Under S. 107-H the plots must have been held as 'land' rent free for 50 years and by two successors and not as grove for that period. 'Land' as defined in the Oudh Rent Act does not ordinarily include groves. **Thakur Gauri Shankar v. Abu Muhammad**, 33 Ind. Cas. 147.

HOLMS, S.M. and CAMPBELL, J.M.

- (37) *Acceptance of enhanced rent by landlord—Enhancement subsequently declared illegal—Notice of ejectment if proper—Estoppel.*

A landlord who had accepted enhanced rent from his tenant, though the enhancement was subsequently declared illegal, could not give notice of ejectment to his tenant, within seven years as he was estopped from pleading that there had been no change of rent within that period. **Raja Rameshar Bakhsh Singh v. Raghubar**, 33 Ind. Cas. 163.

CAMPBELL, J.M.

- (38) *Person having no transferable right—Transfer by that person—Effect.*

If a tenant having no transferable right, nevertheless makes a transfer, the transferee cannot claim his title to hold as more than an ordinary tenant, but remains only an ordinary tenant liable to ejectment. **Ram Nath v. Avadh Bihari**, 33 Ind. Cas. 210.

CAMPBELL, J.M.

- (39) *Occupancy tenant—Determination of rent—Oudh Rent Act (XXII of 1886), Ss. 5 and 33.*

Where an occupancy tenant under S. 5 of the Oudh Rent Act (XXII of 1886), refuses to come to terms with his landlord as to his rent, the latter can sue the former for the determination

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of the rent. **Chunnu Shah v. Maulvi Evas Ali**, 33 Ind. Cas. 214.

CAMPBELL, J.M.

- (40) *Tenancy at deliberate favourable rate of rent—Non-liability to ejectment.*

Where tenants hold their land at a favourable rate of rent, the rate in their case being deliberate and not accidental, they cannot be ejected from their holdings by their landlord as mere tenants. **Krishna Prasad Singh v. Suraj Pal Singh**, 33 Ind. Cas. 214.

CAMPBELL, J.M.

- (41) *Notice of ejectment by single co-sharer—If proper—Oudh Rent Act (XXII of 1886), S. 126, cl. 3, special contract referred to in.*

Where the sole collection of rent by a single co-sharer landlord is not proved, he is not by himself entitled to issue notice of ejectment to the tenant.

The special contract mentioned in cl. 3 of S. 126 of the Oudh Rent Act (XXII of 1886) is a special contract between the co-sharers and not a contract between landlord and tenant. **Sahdeo v. Mahadeo**, 33 Ind. Cas. 215.

HOLMS, S.M.

- (42) *Tenant at favourable rent—Status—Non-liability to ejectment as mere tenant.*

Where a person has been paying rent not in excess of the Government revenue, which constitutes a favourable rent, notice of ejectment cannot be issued against such person, as his status is superior to that of a mere tenant. **Lal Tribhuwan Nath Singh v. Musammat Ganga Dei**, 33 Ind. Cas. 232.

CAMPBELL, J.M.

- (43) *Partition papers, clerical error in—If enhancement of rent.*

Where by a petty clerical error in the partition papers of landlords the rent of a portion of the holding of a tenant is mistakenly recorded, it cannot be considered an enhancement of the rent, so as to give to the tenant a fresh statutory tenancy thereby. **Achhalbir Singh v. Dalip Singh**, 33 Ind. Cas. 234.

CAMPBELL, J.M.

- (44) *Succession—Rightful successor—Direct heirs, successor's rights in presence of—Tenant without right of occupancy.*

A nephew is the rightful successor to his uncle's rent free-holding after the death of the uncle's sons without issue, and is entitled to under-proprietary rights therein. But he is only a tenant without a right of occupancy as regards the land of those grantees who have left direct heirs. **Hayat Ahmad v. Badri Pande**, 33 Ind. Cas. 236.

HOLMS, S.M. and CAMPBELL, J.M.

- (45) *Death of tenant—Acceptance of rent from person other than heir—Admission to tenancy—Oudh Rent Act (XXII of 1886), S. 127, inapplicability of.*

Mere acceptance of rent by a landlord from the heir of a deceased tenant after the expiry of the latter's statutory tenancy, does not amount to acquiescence in the continuation of the

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holding by the former, provided that steps are taken to eject him at the earliest possible opportunity.

The receipt of rent from a man, who is not an heir to a deceased tenant, for periods subsequent to his death, is sufficient evidence of his admission to tenancy giving him a fresh statutory period, and S. 127 of the Oudh Rent Act (XXII of 1886) which only applies to persons occupying land without the consent of the landlord does not apply. *Jagmohan Upadhyaya v. Kamta Shiroman Prasad Singh*, 33 Ind. Cas. 247.

HOLMS, S.M. and CAMPBELL, J.M.

Reference:—3 Rev. L.J. 96, D.

(46) *Ejectment, notice of—Tenant holding separate and joint holdings—Notice, in respect of separate holding only invalid.*

Where a tenant holds a separate holding in addition to a joint holding the rent of which is included in the rent of the separate holding, and the landlord issues notice of ejectment in respect of the separate holding alone, such notice is invalid as being in respect of part of the holding. *Kunj Bihari v. Amresh Bahadur Singh*, 33 Ind. Cas. 263.

HOLMS, S.M. and CAMPBELL, J.M.

(47) *Notice of ejectment—Person recorded as sole tenant—His sole liability to be sued by landlord.*

Where a person has been recorded as the sole tenant with respect to a holding for a number of years and the zemindar has been collecting rent from him alone, the latter is entitled to issue notice of ejectment to him alone without hunting about for any one who might have some claim as co-heir to that holding. *Tribhuwan Dat v. Muhammad Abdul Hasan Khan*, 33 Ind. Cas. 264.

HOLMS, S.M.

(48) *Settlement decrees—Holding of land by way of Kabzadari—Status of such tenant—Oudh Rent Act (XXII of 1886), Ss. 5 and 33.*

A settlement Court decided that certain persons who after parting with their proprietary rights had retained their *sir* at a low rent, should hold that land by way of *kabsadari*, being "a right something between *sir* and *kabsadari*." Held that though the rights of occupancy which were decreed were not rights of occupancy corresponding to those under S. 5 of the Oudh Rent Act (XXII of 1886), still S. 33 of the Act was applicable to the case as the operation of that section was not confined to tenants with a right of occupancy under S. 5. *Buniyad Hussain v. Ram Sahai Singh*, 33 Ind. Cas. 266.

HOLMS, S.M. and CAMPBELL, J.M.

References:—S.D. No. 6 of 1870; S.D. No. 8 of 1893, *Rel.*; S.D. No. 11 of 1912; S.D. No. 23 of 1892, D.

(49) *Grove—Re-planting of trees—Landlord, consent of—Negligence to object—Inference.*

Where a landlord has allowed the tenant of a grove to go on planting and looking after his

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trees for a number of years, the landlord's consent to the re-planting of the grove may be regarded as implied by his neglect in not objecting at an earlier stage; and the ordinary custom as to a tenant's right in grove as laid down in S.D. No. 2 of 1892 is applicable. *Gajadhar v. Lal Bahadur Singh*, 33 Ind. Cas. 322.

BAILLIE, S.M. and BROWN, J.M.

References:—S.D. No. 2 of 1892, *Appl.*; S.D. No. 1 of 1908, D.

(50) *Bengal Tenancy Act (VIII of 1885), Ss. 50 and 105—Application under S. 105—Settlement of rent—Presumption under S. 50—When made—Evidence as to uniform rate of rent.*

When an application by a landlord is made under S. 105 of the Bengal Tenancy Act (VIII of 1885), as amended by Bengal Acts (III of 1898 and I of 1903), for settlement of rent after the final publication of the Record of Rights, the tenant is entitled to the benefit of the presumption which may be made under S. 50 of the Act.

Where there is some evidence on the part of the tenants as regards the rate of rent paid by them and the evidence is sufficient to show that the rate of rent has been uniform for the required period, and the landlord of the village has not produced any of the village papers the Court is entitled to hold on the evidence before it that it has been proved that the tenants have been holding their land at a fixed rate of rent. *Phulchand Lal v. Karman Singh*, 33 Ind. Cas. 415.

CHAMIER, C.J. and JWALA PRASAD, J.

Reference:—37 C. 30, F.

(51) *Oral agreement to pay enhanced rent—Agra Tenancy Act (II of 1901), S. 35, rent "previously payable" under.*

There is nothing in the Agra Tenancy Act (II of 1901) to prevent an occupancy tenant from agreeing orally to pay an enhanced rent, and from paying such rent accordingly.

Where such oral agreement is followed by payment of rent at the new rate, the new rate becomes the rent "previously payable" under the S. 35 of the Act, and the landlord is entitled in future years to recover at that rate. *Mackinnon v. Tilkanchan GIr*, 33 Ind. Cas. 417.

PORTER, S.M. and BAILLIE, J.M.

(52) *Grain rent, change of—Agra Tenancy Act (II of 1901), S. 52, proceeding under—If necessary.*

A *semindar* and a tenant can without a formal proceeding under S. 52 of the Agra Tenancy Act (II of 1901) alter a grain rent in any way they choose. *Sheethalal Upadhyaya v. Muhammad Bashir Ali Khan*, 33 Ind. Cas. 419.

BAILLIE, S.M. and BROWN, J.M.

(53) *Grant of permanent granti tenure—Resumption and settlement with heirs—Sale to strangers—Enhancement of rent—Bengal Tenancy Act (VIII of 1885), Part II, Chap. X, Ss. 104, G and H, 191, 192—Suit for rent against tenant—Res judicata.*

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Some years after the granting of a permanent lease, (*granti tenure*) by a zamindar, in favour of the father of the defendants, of lands, parts of which, it was known were liable to resumption by Government one of the *chaks* included in the lease was resumed by Government, who formed it into a separate estate and granted it in temporary settlement in 1884 for 20 years to the heirs of the zamindar assessed with a rent of Rs. 850. One of the heirs of the zamindar sold his interest in the permanent estate to one, and his interest in the *chak* to another. The purchaser of the interest in the *chak* together with the remaining heirs of the zamindar sued the father of the defendants for the recovery of the *chak* rent. The suit which went up to the Privy Council, was dismissed as it was held by the Privy Council that the resumption of the *chak* by the Government could not abrogate the rights of the lessee (the father of the defendants) vide 30 C. 811.

Then in 1904 a settlement of the *chak* was made with plaintiff and the brothers of the purchaser. A considerably large sum of money (Rs. 1,967) was assessed as the rent payable by defendants for the *chak* after the settlement proceedings under Part II, Chap. X of the Bengal Tenancy Act (VIII of 1885). In a suit against defendants for recovery of arrears of rent it was held that as the defendants (tenants) did not appeal as to the entry of rent which was made in their presence and did not impugn it under S. 104 H, the enhancement which was clearly made with full jurisdiction under S. 192 became final and could not be disturbed; and that as the landlords settlement-holders were not the representatives of the original grantor of the lease the Privy Council decision 30 C. 811 did not operate as *res judicata*. *Khl-roda Kanta Roy v. Akhoy Kumar Chatterjee*, 33 Ind. Cas. 470.

HOLMWOOD and IMAM, JJ.

References:—30 C. 811 (P.C.), R.; 18 C.W. N. 907, D.

(54) Tenancy with special conditions—Non-occupancy tenancy.

A zamindar agreed that he would allow his tenants to hold land on the following conditions:—

(i) that the tenants would from that day remain in possession like (*misl*) fixed rate tenants, in the future there would be no enhancement of rent on them or on their heirs;

(ii) that on certain conditions they would have a right of transfer among themselves but not to outsiders;

(iii) that on certain conditions they would have rights of mortgage;

(iv) that they would have rights of sale on certain conditions, subject to the zamindar's right of pre-emption.

Held that the tenancy which was created under the above circumstances was only a non-occupancy tenancy with special conditions; and that the other privileges of a fixed rate tenant which were not specifically mentioned, were

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not conferred. *Jang Bahadur Singh v. Muhammad Yahlia*, 33 Ind. Cas. 425.

HOLMS, S.M.

(55) Khabulist, condition in—Renewal of lease, covenant for—Terms of conditions, non-specification—Effect.

If the option given to a tenant to take a fresh lease on a fair rent, does not state the terms of the renewal, the new lease will be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof, except as to the covenant for renewal itself; and the silence in the conditions as to the terms for which the settlement is to be made, does not render the covenant unenforceable. *Rasul Gazi v. Abdul Jalil Khan*, 33 Ind. Cas. 460.

NEWBOULD, J.

References:—13 C.W.N. 595, N.F.; 16 C.L.J. 217, Rel.

(56) Tenancy—Permanent tenure created before Transfer of Property Act—Transferability—Decree for rent against registered tenant—Sale of tenure in execution—Rights of prior purchaser.

A permanent tenancy created before the passing of the Transfer of Property Act, and which would be governed by its provisions had it been created after the passing of that Act, is transferable.

Where a transferable tenure has been sold in execution of a decree for rent against the registered tenant, the sale cannot affect the interest of a prior purchaser of a portion of the tenure on the principle of representation, where the purchaser has since the purchase made applications to the landlord that his name should be registered and has refused to be represented by his co-sharer tenant. *Madhu Mati Debí v. Harendra Lal Roy Chowdhury*, 33 Ind. C. s. 502.

TRUNON and NEWBOULD, JJ.

References:—4 C.W.N. 574; 2 C.W.N. 122; 7 C.L.J. 107; 32 C. 1023=9 C.W.N. 895; 7 C.L.J. 553; 7 B.L.R. 152=12 W.R. 496, R.

(57) Suit for determination of tenure—Res-judicata—Usufructuary mortgage of fixed rate tenancy—Death of mortgagor without heirs—Ejectment of mortgagee without redemption—Not permissible.

A decision in a *jamabandi* case declaring certain persons to be non-occupancy tenants but not determining the length of the tenancy, does not operate as *res judicata* in a subsequent suit for determination of their tenure.

On the death without heirs of a fixed rate tenant who has usufructually mortgaged his holding, the landholder cannot eject the mortgagee in possession without paying the mortgage money. *Lal Bahadur Rai v. Maharaja of Vizianagaram*, 33 Ind. Cas. 556.

HOLMS, S.M. and CAMPBELL, J.M.

Reference:—29 Ind. Cas. 555, F.

(58) Arrears of rent—Mode of assessment—Fair occupation of rent—Non-liability of rent-free tenant—Oudh Rent Act (XXII of 1886).

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Where the relationship of landlord and tenant exists and there has been an agreement to pay rent, whether the amount payable has been fixed or not, it is open to the Court to allow arrears of rent according to the rate originally fixed, even if the agreement has terminated, or, in case where the rent has not been fixed, to assess a fair occupation rent and award arrears on that basis. But where there has been no agreement to pay rent at all and where the agreement has been that the land should be held rent-free, though, if the landlord desires to discontinue the indulgence, he may obtain an assessment of rent to be charged in future years, he cannot be permitted to give retrospective effect to that desire and claim arrears of rent assessed on the basis of a fair occupation rent or on any other basis. **Thakur Suraj Bakhsh Singh v. Sita Bakhsh Singh**, 33 Ind. Cas. 770.

STUART, A.J.C.

References:—9 O.C. 296; 9 O.C. 362; 10 Ind. Cas. 2, R.

- (59) *Lease taken from one of several co-sharers—Right of latter to sue in ejectment—Tenant—Inability to dispute his lessor's title—Estoppel.*

Where a person takes a lease from one of several co-sharers, he cannot dispute his lessor's exclusive title to receive the rent or to sue in ejectment(a). **Maung Shwe Gywa v. Ma Shwe Thet**, 34 Ind. Cas. 71.

MAUNG KIN, J.

Reference:—(a) 13 B. 323, F.

- (60) *Co-sharer landlords—Purchase of occupancy holding by one of them—Non-occupancy right—When preserved—Act VIII of 1885 (Bengal Tenancy), as amended by Bengal Act I of 1907, S. 22.*

If the purchase of an occupancy holding be made by one co-sharer on behalf of all landlords, the whole tenancy merged even under the Tenancy Act as it stood prior to 1908(a).

Where a landlord purchases an occupancy holding and gives a lease in respect of it to another tenant, he brings the whole tenancy to a termination and cannot be heard to say that the non-occupancy right still subsists(b).

If a co-sharer landlord purchases for himself alone an occupancy right, under the old Tenancy Act (i.e., prior to 1908) the non-occupancy right would be kept alive by the co-sharer landlord purchaser. **Raja Ram Sahu v. Jhanti Gope**, 34 Ind. Cas. 75.

MULLICK, J.

References:—(a) 24 C. 521, R. (b) 3 C.W.N. 62, F.

- (61) *Ejectment, notice of—Decision of Revenue Court—Tenant's status superior to ordinary tenant—Civil suit by proprietor for actual possession of land—If maintainable—Under-proprietary rights—Jurisdiction.*

Where after a notice of ejectment was served on behalf of a proprietor on the tenant, the latter contested it asserting under-proprietary rights, and the Revenue Court decided that,

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though he could not prove under-proprietary rights, he nevertheless had a status superior to that of an ordinary tenant, such decision afforded a cause of action to the proprietor to go to the Civil Court for a declaration that the person whom he sought to eject did not possess under-proprietary rights; and in order to maintain such a suit in the Civil Court it was not necessary that the Revenue Court should definitely hold such person to possess under-proprietary rights. **Bandi Bakhsh v. Indar Pal**, 84 Ind. Cas. 304.

STUART, A.J.C.

References:—14 O.C. 194, Rel.; 23 Ind. Cas. 231, R.

- (62) *Estoppel—Non-transferable holding, transfer of—Deposit of amount of decree in rent suit by the purchaser—Amount withdrawn by landlord—Landlord not estopped from disputing transferee's right—Absence of sufficient notice of transferee's right.*

Where the purchaser of a non-transferable holding deposited the amount of a rent decree to avert sale of the holding and the amount was withdrawn by the landlord there being nothing more to indicate the purchaser's claim to the holding than the appearance of his name in the chellan, held that there was no sufficient notice to the landlord of the claim by the purchaser and that the landlord was not estopped from disputing the transfer. **Bharat Chander Galui v. Pramotha Nath Roy**, 34 Ind. Cas. 337.

CHITTY and WALMSLEY, JJ.

- (63) *Bengal Act (VIII of 1885), Ss. 155 (b), 178, 179—Breach of condition not remediable—Transfer of holding in breach of the conditions of the tenancy—Compensation—Deposit by the transferee impleaded as defendant—Contract made before the Act—No declaration that transferee is to be regarded as tenant.*

The scope of S. 155, Bengal Tenancy Act, seems to be that whether the alleged breach of a condition of the tenancy is capable of remedy or not, a sum is to be specified by the Court in the suit for ejectment as reasonable compensation for the breach and it is only if the tenant fails to deposit that sum within the time given that the landlord can have his decree for ejectment.

The effect of S. 178 is that even when there is a provision for re-entry in a contract made before the passing of the Act S. 155 applies with full force.

In a suit by the landlord for ejectment on the ground of breach of a condition against transfer of the tenure, in which the original tenant and the transferee were impleaded, a deposit by the transferee defendant of the sum specified as compensation is sufficient. The section appears to allow the deposit to be made not only by the original tenant but by any person who is impleaded as a defendant. In such a suit a declaration ought not to be given to the transferee that he is to be regarded as

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plaintiff's tenant. *Afiladdi v. Satish Chandra Banerji*, 84 Ind. Cas. 497.

BEACHCROFT and NEWBOULD, JJ.
Reference :—22 O. 77, F.

(64) *Ejectment—Succession to father's property by sons—Entry in the Patwari papers of the name of one only—Notice to him alone—Validity of.*

Two sons succeeded on the father's death to his holding but the name of one only was recorded in the Patwari papers as head of the family and it was not proved that the zamindar ever accepted rent from the other, held that a notice of ejectment issued on that one only is sufficient to entitle the landlord to eject the tenant. *Jhumak Lal v. Sarju Prasad*, 34 Ind. Cas. 711.

HOLMS, S.M.

(65) *Rival tenants—Revenue Court's decision—Ejectment—Civil Court—Jurisdiction.*

Where a dispute is between a tenant and another person who alleges himself to be a co-tenant, the Revenue Court has no jurisdiction to decide the matter finally. It can only do so in a suit between landlord and tenant. *Tural v. Mohan*, 35 Ind. Cas. 302.

WALSH and SUNDAR LAL, JJ.

(66) *Joint holding—Surrender by one tenant—Deed stamped and registered as conveyance—Effect.*

Even if there could be no valid surrender of a portion of a joint holding by one of the joint tenants in favour of the landlord, the deed of surrender may operate as a valid transfer of his interest in the holding if the deed is stamped as a conveyance and registered and if the transferor had any subsisting interest in the holding at the date of the deed. *Abdul Karim Mean v. Mianjan Mianji*, 32 Ind. Cas. 232.

CHATTERJEE and NEWBOULD, JJ.

(67) *Re-entry on re-payment of rent—Forfeiture—Days of grace allowed—Power of Court to relieve.*

The Court has jurisdiction to relieve a tenant from a proviso for re-entry on non-payment of rent in all proper cases, whether days of grace are allowed or not (a). *Narayana v. Kashappaya*, 32 Ind. Cas. 526.

NAPIER and SRINIVASA IYENGAR, JJ.

References :—(a) 15 M.L.J. 210; 29 M. 389 = 15 M.L.J. 208; 6 Ind. Cas. 438 = 20 M.L.J. 944 = 8 M.L.T. 108 = (1910) M.W.N. 419; 30 Ind. Cas. 596 = 29 M.L.J. 381 = 18 M.L.T. 336 = (1915) M.W.N. 857, R.

(68) *Payment by ryot to one not entitled to receive—Discharge of liability.*

Payment of rent by ryot to a person who is not entitled on the date of the payment to receive the amount does not discharge him from his liability to pay. *Macca Meera Leval Rowther v. Eastern Development Corporation Co. of London*, 36 Ind. Cas. 82.

CLEGG, F.M.

(69) *Ejectment—Right to eject from part of holding—Claim of reversioner to sue in*

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ejectment—Acquiescence of transfer by acceptance of rent.

A landlord cannot seek to recover only a part of the holding or originally created.

An action for ejectment being based on the right to immediate possession, a reversioner is not entitled to sue in ejectment (a).

Where a landlord accepts rent from the transferee of his tenant he is not entitled to maintain a suit for ejectment of the transferee, as the acceptance of rent amounts to a recognition of and acquiescence in the transfer. *Bhagloo Shah v. Mahadeo Chaudhuri*, 36 Ind. Cas. 283.

ATKINSON, J.

Reference :—(a) 11 O.W.N. 828, Diss.

(70) *Tenant out of possession—Liability to pay rent.*

A tenant cannot be held liable for rent for the time during which he was out of possession. *Ram Chandra Chowdhury v. Madho Prasad Chatterji*, 36 Ind. Cas. 537.

SHARFUDDIN and ROW, JJ.

References :—6 Ind. Cas. 478 = 11 C.L.J. 591, R.

(70-a) *Occupancy holding—Non-transferable—Whether recorded tenants represent unrecorded tenants—Suit for rent against recorded tenant, effect of—Symbolical possession, effect of—Execution purchaser's suit for possession—Limitation.*

An occupancy holding not transferable by the custom of the locality was inherited by three brothers, defendants Nos. 1, 2 and 3. They jointly sold a portion of the *Jote* to defendants Nos. 12 and 13 and established sub *ryots* of whom defendant No. 6 was one. The name of defendant No. 1 alone, however, was recorded in the *sherikhta* of the landlord, who brought suits against defendant No. 1, alone and obtained decrees some of which were satisfied by all the brothers, while in execution of the last of such decrees he purchased the *Jote* himself and settled with the plaintiff. The latter within 12 years from the date of symbolical possession but more than 12 years from the date of the execution-sale, instituted a suit against all the defendants for possession of the holding. Held (1) that the suit was not barred as against defendants Nos. 2 and 3, for they having elected to be represented in their relations to the landlord by their brother, defendant No. 1, were parties to the suit in the name of their brother and could not be heard to say that they were strangers to the suit; and that, therefore, against them the symbolical possession gave start to a fresh period of limitation:

(2) That as defendants 6, 12 and 13 being strangers to the suit, the delivery of symbolical possession did not affect their possession, and that the suit as against them was barred by limitation. (3) That defendants 12 and 13 being unrecognised purchasers of a portion of the holding, were bound by the result of the rent suit and were liable to be turned out by a separate suit brought for the purpose within 12 years.

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from the date of the execution-sale. *Saidulla Mridha v. Joyanabunnessa Bibi*, 32 Ind. Cas. 708.

D. CHATTERJEE and BEACHROFT, JJ.
Reference:—6 C.L.J. 472, *Appl.*

(70-b) Transfer of non-transferable occupancy holding by a raiyat, effect of.

The transfer, by a raiyat, of a non-transferable occupancy holding is operative against a co-sharer landlord purchasing it subsequently in execution of a money decree against the Raiyat. *Deo Saran Lal v. Baleswar Mandal*, 32 Ind. Cas. 1009.

SHARFUDDIN and TEUNON, JJ.
Reference:—42 C. 172, *Appl.*

(71) Abadi land—Ejectment of tenant from tenancy—Right to live in house—Burden of proof. *Shoharat Singh v. Jhagru*, 13 A.L.J. 745=30 Ind. Cas. 782. See Final Part, 1915, Col. 883.

(72) Grove planted on occupancy holding by tenant—Right of transfer. *Daya Kishen v. Mohammad Wazir Ahmad*, 13 A.L.J. 833=30 Ind. Cas. 565. See Final Part, 1915, Col. 884.

(73) Rent, assessment of, suit for—Lakhoraj land—Suit instituted under Reg. II of 1819 and subsequently transferred to the Civil Court. *Maharaja Birendra Kishore Manikya Bahadur v. Bharat Chandar Sinha*, 22 O.L.J. 117=30 Ind. Cas. 910. See Final Part, 1915, Col. 884.

(74) Adverse possession — Rent, assessment of — Mesne profits, claim for. *Maharaja Birendra Kishore Manikya Bahadur v. Nazir Mahomed*, 22 O.L.J. 122=30 Ind. Cas. 917. See Final Part, 1915, Col. 885.

(75) Encroachment — Adverse possession — Limitation Act, 1877, Sch. II, Art. 144. *Maharaja Birendra Kishore Manikya Bahadur v. Laksmi*, 22 C.L.J. 129=30 Ind. Cas. 896. See Final Part, 1915, Col. 885.

(76) Possession, suit for—Suit for assessment of rent — Limitation — Squatter—Tenancy. *Gagan Chandra Chuckerbutty v. Maharaja Birendra Kishore Manikya Bahadur*, 22 C.L.J. 135=30 Ind. Cas. 931. See Final Part, 1915, Col. 886.

(77) Possession, suit for—Allegation, defendants trespassers—Decree, declaring zemindari title—Decree, also declaring adverse possession of defendants—Effect not appealing — Bengal Tenancy Act (VIII of 1885), as amended by Act I.P.C. of (1907), S. 103-B, sub-S. (3)—'Proved by evidence, to be incorrect'—Evidence, nature of—Presumption, if rebutted—Limitation—Claim for assessment of rent. *Maharaja Birendra Kishore Manikya Bahadur v. Kallias Chandra Sarkar*, 22 O.L.J. 140=30 Ind. Cas. 937. See Final Part, 1915, Col. 887.

(78) Possession, suit for—Record of rights, entry in—Entry made after decision of dispute—Correctness, presumption of—Bengal Tenancy Act (VIII of 1885), S. 109, sub-S. (2) (before amendment)—Adverse possession—Pleading—

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Rent-free title — Long possession—Inferencia. *Sobhan Baksh v. Maharaja Birendra Kishore Manikya Bahadur*, 22 O.L.J. 144=30 Ind. Cas. 939. See Final Part, 1915, Col. 887.

(79) Limitation—Rent-free title—Encroachment — Presumption. *Maharaja Birendra Kishore Manikya Bahadur v. Ram Charan Das*, 22 C.L.J. 147=30 Ind. Cas. 942. See Final Part, 1915, Col. 887.

(80) Limitation—Adverse possession—Claim for assessment for rent. *Maharaja Birendra Kishore Manikya Bahadur v. Anandapriya Balshanabi*, 22 O.L.J. 151=30 Ind. Cas. 946. See Final Part, 1915, Col. 888.

(81) Limitation—Adverse possession—Rent-free tenure. *Maharaja Birendra Kishore Manikya Bahadur v. Ram Chandra Dey*, 22 C.L.J. 153=30 Ind. Cas. 948. See Final Part, 1915, Col. 888.

(82) Rent of shop the stock in which is mortgaged—Mortgagee's liability to pay rent—Want of privity of contract between landlord and mortgagor. *Bansilal Abhoychand v. Mahomed Ebrahim Mulla*, 8 Bur. L.T. 163=8 L.B.R. 164=30 Ind. Cas. 675. See Final Part, 1915, Col. 888.

(83) Pre-settlement inam — No exemption—Contract Act, S. 70—Suit for return of ordinary and penal water rate—Res judicata. Collector of Kistna v. Dasika Srinamulu, (1915) M.W.N. 467=29 M.L.J. 597=30 Ind. Cas. 178. See Final Part, 1915, Col. 889.

(84) Civ. Pro. Code (1908), S. 11—Res judicata—Rent for prior fasli fixed by an ex parte decree—Decision whether res judicata in a subsequent suit for compelling acceptance of putta—Document, objection to admissibility of, not raised in lower Court—Effect of the document only tried to be explained away—Objection whether can be raised in second appeal—Blowing hot and cold—Finding of fact—Second appeal, interference in, when permissible—Landlord and tenant—Temporary departure from usage or contract, if disentitles either landlord or tenant to revert to original contract or usage — Madras Estates Land Act, Ss. 27 and 28—Presumption—Proof to the contrary—Madras Estates Land Act, S. 26 (3) only a repetition of S. 11 of Madras Rent Recovery Act (VIII of 1865)—Gadupatkattu village, what is. *Ayyappamallodayan v. Ramasami Chettiar*, 2 L.W. 650=29 M.L.J. 362=(1915) M.W.N. 614=30 Ind. Cas. 983. See Final Part, 1915, Col. 890.

(85) Sale of holding for arrears of rent — Merger of occupancy right — Notice to quit, effect of. *Eakuf Ali v. Meajan*, 29 Ind. Cas. 686=43 C. 164. See Final Part, 1915, Col. 892.

(86) Clause for relinquishing — How far alienation a desire to relinquish—Forfeiture—Road cess — Mad. Act V of 1884. *Mallikht Hengsu v. Soma*, (1915) M.W.N. 639=29 M.L.J. 452=30 Ind. Cas. 494. See Final Part, 1915, Col. 892.

Landlord and Tenant—(Continued).

(87) *Permanent lease—Non-payment of rent—Provision for days of grace—Power to relieve against forfeiture—Agricultural leases—Law applicable.* *Appayya Shetty v. P. M. Mahamade Bearl*, 29 M.L.J. 381=18 M.L.T. 336= (1915) M.W.N. 857=30 Ind. Cas. 596=39 M. 834. See Final Part, 1915, Col. 893.

(88) *Muzigeni tenant—Right to cut trees on his holding.* *Krishnacharya v. Anthakki*, 29 M.L.J. 314= (1915) M.W.N. 726=19 M.L.T. 218=31 Ind. Cas. 12. See Final Part, 1915, Col. 893.

(89) *Dry area left waste without the tenant's negligence—Tenant liable to pay rent therefor—Madras Estates Land Act, I of 1908, S. 4, if dis-entitles tenant to claim exemption from payment—Practice and Procedure—Suit against a dead man—Amendment of plaint into one as against legal representative, if allowable.* *In re Arunachalam Chettiar*, 2 L.W. 828=30 Ind. Cas. 679. See Final Part, 1915, Col. 894.

(90) *Suit for arrears of rent—Previous decree, whether proves landlord's title—Presumption as to continuance of relationship—Evidence Act, S. 114, ill. (d).* *Hiranmoy Kumar Saha v. Ramjao Ali Dewan*, 29 Ind. Cas. 694=20 C.W.N. 48=43 C. 170. See Final Part, 1915, Col. 895.

(91) *Ejectment—Durpatnidar—Condition in durpatni that durpatnidar will get khut rent from chakran tenant—Chakran land, resumption of Unauthorised settlement by Zemindar—Chakran tenants, settlement with—Tenants, if liable to be ejected—Mesne profits.* *Hazari Lal Sarkar v. Maharaj Kumar Kshaunish Chandra Roy Bahadur*, 22 C.L.J. 290=31 Ind. Cas. 249. See Final Part, 1915, Col. 896.

(92) *Tenant holding over after notice to quit—Suit for mesne profits a proper suit—Suit for rent may be amended to one for use and occupation.* *Maung Po Shin v. Mahomed Thumbi*, 8 Bur. L.T. 234=30 Ind. Cas. 753=8 L.B.R. 270. See Final Part, 1915, Col. 896.

(93) *Ejectment—Waiver—Acceptance of rent—Future default—Waiver by receipt of rent and waiver by distress, difference between—Transfer of Property Act, S. 112.* *Raj Mohan De v. Mati Lal Saha Poddar*, 22 C.L.J. 546=33 Ind. Cas. 331. See Final Part, 1915, Col. 897.

(94) *Reduction of rent, suit for—Disruptive Portion of land demised—Bengal Tenancy Act (VIII of 1885), S. 52* *Nawab Sir Sall-mulloah Bahadur v. Kalprosonno Parbat*, 22 C.L.J. 509=31 Ind. Cas. 349. See Final Part, 1915, Col. 897.

(95) *Partition into separate tenancies without tenant's consent—Difference between partition under Act VIII of 1876 and partition made by Civil Court—Sale of entire separated holding by tenant—Abandonment.* See BEN. ACT VIII OF 1876 (ESTATES PARTITION), No. 1, 1 Pat. L.J. 270.

(96) See BEN. ACT VIII OF 1885 (TENANCY), No. 5, 24 C.L.J. 363.

Landlord and Tenant—(Continued).

(97) See BEN. ACT VIII OF 1885 (TENANCY), No. 48, 34 Ind. Cas. 82.

(98) See BEN. ACT VIII OF 1885 (TENANCY), No. 74, 34 Ind. Cas. 537.

(99) *Legitimate purpose and scope of Bengal Tenancy Act.* See BEN. ACT VIII OF 1885 (TENANCY), No. 90, 20 C.W.N. 872.

(100) *Money rent—Kabuliat—Rent in kind—Stipulation to pay fixed sum in default—Enhancement—Validity.* See BEN. ACT VIII OF 1885 (TENANCY), No. 13, 29 C.L.J. 635.

(101) *Part of tenure created before the Permanent Settlement but separated by assignment and held at proportional rent by assignee—Confirmatory sanad if creates new tenure—Enhancement of rent.* See BEN. ACT VIII OF 1885 (TENANCY), No. 6, 20 C.W.N. 1002.

(102) *Pattah and kabuliat enhancing rent and creating permanent mukarrari interest—Plea of undue influence—Effect of ratifying kabuliat—Claim for enhancement for improvements when to be made.* See BEN. ACT VIII OF 1885 (TENANCY), No. 18, 1 Pat. L.J. 76.

(103) *Plaintiff shown as tenant liable to pay rent in Record of Rights—Suit for declaration that he was a lakhiraj tenant not liable to pay rent—Nature of suit—Limitation.* See BEN. ACT VIII OF 1885 (TENANCY), No. 59, 1 Pat. L.J. 73.

(104) *Sale of portion of tenure by registered instrument—Non-payment of landlord's fee—Title if passes—Purchaser allowing vendor to represent him before landlord—Effect on rent sale.* See BEN. ACT VIII OF 1885 (TENANCY), No. 8, 20 C.W.N. 355.

(105) *Wrong entry in Record of Rights—Suit for declaration—Whether governed by Bengal Tenancy Act—Holding at fixed rates—Evidence of long payment at unchanged rates—Admissibility—Presumption.* See BEN. ACT VIII OF 1885 (TENANCY), No. 30, 1 Pat. L.J. 67.

(106) See MAD. ACT I OF 1908 (ESTATES LAND), No. 2, 35 Ind. Cas. 121.

(107) *Commutation of rent—Principles regarding award of.* See MAD. ACT I OF 1908 (ESTATES LAND), No. 26, 34 Ind. Cas. 935.

(108) *Levy of Kanganam fee whether legal—Zamindar's right to enter on holding for estimating out-turn—Loss of crops owing to theft, cattle, etc.—Liability of tenant—Right to charge rent on uncultivated portion—Kulam Korvai lands—Right of zamindar to Sarasari—Dry crops on nanja lands—Liability for wet rates.* See MAD. ACT I OF 1908 (ESTATES LAND), No. 10, 20 M.L.T. 70.

(109) *Receiver appointed to realise arrears of rent, if landlord.* See MAD. ACT I OF 1908 (ESTATES LAND), No. 7-8, 36 Ind. Cas. 82.

Landlord and Tenant—(Continued).

(110) Remission for *shavi*—Nature of obligation—Enforceability. See MAD. ACT I OF 1908 (ESTATES LAND), No. 31, 3 L.W. 300.

(111) Ryot out of possession of the holding whether can sue for a patta. See MAD. ACT I OF 1908 (ESTATES LAND), No. 38, 20 M. L. T. 36.

(112) See OUDH ACT XXII OF 1886 (RENT), No. 17, 31 Ind. Cas. 472.

(113) See OUDH ACT XXII OF 1886 (RENT), No. 8, 34 Ind. Cas. 861.

(114) Agreement between—Rate of rent fixed—Liability to ejectment in default of payment—No period fixed for tenure—Enhancement of rent—Not possible. See OUDH ACT XXII OF 1886 (RENT), No. 11, 33 Ind. Cas. 157.

(115) Ejectment—Co-sharers—Right of one co-sharer to apply for ejectment of tenant. See OUDH ACT XXII OF 1886 (RENT), No. 19, 34 Ind. Cas. 693.

(116) Land held under lease—Variable rent—Lessee whether 'tenant'—Ejectment. See OUDH ACT XXII OF 1886 (RENT), No. 20, 14 A.L.J. 1 (Rev.).

(117) Suit for ejectment through Revenue Court—Recognition of trespassers as tenants. See OUDH ACT XXII OF 1886 (RENT), No. 43-a, 36 Ind. Cas. 770.

(118) Suit for rent by tenant against trespasser treating him as sub-tenant, maintainability of—Tenant and sub-tenant, nature of their relationship. See OUDH ACT XXII OF 1886 (RENT), No. 40, 19 O.C. 370.

(119) Sub-tenant is a tenant of landlord—Occupancy tenant—Extinguishment of tenancy—Compensation for improvements by tenant—Executing Court bound to award compensation even after ejectment—Revision. See PUN. ACT XVI OF 1887 (TENANCY), No. 8, 1 P. W. R. 1916 (Rev.).

(120) Agreement to pay enhanced rent—Not registered—Effect. See U. P. ACT II OF 1901 (AGRA TENANCY), No. 28, 14 A. L. J. 57.

(121) Landlord taking forcible possession of grove—Grove holder's remedy. See U. P. ACT II OF 1901 (AGRA TENANCY), No. 32, 31 Ind. Cas. 453.

(122) Question of tenant's right in Civil Court—Remand—Revenue Court's decision on question of tenancy in former suit—Suit in Civil Court for ejectment—Cessation of tenancy. See U. P. ACT II OF 1901 (AGRA TENANCY), No. 56, 14 A.L.J. 734.

(123) Tenant holding without landlord's consent—Occupancy rights. See U. P. ACT II OF 1901 (AGRA TENANCY), No. 8, 31 Ind. Cas. 486.

(124) See AGENT, No. 1, 35 Ind. Cas. 81.

(125) Suit for arrears of rent—Defendant denying plaintiff's title—Question of proprietary title—Appeal. See APPEAL (GENERAL), No. 2, 14 A.L.J. 140.

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(126) See CIV. PRO. CODE (1908), No. 525, 1 Pat. L.J. 446.

(127) Misrepresentation—Ability to discover truth—Hotel-keeper—Right to sue for rent—Breach of contract—Distraint. See CONTRACT ACT, No. 14, 112 P.L.R. 1916.

(128) Tenant if bound to return possession to his landlord, where landlord is one of two co-owners. See CO-OWNER, No. 1, 4 L.W. 286.

(129) Suit for possession and ejectment of trespasser—Landlord supporting trespasser. See EJECTMENT, No. 5, 1 Pat. L.J. 430.

(130) See ESCHEAT, No. 1, 35 Ind. Cas. 843.

(131 to 134) Non-transferable holding, usufructuary mortgage of, by the tenant—Acceptance of rent from the mortgagee—Validity of mortgage if can be questioned by the landlord. See ESTOPPEL, No. 7, 34 Ind. Cas. 764.

(135) Registered *kabuliyat*—Acceptance by landlord for a long time of reduced rent, if precludes suit at *kabuliyat* rate—Admissibility of evidence of conduct to prove agreement to take rent at reduced rate or to prove that *kabuliyat* originally not intended to be acted upon. See EVIDENCE ACT, No. 78, 20 C.W.N. 680.

(136) Tenancy relinquished in favour of creditor—Mutation of names. See EVIDENCE ACT (I OF 1872), No. 60, 35 Ind. Cas. 102.

(137) Tenant let into possession by landlord—If can deny landlord's title—Estoppel, extent of. See EVIDENCE ACT, No. 103, 4 L.W. 349.

(138) See EXECUTION OF DECREE, No. 18, 24 C.L.J. 523.

(139) Lease for a term—Option of renewal—Option not exercised—Holding over—Effect of notice to quit. See LEASE, No. 4, 24 C.L.J. 30.

(140) See LIMITATION ACT (1908), No. 243, (1916) 2 M.W.N. 324.

(141) Co-owners—Purchase of undivided moiety—Lease executed in respect of other moiety—Defendant in occupation of whole house without paying rent—Suit for possession of plaintiff's moiety and arrears of rent—Limitation—Fiction of tenancy by sufferance. See LIMITATION ACT (1908), No. 178, 39 M. 51.

(142) Suit by landlord to recover possession from tenants—Denial of landlord's title more than 12 years before suit—Bar of suit by adverse possession. See LIMITATION ACT (1908), No. 244, 36 Ind. Cas. 829.

(143) Disclaimer of the title of Jenmi—What constitutes a disclaimer. See MALABAR LAW—GENERAL, No. 1, (1916) M.W.N. 11.

(144) See MORTGAGE—GENERAL, No. 34, 33 Ind. Cas. 112.

(145) Occupancy holding, if may be sold in execution of a money-decree against the riyat with landlord's consent. See OCCUPANCY RIGHTS, No. 1, 36 Ind. Cas. 803=21 C.W.N. 400.

Landlord and Tenant—(Concluded).

(146) See PRE-EMPTION, No. 19, 116 P.R. 1916.

(147) See RES JUDICATA, No. 28, 34 Ind. Cas. 640.

(148) Tenant's possession if adverse by non-payment of rent. See SPECIFIC PERFORMANCE, No. 8, (1916) 2 M.W.N., 191.

(149) Eviction of tenant by a trespasser—Tenant's attornment in favour of other person than proprietor—Effect—Dispossession of proprietor without dispossession of tenant—Effect. See SPECIFIC RELIEF ACT, No. 2, 18 O.C. 353.

(150) Tenancy denied—Suit by former for declaration of his right—No prayer for possession—Maintainability. See SPECIFIC RELIEF ACT, No. 45, 9 S.L.R. 174.

(151) Suit for possession—Physical possession. See SPECIFIC RELIEF ACT, No. 3, 9 Bur. L.T. 172.

(152) See SUB-LEASE, No. 2, 24 O.L.J. 538.

(153) Tender of lease at prevailing rate—Refusal of valid tender by tenant—Ejectment, liability to. See TENDER, No. 1, 33 Ind. Cas. 450.

(154) Agreement to let land on payment of annual rent—Agreement neither in writing nor registered—Validity. See TRANSFER OF PROPERTY ACT, No. 130, 14 A.L.J. 137.

(155) Action for trespass—When tenant or owner may sue. See TRESPASS, No. 1, 20 C.W.N. 773.

(156) See UNDER-PROPRIETARY RIGHTS, No. 4, 34 Ind. Cas. 733.

(157) Decree for ejectment—Institution of rent suit when right to eject had not accrued—Waiver—Waiver of conditional right. See WAIVER, No. 1, 1 Pat. L.J. 185.

(158) See WILL, No. 19, 32 Ind. Cas. 364.

Landlord and Tenant Procedure Act.

See BEN. ACT VIII OF 1869.

Land Owner.

Ownership of plot of land under building. See PUN. ACT II OF 1905 (PRE-EMPTION), No. 5, 30 Ind. Cas. 517.

Land Revenue Act.

See BOM. ACT II OF 1876.

See C.P. ACT XVIII OF 1881.

See OUDH ACT XVII OF 1876.

See PUN. ACT XVII OF 1887.

See U.P. ACT XIX OF 1879.

See U.P. ACT III OF 1901.

Land Revenue Code.

See BOM. ACT V OF 1879.

Land Revenue Sales Act.

See BEN. ACT VII OF 1869.

•Lands (Waste) Act.

See ACT XXIII OF 1863.

Laws Act.

See OUDH ACT XVIII OF 1876.

See PUN. ACT IV OF 1872.

Lease.

(1) *Lessor and lessee—Lease not valid—Right to compensation—Transfer of Property Act, S. 108, cl. (b).*

Where a lessee comes upon a property and the lease is found to be invalid, the principle of S. 108, cl. (b) of the Transfer of Property Act applies to the improvements made by him. If he seeks any remedy, he is only entitled to have the superstructure removed by him and not to any compensation.

Coutts-Trotter, J.—No claim for compensation can be made except in the case of fraud, namely, if the persons really entitled knew that they were entitled and the persons in actual possession were not, and stood by and allowed them to spend money in building on the land. An allegation of fraud must be made definitely and categorically and must, in no circumstances, be allowed to be made at a subsequent stage of the suit. *Govindasami Naidu v. Ethirajammal*, (1916) M.W.N. 180=34 Ind. Cas. 1.

COUTTS-TROTTER and SESHAGIRI AIYAR, JJ.

(2) *Transaction whether lease or mortgage—Construction—Stipulation against sub-letting whether a covenant or a condition—Breach of stipulation—Remedy—Damages, Ss. 10, 108 (j), 111 (g). Transfer of Property Act.*

N executed a document reciting that, on receipt of Rs. 4,000 by him, his interests in certain properties were released to M for a term of years at an annual rental of Rs. 4,000. On the expiry of the term, the lessee should receive back from the executant the sum of Rs. 4,000 without interest, provided that the annual rent was fully satisfied, and should surrender the leased property. It was also recited in the lease that the lessee should not sub-lease the property without the permission of the executant.

Held, the transaction was a lease and not a mortgage.

Where the lease does not contain any provision for forfeiture or re-entry by the lessor in the event of a sub-lease being executed without his consent, the provision against sub-letting is a covenant and not a condition, and the landlord's remedy in the case of a breach would be a suit for damages merely and not a suit for ejectment. And such a breach of covenant against alienation does not operate in law to prevent an assignment of the leased properties (a).

Under S. 10, Transfer of Property Act, any provision in the lease restraining the lessee from sub-letting would obviously be for the benefit of the lessor, if it provides for the re-entry of the lessor or for forfeiture of the lease

Lease—(Continued).

But the mere existence of a condition in general terms against sub-letting is not of itself sufficient to prove that the condition was for the benefit of the lessor. There must be something else, either in the circumstances of the case or in the nature of the property, or there must be something in the wording of the lease, from which it might be inferred that the provision was intended directly for the benefit of the lessor. *Sital Prasad v. Nawab Dildar Ali Khan*, 1 Pat. L.J. 1=33 Ind. Cas. 403.

CHAPMAN and ATKINSON, JJ.

References:—(a) 36 C. 745; L.R. 3 Q.B. 799, R.

- (3) *Meaning and effect of the expression "Istemrari Mokarari" in leases—Lease when to be deemed perpetual and when not—Effect of mode of registration of lease—Meaning of words in a document whether a question of fact or law—Rights of parties to a contract by what law to be judged—Lease in favour of two persons—Duration of lease—Limitation when arises.*

The expression *istemrari mokarari* does not *per se* convey an estate of inheritance, but an *istemrari mokarari patta*, notwithstanding the absence of words indicative of heritability, such as *ba farsandan*, *naslan bad naslan* or *al-aulad*, may be a perpetual grant, if the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties show such an intention with sufficient certainty (a).

The clauses which impose a restraint on transfer and on the cutting down of fruit-bearing or income-yielding trees and make it obligatory on the lessees to plant another tree in place of any that might fall down by itself, are not consistent with the theory that a perpetual grant was intended. On the other hand, the clause which throws the cost of improvement on the lessees indicates some measure of continuity, but not necessarily perpetuity.

The fact that a lease was in favour of two lessees points to the conclusion that, though some measure of continuity was desired, perpetuity was not intended.

But a substantial premium is one of the surest indications of a permanent grant.

The mode in which registration of a lease is effected is not conclusive in an enquiry as to the nature of the lease (b).

The meaning of words in a document is a question of fact, though the effect of words is a question of law. But the existence of an alleged customary local meaning is not proved merely by the assertions of witnesses that, in their opinion, the expression has a particular meaning (c).

The rights of the parties to a contract are to be judged of by that law by which they may justly be presumed to have bound themselves (d).

Where a lease is in favour of two persons and it would not terminate till the death of the survivor of the two lessees, the landlord is not entitled to re-enter till both the lessees are dead and till then no question of limitation or

Lease—(Continued).

recognition arises. *Ram Narain Singh v. Chota Nagpur Banking Association*, 43 C. 332=36 Ind. Cas. 321.

JENKINS, C.J., MOOKERJEE and RICHARDSON, JJ.

References:—(a) 12 Q. 117=12 I.A. 205; (1848) S.D.A. 752=10 I.D. (O.S.) 532; 5 M.I.A. 467; (1860) S.D.A. 577; 13 B.L.R. 124=L.R. Sup. Vol. 181; 5 C. 543 (555); 8 C. 664=9 I.A. 33; 27 C. 156=26 I.A. 216; 30 C. 883; 10 C.W. N. colxxxv; 24 W.R. 176, F.; 3 W.R. 84; 2 B. L.R. (A.C.) 125-n; 5 W.R. 101; 3 B.L.R. (A.C.) 226=12 W.R. 3; 5 B.L.R. 652=14 W.R. 107, overruled. (b) 7 C. 196; 33 C. 1133; 35 C. 845; 10 A. 372=15 I.A. 51, R. (c) (1891) 1 Q. B. 79, R. (d) (1865) 6 B. and S. 100 (189) =122 E.R. 1134; 27 M. 131=31 I.A. 1, F.

- (4) *Ejectment—Lease for a term—Option of renewal—Option not exercised—Holding over—Notice to quit, effect of—Landlord and Tenant Procedure Act (VIII B.C. of 1869), S. 53.*

On the determination of a lease for a term, the lessee is bound to surrender possession to the lessor; on default, he may be ejected without notice, for though he entered into the land with right, he has remained without right, as the tenant cannot be said to hold over, unless the landlord assents to the continuance of his possession (a).

The assent of the landlord to the continuance of the occupation of the tenant after expiry of the term may be indicated by acceptance of rent or by conduct which justifies an inference to that effect.

The fact that the landlord tolerates the continuance in occupation of the tenant after the expiry of the term does not make his former tenant, his tenant in future (b).

The serving of notice to quit, on the person who continues in occupation after the expiry of the term, does not make him a tenant whose tenancy is to be terminated by a notice to quit (c).

The defendant took a lease of the disputed land in the district of Sylhet from the plaintiff for a term of 3 years from 13th April 1904 till 13th April 1907. The lease provided expressly that the tenant would give up possession upon the expiry of the term, and that, if he desired to continue as tenant, he would take a fresh lease. The term expired, but the defendant neither took a fresh lease nor made over possession of the land to the plaintiff. Notices were served on the 8th and 15th October 1910, asking the defendant to quit on the 13th April 1911:

Held, that the defendant ceased to be tenant upon the expiry of his term and was liable to be ejected in the manner prescribed by S. 53 of the Landlord and Tenant Procedure Act. *Paramananda Singh v. Syjou Singh*, 24 C.L.J. 30.

MOOKERJEE and ROE, JJ.

References:—(a) 20 C.L.J. 448, F.; 2 W.R. 73, D. (b) 34 C. 396; (1810) 3 Taunt. 54, R. (c) (1810) 3 Taunt. 54, R.

Lease—(Continued).

- (5) *Transfer of Property Act, S. 8—Trees reserved by the lessor—Lessor, if can cultivate shellac on the trees—Fruits and flowers—Kabuliat, construction of.*

In construing a *Kabuliat* it is permissible to look at the circumstances under which it was executed.

A lessor reserved property in the trees growing on the lease-hold land and the lessee was prohibited from taking them away; the latter was given enjoyment of the *phal phul* (fruits and flowers) of the trees only at the lessor's permission.

Held, that this ownership did not carry with it a right to go on the lessee's land to cultivate shellac on the trees reserved.

A transfer of property passes to the transferee the interest of the transferor unless a different intention is expressed or necessarily implied.

Per *Sanderson, C.J.*—Fruits and flowers of the trees would in the ordinary meaning of the words include the natural products of the trees. *Raj Charan Mahanti v. Kanai Kumar*, 24 C. L.J. 21 = 24 Ind. Cas. 72.

SANDERSON, C. J. and WOODROFFE, J.

- (6) *Moguli rent, meaning of—Presumption of lost grant, in absence of proof of legal title, on the basis of user exercised and enjoyed—Surface rights and subsoil and mineral rights—Distinction between copyholders and tenants of freehold land in England—Construction of the terms "Restrictions and conditions as to the exercise of the power" in mining lease—Limitation—Adverse possession.*

"*Moguli*" is a word of doubtful meaning and at the best imports no more than that the rent assessed represents a proportion of the Government revenue.

Where a Court is asked to presume a grant in favour of a party in the nature of a lost grant, i.e., a lawful origin of a long and continuous user and enjoyment of property in the absence of legal proof of title, it should presume a grant on the basis of the user exercised and enjoyed by that party.

Where the mineral rights were never in contemplation of the parties when the lease was granted in 1830 and the lessees never exercised any mineral rights whatsoever, barring taking small quantities of coal from the outcrop for domestic purposes and burning lime, and the zamindar by the lease granted a willage containing 380 bighas at the abnormally low rent of Rs. 17 per annum the presumption made, in the absence of the original document, was that only surface rights were conveyed to the grantee.

In such cases the mines and minerals and the property in the subsoil remained the property and in the possession of the zamindar. The surface rights with their incidents became vested in the grantee as tenure holders (a).

If the mines are presumed to be vested in, and to be the property of, the zamindar, his rights must be just the same as those of a fee-simple freehold owner of land according to

***Lease—(Continued).**

English law, who makes a grant with an express reservation of the mines to himself together with the incidents that follow therefrom. By reason of that presumption and by reason of the severance of the tenement and the reservation that must be deemed to arise in favour of the Raja, the latter has, as incident to his right of property and ownership in the mines, the right by implication of law to enter upon the surface of the tenure-holder's mouzah for all reasonable and necessary purposes to enable him to work the mines and exercise his mineral rights.

The case of *Prince Mahomed Bakhyar Shah v. Rani Dhajamoni* (b) in so far as it decided that the owner of a limited estate in possession can prevent the grantor or his lessee to work and appropriate the mineral during the existence of such limited estate unless the grantor had expressly reserved the mineral right in his own favour, was wrongly decided by the misapplication of the English Law of copyholders to the case of owners and tenants of freehold land.

The distinction between freehold and copyhold law is that, under the latter, there is no division into strata and the tenant obtains possession of the entire surface and subsoil to the centre of the earth, so that the lord of the manor cannot work the mines unless he proves a right or custom to that effect. It is only under the copyhold law and where there is no reservation of custom proved that a deadlock occurs and neither landlord nor tenant can work the mines. Under the law applicable to freehold land there can be no deadlock, for if the mines be excepted the grantor has an implied right to work them incidental to such exception; if there be no exception then that right is with the grantee as owner of the surface and subsoil.

Where tenement is severed the person in whose favour the reservation is made is the absolute owner of the subsoil and the rights of such a person are that he has by implication of law the power to go upon the surface and do all things reasonably necessary in order to exercise the enjoyment of his property (c).

Held, on the construction of a mining lease, that under cl. (3) of Part II of the lease, the lessees had merely power and liberty to enter upon lands in direct possession of the Raja himself in order to exercise the mineral rights vested in them. The implied liberty to enter and work the mines subject to reasonable restrictions is not to be curtailed by the express conditions of the lease unless the intention is apparent. Part III of the lease headed "Restrictions and conditions as to the exercise of the above liberties, powers and privileges" must be construed as only restricting the liberties and privileges expressly conferred by Part II and not as any restriction upon the general right of access which is implied by law (d).

Held, also—That the defendant acquired no title by adverse possession to the mines and minerals of the land in question. *Nawagarh*

Lease—(Continued).

Coal Co., Ltd. v. Beharilal Trigunalt, 20 C.W.N. 1185=1 Pat. L.J. 275.

ATKINSON and KINGSFORD, JJ.

References:—(a) 37 I. 4. 136=37 C. 723=14 C.W.N. 746; 39 C. 696=16 C.W.N. 482, *Rel. on*; 42 C. 346=19 C.W.N. 203. R. (b) 2 C.L.J. 20, R.; 1 Ob. 256 (1906), R. (c) L.R. 1 A.C. 701 (1876), R. (d) 2 B. & C. 197; 107 Eng. Rep. 361 (1823), R.

(7) *Tenants-in-common—Co-lessors—Lease by Muhammadan co-heirs—Mining lease—Forfeiture—Penal provisions, strict construction of—Relief against forfeiture—Covenantants in a mining lease, exception to rule—English and American law.*

One of the several tenants in common can sue to recover possession of his share from the joint lessee(s).

The aim of law generally is in favour of giving relief against forfeiture. The safe recourse will be to act on the principle that penal provisions providing for re-entry should be strictly construed.

In the cases of mining leases however a proviso for re-entry should be strictly construed and forfeiture cannot ordinarily be relieved against.

English and American law on the point considered(b).

Per Seshagiri Aiyar, J—In mining leases, as a general rule forfeiture should be enforced if it had been incurred. Under the English Conveyancing Acts of 1881 and 1892, which were passed with the object of affording relief against forfeiture, one of the exceptions relates to "Covenants in a mining lease to allow the lessor to have access to, or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or workings." In the Indian Mines Act (VIII of 1901) there is no provision either in favour of or against forfeiture. The principle of the English rule must therefore ordinarily apply. The reason of the rule is apparently that in a mining lease, the interest of the Government are also in jeopardy. Consequently, it is not a matter depending entirely upon the rights of the actual parties to the contract. For this reason also it must be held that the forfeiture cannot be ordinarily relieved against. **Syed Ahmad v. Magnesite Syndicate, Ltd.**, 39 M. 1049=32 Ind. Cas. 512.

SESHAGIRI AIYAR and KUMARASAMY SASTRIYAR, JJ.

References:—(a) 29 M. 29; 25 M.L.J. 315; 11 B. 644, F.; 35 C. 807, *Diss.* (b) (1844) 6 Q.B. 107 and (1846) 15 M. & W. 465=153 E.R. 953, F.; 35 B. 289, *Ref. to*.

(8) *Right of mortgagor in possession to grant perpetual lease.*

A mortgagor in possession may make a lease conformable to usage in the ordinary course of management, but cannot grant a lease on unusual terms or alter the character of the land or authorise its use in a manner prejudicial to the right of the mortgagee. In other words a mortgagor, by any dealings with the mortgage property subsequent to the date of the mort-

Lease—(Continued).

gage cannot injuriously affect the rights of the mortgagee under the prior contract, as by creating a lease in perpetuity. **Ram Sarup v. Suraj Din**, 30 Ind. Cas. 258.

KANHAIYA LAL, A.J.C.

References:—17 Ind. Cas. 5=17 C.L.J. 284; 16 Ind. Cas. 476=15 O.C. 239; 2 A.L.J. 294; 23 Ind. Cas. 102=12 A.L.J. 370=36 A. 248, R.

(9) *Grant of, by mortgagor—Absolute prohibition of alienation—Right of redemption by lessee.*

A covenant against alienation in a mortgage deed creates only a personal liability as between the mortgagor and the mortgagee and it can be enforced by the mortgagee against the mortgagor only and not against all persons claiming under him. Where a lease is granted by a mortgagor for a long term after the execution of a mortgage deed, absolutely prohibiting alienation by him, such lease is not void and inoperative as against the mortgagee, merely on the ground that it has been executed in contravention of the covenant against alienation. The lessee acquires an interest in the equity of redemption in the property and can redeem it upon that footing.

Though a lease for a long term is a transaction prejudicial to the saleable value of the mortgage security and injurious to the interest of the mortgagee the latter can claim only that his rights under the mortgage or the decree obtained upon it cannot be prejudiced by the subsequent action of the mortgagor. The lease cannot be declared to be void, but will hold good except as to the long period. **Mir Syed Husain v. Bank of Upper India, Ltd.**, 30 Ind. Cas. 289.

LINDSAY, C.J. and KANHAIYA LAL, A.J.C.

References:—6 C. 317=7 C.L.R. 233; 16 B. 599, R.; 16 Ind. Cas. 476=15 O.C. 239; 30 B. 250=6 Bom. L.R. 996; 17 Ind. Cas. 1=17 C.L.J. 384, D.

(10) *Covenant by lessor to renew—Possession, suit for—Ejectment.*

A covenant by a lessor to renew, assuming it is legally enforceable against him, cannot be pleaded in bar to a suit for possession brought by the lessor on the expiry of the term mentioned in the lease-deed(a).

The covenant to renew in a lease-deed cannot be treated as a promise not to eject the lessee on the expiry of the term. **District Board of Tanjore v. Vythilinga Chetty**, 31 Ind. Cas. 919.

SADASIVA AIYAR and NAPIER, JJ

References:—13 M.L.J. 217; 29 M. 336; 30 M. 300, F.

(11) *Lease money, non-reservation of—Rights under deed—Oudh Rent Act (XIX of 1868), S. 5—XXII of 1886, S. 5—"Proprietor", meaning of.*

Where no lease-money is reserved in a document, the rights conferred by that deed are not those of a lessee, but either proprietary or under-proprietary rights. *Held* also that the word "proprietor" in S. 5 of Oudh Rent Act (XXII of 1886)=former Act XIX of 1868, S. 5, refers

Lease—(Continued).

to subordinate as well as to superior proprietor.
Jagdeo Singh v. Karam Ali, 33 Ind. Cas. 170.
 HOLMS, S.M. and CAMPBELL, J.M.

Reference:—R.A.R. No. 49, F.

(12) *Lease or grant, 'hamasha' or 'dawami'.*

The use of the words 'hamasha' or 'dawami' in a lease or grant does not create an interest after the life of the lessee or grantee; and the conduct of the parties in the circumstances of each case and similar matters must be considered(a). **Tribhuvan Dat v. Muhammad Abdul Hasan Khan**, 33 Ind. Cas. 264.

HOLMS, S.M.

Reference:—(a) 23 A. 324 (P.C.), R.

(13) *Rent payable according to custom of kwin—Custom. proof of.*

Where by the terms of a lease rent was payable according to the custom of *kwin*, held that the custom referred to must be as to the manner of the payment or the quantity to be paid, and that if the tenant contended that it referred to a custom whereby the rent payable was proportional to the outturn in case of destruction of crops by floods, the onus was on him to prove the custom by evidence of a sufficient number of transactions in which the custom was followed so as to justify the Court in holding that the custom was general in the *kwin* in question. **Ma U v. Maung Pohan**, 33 Ind. Cas. 756.

MAUNG KIN, J.

(14) *Proviso against transfer—Transfer of Property Act (IV of 1882), S. 106—Notice to quit—Ejectment—Transfer of major portion—Failure to serve notice.*

Where in a lease there was a covenant against transfer and the lessee did transfer the major portion of the property but the lessor failed to serve a written notice as he was bound to do under the terms of the lease read by the light of S. 106 of the Transfer of Property Act, the lessor cannot enforce his right of re-entry the lease not having been determined in the proper manner. **Umesh Chandra Ghose v. Kala Chand Guha**, 34 Ind. Cas. 516.

CHATTERJEE and BEACHCROFT, JJ.

(15) *Lease, renewal of, by thekadar—Thekadar's powers, absence of definite restriction on—Onus of proof on landlord.*

In the absence of definite restriction on a *thekadar's* powers to admit tenants to tenancies, it is for the landlord to show as against tenants admitted to tenancies by the *thekadar* that the landlord has restricted the *thekadar's* ordinary powers as a tenant, and had made the restrictions known, and, secondly, that the transactions between the *thekadar* and the tenants have not been made in good faith in the ordinary course of village management. **Padal Khan v. Muhammad Mehdi Ali Khan**, 33 Ind. Cas. 203.

HOLMS, S.M. and CAMPBELL, J.M.

Reference:—S.D. No. 9 of 1892, R.

(16) *Ejectment—Mortgagee auction-purchaser—Lease by mortgagor—Lessee, status of—Lis pendens—Transfer of Property Act, S. 52—*

Lease—(Continued).

Lease after mortgage and before suit, if and when can be avoided. **Madan Mohan Singh v. Rajkishori Kumari**, 17 C.L.J. 384=17 Ind. Cas. 1=21 C.W.N. 88. See Final Part, 1913, Col. 785.

(17) *Lease—Lease created before 1882—Six months' notice—Bengali year—British Calendar.* **Gopi Nath Chongdar v. Shaik Abdul Gafur**, 22 C.L.J. 74=30 Ind. Cas. 886. See Final Part, 1915, Col. 907.

(18) *Landlord and tenant—Occupation rent—Unregistered lease deed—Not admissible to prove rent fixed—Claim for occupation rent—Whether transferable—Transfer of Property Act, Ss. 3, (6) (e)—Registration Act (1908), Ss. 17 (d), 49.* **Govindasami Pillai v. Ramasami Aiyar**, 18 M. L.T. 483=2 L.W. 1186=31 Ind. Cas. 604. See Final Part, 1915, Col. 908.

(19) *Lease—Evidence, documentary and oral, admissibility of—Putra poutradhi kramay, meaning of—Lease, perpetual—Tenancy, Proof of.* **Kartik Mandal v. Rama Charan Mandal**, 29 Ind. Cas. 502=20 C.W.N. 182. See Final Part, 1915, Col. 908.

(20) *Lease for indefinite period—Whether admissible in evidence without registration—S. 17, Registration Act (1877)—Tenant's possession when becomes adverse—Tenant holding over—Suit by landlord against tenant—Limitation—Art. 139, Limitation Act (1908).* **Umar Bakhsh v. Baldeo Singh**, 37 P.R. 1915=32 Ind. Cas. 35. See Final Part, 1915, Col. 908.

(21) *Mokarrari—Provision for enhanced rent for collection charges—Construction of contract.* See ABWAB, No. 1, 36 Ind. Cas. 404.

(22) *Insolvent an agriculturist—Of occupancy holding ordered to be surrendered—House ordered to be sold—Order illegal.* See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 22, 14 A.L.J. 1031.

(23) *Abandonment—Whether sufficient to extinguish rights of lessee's transferee—Surrender and abandonment—Difference between—Transfer of Property Act, Ss. 3, 117.* See BEN. ACT VIII OF 1885 (TENANCY), No. 43, 33 Ind. Cas. 98.

(24) *Land in suburb of Calcutta let out in 1898 for 5 years—Lessee holding on till sued in ejectment, in 1910—Status of lessee—Non-occupancy—Raiyat holding over after term if holds on from year to year.* See BEN. ACT VIII OF 1885 (TENANCY), No. 3, 20 C.W.N. 259.

(24-a) *Lessee inducted on land by a void, if may plead lease void and created no rights—Lease registered in contravention of the law—Suit for damages for breach of covenant—Estoppel.* See BEN. ACT VIII OF 1885 (TENANCY), No. 41, 20 C.W.N. 1340.

(25) *Lessee's possession disturbed by persons with paramount rights of pasturage over premises demised—Lessee's right to abatement of rent.* See BEN. ACT VIII OF 1885 (TENANCY), No. 68, 34 Ind. Cas. 851.

Lease—(Continued).

(26) Under-riyati lease for 9 years with covenant for renewal if valid. See BEN. ACT VIII OF 1885 (TENANCY), No. 38, 20 C.W.N. 948.

(27) Written—A definite amount over and above amount stated as rent, but forming part of consideration, if abwab. See BEN. ACT VIII OF 1885 (TENANCY), No. 37, 21 C.W.N. 108.

(28) See MAD. ACT I OF 1908 (ESTATES LAND), No. 9, 20 M.L.T. 520.

(29) Auction lease of a lanka—Lease different from an ordinary jeroyiti patta—Lessee whether a "ryot." See MAD. ACT I OF 1908 (ESTATES LAND), No. 18, 20 M.L.T. 36.

(30) Under Oudh Circular 16 of 1874—Nature and incidents of—Ejectment. See OUDH ACT XXII OF 1886 (RENT), No. 16, 34 Ind. Cas. 760.

(31) Construction of—See U.P. ACT II OF 1901 (AGRA TENANCY), No. 18, 33 Ind. Cas. 524.

(32) Lessee *pendente lite*—Whether can be made parties to the suit. See CIV. PRO. CODE (1908), No. 551, 1 Pat. L.J. 596.

(33) Suit for rent—Barred claims for unliquidated damages if can be set off. See CIV. PRO. CODE (1908), No. 370, 3 L.W. 24.

(34) Kabuliati—Construction—Grant of right to defendant to carry on trade in a district—Not in restraint of trade nor against public policy—Suit for rent—Limitation—Arts. 110, 116, Limitation Act (1908). See CONTRACT ACT, No. 28, 1 Pat. L.J. 37.

(35) Suits to declare, as void and inoperative—Power of Court to grant declaration in modified form. See DECLARATION, No. 1, 30 Ind. Cas. 289.

(36) Service inam—Lease by minority of inamdars for 40 years—Remedy of inamdar not joining in the lease. See INAM, No. 1, 3 L.W. 157.

(37) Right of *lambardar* to, out *banjar* land. See LAMBARDAR, No. 1, 12 N.L.R. 136.

(38) Kabuliati condition in—Renewal of, covenant for—Terms of conditions, non-specification—Effect. See LANDLORD AND TENANT, No. 55, 33 Ind. Cas. 450.

(39) One of several co-sharers giving lease—Right to eject tenant—Tenant not to dispute lessor's title—Estoppel. See LANDLORD AND TENANT, No. 59, 34 Ind. Cas. 71.

(40) Permanent lease—Covenant for re-entry upon an involuntary sale—Validity—Right of re-entry where reserved and where not—Remedy of lessor—Forfeiture when takes place—Election by lessor—Effect of forfeiture on under-lease. See LANDLORD AND TENANT, No. 22, 24 C.L.J. 40.

(41) Tenant executing the, but not let into possession by the lessor—Whether can deny lessor's title—Estoppel. See LANDLORD AND TENANT, No. 31, 31 M.L.J. 719.

Lease—(Continued).

(42) Contract of—Suit for possession in the alternative for the return of premium—Mesne profits. See LIMITATION ACT (1908), No. 192, 32 Ind. Cas. 245.

(43) Lease for a term of years—Failure to give possession of part of the demised property—Breach of covenant whether continuing—Suit by lessee for damages—Limitation when commences. See LIMITATION ACT (1908), No. 191, 19 M.L.T. 318.

(44) Registered—Suit for recovery of rent by assignee of landlord. See LIMITATION ACT (1908), No. 180, 1 Pat. L.J. 506.

(45) Suit for damages for breach of covenant in a registered *Zur-i-peshgi*. See LIMITATION ACT (1908), No. 192-b, 34 Ind. Cas. 51.

(46) Lease of wakf property for more than 3 years—Validity. See MAHOMEDAN LAW (WAKF), No. 3, 4 L.W. 74.

(47) Of wakf house property for more than a year—Sanction of Kazi—Earnest money paid to Mutwalli for a lease—Right to recover. See MAHOMEDAN LAW (WAKF), No. 10, 32 Ind. Cas. 205.

(48) Husband and wife—Permanent, to wife alone—Deed containing no words of conveyance to children. See MALABAR LAW (HUSBAND AND WIFE), No. 1, 31 Ind. Cas. 654.

(49) Simple mortgage-deed and, executed simultaneously, effect of. See MORTGAGE (GENERAL), No. 31, 19 O.C. 328.

(50) See MORTGAGE (REDEMPTION), No. 22, 33 Ind. Cas. 220.

(51) Simple mortgage—Mortgagor's power to create leases binding on mortgage. See MORTGAGE (SIMPLE), No. 1, 20 C.W.N. 350.

(52) Usufructuary mortgage—Lease to mortgagors—Lessee agreeing to pay rent in cash and deliver certain other things in kind—*Rasum Zemindari*—Rent or cess—Right to recover. See MORTGAGE (USUFRUCTUARY), No. 1, 14 A.L.J. 393.

(53) Suit for partition by lessee against co-sharers of lessor if maintainable. See PARTITION, No. 1, 23 C.L.J. 231.

(54) Agreement to lease for more than a year constituted by correspondence contained in several letters—Registration if compulsory. See REGISTRATION ACT (1908), No. 21, 3 L.W. 370.

(55) For one year—Necessity for registration. See REGISTRATION ACT (1908), No. 16, 36 Ind. Cas. 378.

(56) Number of documents constituting—Legality. See REGISTRATION ACT (1908), No. 8, 35 Ind. Cas. 108.

(57) Tark bad land if can be leased for cultivation. See REGISTRATION ACT (1908), No. 8, 35 Ind. Cas. 108.

(58) By mortgagor after mortgage decree but before sale, whether binds the auction-purchaser—Nature of mortgage decree—*Lis pendens*

Lease—(Concluded).

—Transfer of Property Act, Ss. 52, 58. See **SMALL CAUSE COURT, JURISDICTION OF**, No. 1, 20 M.L.T. 512.

(59) Contract to lease—Plea of inadmissibility for want of registration—Validity—Admission of genuineness in pleadings—Effect—Suit for specific performance—Maintainability. See **SPECIFIC PERFORMANCE**, No. 5, 20 M.L.T. 44.

(60) Document leasing land for 10 years for casuarina plantation—Construction—Document unstamped but registered—Liability for stamp duty—Unstamped instrument admitted in evidence—Effect—Procedure. See **STAMP ACT (1909)**, No. 9, 31 M.L.J. 234.

(61) See **SUB-LEASE**, No. 2, 24 C.L.J. 533.

(62) See **SUB-LEASE**, No. 1, 24 C.L.J. 539.

(63) Tender of, at prevailing rate—Refusal of valid tender by tenant—Ejectment, liability to. See **TENDER**, No. 1, 33 Ind. Cas. 450.

(64) German, Secular agent of Basel Mission, by, of land in British India—Whether he can sue for rent—Limitation on alien enemy's right of suit. See **TRADING WITH ENEMY**, No. 2, 31 M.L.J. 860.

(65) From year to year—Legality of transfer. See **TRANSFER OF PROPERTY ACT**, No. 17, 36 Ind. Cas. 1006.

(66) Lease for planting casuarina trees not an agricultural lease—Registration necessary. See **TRANSFER OF PROPERTY ACT**, No. 138, 3 L.W. 319.

(67) Lease from year to year in existence from before 1882—Transferability—Custom—Onus—Transfer by way of sub-lease—Landlord if may recover khas possession. See **TRANSFER OF PROPERTY ACT**, No. 9, 20 C.W.N. 322.

(68) Provision in, for forfeiture on alienation—Usufructuary mortgage by lessee without divesting himself of possession. See **TRANSFER OF PROPERTY ACT**, No. 143, 31 Ind. Cas. 454.

(69) Rent—Assignment—Debt—Simple mortgage and subsequent, of the hypotheca to mortgage—Mesne profits. See **TRANSFER OF PROPERTY ACT (IV OF 1882)**, No. 16, 31 Ind. Cas. 473.

(70) Deed of lease prescribing no time—Long occupation—Effect—No right of permanent occupancy created—Monthly tenancy. See **TRUST**, No. 4, 33 Ind. Cas. 57.

Lease Deed.

Execution and registration of—Passing of title—Intention of parties. See **TITLE**, No. 3, 30 Ind. Cas. 210.

Leave of Court.

(1) *Quare*.—Whether leave is necessary for an application to execute the decree by attachment of the insolvent's property. *In the matter of Ko Shwe Gye*, 9 Bur. L.T. 252.

YOUNG, J.

(2) Proceedings in. Insolvency—Release of property seized as that of the insolvent—Appeal from order of release—Need for leave of Court

Leave of Court—(Concluded).

—Practice. See **ACT III OF 1907 (PROVINCIAL INSOLVENCY)**, No. 19, 33 Ind. Cas. 773.

(3) Judgment-debtor, adjudicated insolvent in High Court subsequent to decrees of Presidency Small Cause Court—Application for execution by arrest in the Presidency Small Cause Court—Leave of the High Court, necessary. See **ACT III OF 1909 (PRESIDENCY TOWNS INSOLVENCY)**, No. 7, 39 M. 689.

(4) Pendency of insolvency proceedings—For application to arrest insolvent—Effect of refusal of discharge on protection order. See **ACT III OF 1909 (PRESIDENCY TOWNS INSOLVENCY)**, No. 8, 9 Bur. L.T. 252.

(5) Omission to obtain leave for suit for other reliefs on same cause of action—Subsequent suit barred—Jurisdiction to grant leave. See **CIV. PRO. CODE (1908)**, No. 324, 9 Bur. L.T. 93.

Leave to Appeal.

(1) See **CIV. PRO. CODE (1908)**, No. 224, 30 Ind. Cas. 372.

(2) To Privy Council—Value of subject-matter of suit. See **CIV. PRO. CODE (1908)**, No. 694, 30 Ind. Cas. 204.

Leave to Appeal to Privy Council.

Application for—Question of law involved in appeal, nature of. See **CIV. PRO. CODE (1908)**, No. 219, 19 O.C. 131.

Leave to bid.

See **EXECUTION OF DECREE**, No. 19, 24 C. L.J. 462.

Leave to sue.

(1) See **CIV. PRO. CODE (1908)**, No. 60, 4 L. W. 411.

(2) Application for, as pauper. See **CIV. PRO. CODE (1908)**, No. 592, 9 Bur. L.T. 228.

(3) Application for leave to sue whether a stage in a judicial proceeding. See **SANCTION TO PROSECUTE**, No. 1, 43 C. 597.

Legal Necessity.

(1) See **HINDU LAW (ALIENATION)**, No. 26, 36 Ind. Cas. 780.

(2) Building of a residential home whether a. See **HINDU LAW (JOINT FAMILY)**, No. 28, 35 Ind. Cas. 326.

(3) Hindu Law—Sale by Hindu widow—*Onus probandi*. See **HINDU LAW (WIDOW)**, No. 14, 20 M.L.T. 335.

(4) Maintenance—Gift by husband to one who has been maintaining him during illness—Lien—Charge. See **HINDU LAW (WIDOW)**, No. 31, 35 Ind. Cas. 566.

(5) Hindu widow, alienation made by—Established for bulk of the consideration, effect of. See **HINDU LAW (WIDOW)**, No. 18, 19 O.C. 122.

Legal Practitioners.

(1) *Legal Practitioners—Women—Administration of Justice Reg.* 1781, Ss. 46, 84—*Reg.* VII of 1793, *Preamble*, Ss. 2, 5—

Legal Practitioners—(Concluded).

Regt XXVII of 1814, Preamble, Ss. 3, 5, 10—14, 18, 20—22, 30, 35, 37—Act I of 1846, Ss. 4, 12—Act XVIII of 1852—Act XX of 1853—Act II of 1857 (Calcutta University)—Act XLV of 1860 (Penal Code), S. 8—Act X of 1865 (Succession Act), S. 3—Act XI of 1865 (Small Cause Courts), S. 1—Act XX of 1865 (Pleadings), Ss. 2, 4, 5—Act XXIII of 1865 (Punjab Chief Courts), S. 1—Act XXIX of 1865—Legal Practitioners Act (XVIII of 1879), S. 6—Statutes, interpretation of—Number—Gender—General Clauses Act (I of 1868), S. 2 (i), (ii)—General Clauses Act (X of 1897), S. 13—Statutory rules, Construction of—General Rules of the High Court, Part I, Ch. XI, rr. 18, 27—Solicitor's Act, 1843 (6 and 7 Vict., c. 73), S. 48.

Under the Statute law of British India a woman though otherwise qualified, is not entitled to be enrolled as a legal practitioner. The Acts, Regulations and cases relating to the subject discussed. *In the matter of Regina Guha*, 24 C.L.J. 382=21 C.W.N. 74=35 Ind. Cas. 925 (S.B.)

SANDERSON, C.J., MUKERJEE, CHITTY, TEUNON and CHAUDHURI, JJ.

- (2) Counsel engaged for one party appearing for the opposite party, desirability of.

Held, that it is not desirable except under very exceptional circumstances that a counsel who has been engaged to conduct a case from start to finish for one party should be allowed to appear for the opposite party. *In re Syed Ali Muhammad*, 19 O.C. 237.

KANHAIYA LAL and KENDALL, A.J.CS.

- (3) Conduct of counsel, in the matter of cross-examination of witnesses examined on commission, commented upon. *Baqar Mirza v. Mehdi Hasan*, 19 O.C. 246.

LINDSAY, J.C. and KENDALL, A.J.C.

- (4) Appearance by pleader not duly authorized—Delegation of duties by one, to another practice as to—Legality—Power of attorney See CIV. PRO. CODE (1908), No. 344, 12 N.L. R. 189.

- (5) See CONSTRUCTION—OF ACTS, No. 2, 31 M.L.J. 698.

Legal Practitioners Act (I of 1846).

- (1) Ss. 4, 12. See LEGAL PRACTITIONERS, No. 1, 24 C.L.J. 382.

- (2) S. 12. See No. 1, *supra*.

Legal Practitioners Act (XX of 1853).

See LEGAL PRACTITIONERS, No. 1, 24 C. L.J. 382.

Legal Practitioners Act (XVIII of 1879).

- (1) Ss. 4 and 27—Construction of.

There is nothing in Ss. 4 and 27 of the Legal Practitioners Act of 1879 which takes away the right of audience of Vakils on the original side of the Madras High Court. *Namberumal Chetty v. Narasimhaiah*, 31 M.L.J. 698=, (1916) 2 L.W.N. 529.

COUTTS-TROTTER, J.

Legal Practitioners Act (XVIII—(Continued).

- (2) S. 6. See LEGAL PRACTITIONERS, No. 1, 24 C.L.J. 382.

- (3) Ss. 10 and 32—Civ. Pro. Code, O-III, r. 1—Usurping function of a pleader.

Where a Barrister reported to the District Judge that respondent appeared and conducted cases before Courts as holding powers of attorney on behalf of parties in several suits without holding a pleader's license, and where the District Judge refused to interfere with the discretion of the Judges of those Courts under the proviso to r. 1 of O. III, Civ. Pro. Code.

Held, that the proper course for the Barrister would be to file a petition asking the District Court to punish the respondent under 32 of the Legal Practitioners' Act and that, notwithstanding the order already passed by him, the District Judge should proceed to adjudicate on the matter as to whether the respondent is usurping the functions of a pleader and practising as one in contravention of S. 10 of the Act, or whether his appearances are covered by the provisions of O. III, r. 1, Civ. Pro. Code. *Maung Maung Gyi v. Maung Sein Nyun*, 8 Bur. L.T. 280.

HARTNOLL, O.C.J.

Reference:—14 C. 556, R.

- (4) Ss. 13 and 14—Specific charge under S. 13 (b), necessary—Taking instructions from unauthorised persons—Conduct improper.

In a reference under the Legal Practitioners Act, the High Court confines itself to the charge framed by the Primary Court. The finding that the pleader was guilty of fraudulent or grossly improper conduct in the discharge of his professional duty within the meaning of S. 13 (b) of the Legal Practitioners Act was disregarded as the pleader was not charged with that.

Where a pleader was found to have received instructions from a person about whom he made no enquiries as to his right to instruct him on behalf of certain minors or their mother and also that he filed a written statement which was not prepared by him and that he accepted the vakalatnama at the instance of another party in the suit and that he filed a receipt which on the face of it was not genuine without even examining it, it was held that his conduct was most improper, although no injury resulted from it.

The pleader was suspended for nine months. *In the matter of Babu Jugal Chandra Mazumdar*, Pleader, 20 C.W.N. 1016=17 Cr. L.J. 229=34 Ind. Cas. 645.

CHAMIER, C. J., SHARFUDDIN and ATKINSON, JJ.

- (5) Ss. 13, 14—Jurisdiction of Subordinate Courts to take proceedings under the Act—Inquiry by Subordinate Courts if valid—Misconduct in the presence of the Court, effect of—Misconduct, what amounts to—Contempt—Disciplinary action, object of.

S. 14 of the Legal Practitioners Act covers cases of misconduct under all the clauses of

Legal Practitioners Act (XVIII of 1879)
—(Continued).

S. 13 of the Act and as such a Court subordinate to the High Court is competent to enquire into a matter falling within the purview of any of the clauses of S. 13, when the legal practitioner whose conduct is called in question practises in such Court (d).

The High Court is competent to take action under S. 13, cl. (f) of the Legal Practitioners Act after such enquiry as it thinks fit and it is not required that the enquiry should be conducted directly by the High Court; it may well be made by a Subordinate Court under the direction of the High Court, the only essential being that notice containing the charges should be given to the legal practitioner to show cause against suspension or dismissal (b).

Misconduct in the presence of the Court which shews disrespect of its authority or which obstructs or has a tendency to interfere with the due administration of justice is contempt and thus disorderly conduct in the Court-room, is treated as contempt of Court. The Court is deemed present in every part of the place set apart for its use and for the use of its officers, jurors and witnesses and consequently misbehaviour in such places is misconduct in the presence of the Court (c).

A contempt may be of such a character as to warrant the exercise of the disciplinary powers of the Court.

Held, therefore, that the legal practitioner in the present case having used abusive language to an officer of the Court, and the same having been heard by the presiding judge himself who was holding his Court in the room adjoining the office where the incident took place, misbehaved in the presence of the Court within the meaning of this Rule and as such the Court could take disciplinary action against him.

Where the Court takes notice of a misconduct which consists in the obstruction of or an interference with one of its officers, the object of the discipline enforced is not so much to vindicate the dignity of the Court or the person of the officer as to prevent undue interference with the administration of justice (d). *In the matter of Rasik Lal Nag*, 24 C.L.J. 190=20 C.W.N. 1294.

MOOKERJEE and CUMING, JJ.

References:—(a) 29 A. 61; 18 M.L.T. 549, Appr.; 27 C. 1023, Diss. (b) 19 M.L.J. 504, R. (c) (1824) 1 Hogan 138, R. (d) (1886) 35 Ch. D. 449 (455), *Rel. on*.

(6) S. 13 (a)—*Pleader—Withdrawal of money from Court on instruction of person not clerk with "card" for the year*—*Bona fide belief by pleader that such person had taken out "card"*—*Breach of r. 45 (e) of General Rules and Orders of Calcutta High Court*.

The petitioner, a pleader, was engaged jointly with another at the time of the institution of a suit, but his signature on the vakalatnama was not then obtained. When the other pleader had left the station to practise elsewhere the petitioner signed his name on the vakalatnama seeing that he was the only pleader left to

Legal Practitioners Act (XVIII of 1879)
—(Continued).

conduct the case. After a decree was passed money was deposited by the judgment-debtor. The petitioner acting under the instruction of the clerk of the other pleader withdrew the money and paid over the amount to that clerk. At the time when the petitioner got instructions from the other pleader's clerk, the latter had ceased to be a pleader's clerk as he had not taken out his "card" for the year, but the petitioner *bona fide* believed that that person had taken out his "card" and was authorized to act as pleader's clerk.

Held that the petitioner had contravened the provisions of S. 13 (a) of the Legal Practitioners' Act. He ought to have taken care to inform himself whether the person who gave instruction had any authority to give him instructions on behalf of the decree-holder. He had been guilty of carelessness in treating what the alleged clerk told as if it was instruction from the decree-holder. He had also contravened the provisions of r. 44 (e) of the General Rules and Orders of the High Court. As there was no question of dishonesty against the petitioner, the High Court discharged him expressing at the same time severe censure against him for what he had done. *In the matter of Babu Jogendra Chandra Nandy*, 36 Ind. Cas. 442.

CHATTERJEE and SHEETSANKS, JJ.

(7) S. 13 (a)—*Pleader acting in contravention of—Effect*. See *PLEADER*, No. 3, 20 C.W.N. 283.

(8) Ss. 13 (f) and 14—*Insulting affidavit filed before a Judicial Officer—Misconduct under S. 13, cl. (f)—Subordinate Court can take action under S. 14* District Judge of Kistna v. Hanumanulu, 18 M.L.T. 549=(1915) M.W.N. 1050=17 Cr. L.J. 38=32 Ind. Cas. 326=39 M. 1045 (F.B.). See Final Part, 1915, Col. 30.

(9) S. 14—*Order refusing to renew pleader's certificate—Order for prosecution—Penal Code*, S. 209.

The plaintiff, a pleader, brought a suit for pre-emption based on the Muhammadan Law which was decreed by the Munsif. The District Judge on appeal reversed the decree of the Munsif after having recalled and examined the plaintiff. The District Judge ordered the prosecution of the plaintiff under S. 209, Penal Code. The prosecution was suspended by reason of appeals against his decree having been preferred in the High Court. Upon the pleader applying for renewal of certificate, the District Judge reported to the High Court that he had refused to renew his certificate:—

Held, that the action of the District Judge was inconsistent, for either he ought to have waited till the determination of the criminal prosecution which he had ordered or he might have proceeded under S. 14 of the Legal Practitioners' Act. The District Judge had in effect found the pleader guilty before he had been tried, by ordering his suspension. *In the matter of a Pleader*, 14 A.L.J. 82=88 A. 182 (F.B.).

RICHARDS, C.J., TUDBALL and RAFIQ, JJ.

Legal Practitioners Act (XVIII of 1879)
—(Continued).

- (10) S. 14—*Inquiry under the Act—Nature—Application for transfer under S. 24, Civ. Pro. Code, 1908—Non-sustainability—Code of Civil Procedure, Ss. 24, 141—Not applicable—S. 107, Government of India Act, 1915—Whether High Court can interfere thereunder.*

The Code of Civil Procedure is not applicable to inquiries under S. 14 of the Legal Practitioners Act (a).

S. 141, Civ. Pro. Code (1908), does not contemplate an inquiry of an administrative nature, such as is prescribed by S. 14 of the Legal Practitioners Act.

Observations as to whether the High Court is precluded from interfering under S. 107, Government of India Act, 1915, by the terms of S. 14, Legal Practitioners Act, which make it incumbent that the inquiry should be made by the presiding officer of the Court.

The inquiry under the Legal Practitioners Act cannot be delegated or transferred to another officer who is not the presiding officer of the Court in which the mal-practices complained of were committed.

A proceeding under the Legal Practitioners Act is not a Civil proceeding. The procedure under the said Act is self-contained. It is neither criminal nor civil but purely designed for the purpose of discipline in controlling the procedure and the conduct of practitioners practising in subordinate Courts. *Per Atkinson, J.*

It cannot be said that, under S. 107, Government of India Act, 1915, the High Court has the right to interfere unless it finds that the presiding officer or a subordinate Court has grossly abused his powers or that he has acted in excess of his jurisdiction or done something without jurisdiction. *Per Atkinson, J. In the matter of Janak Kishore, Abinash Ch. Nandi and Girwardhar, 1 Pat. L.J. 576.*

MULLICK and ATKINSON, JJ.

Reference: (a) 27 C. 1023, *Ref. to.*

- (11) S. 11—Pleader's conduct as a party to suit—When action to be taken under. See PLEADER, No. 3, 20 C.W.N. 278.

(12) S. 11. See Nos. 4, 5, 8, *supra*.

- (13) S. 27—Rule framed thereunder—Authority to Court to fix daily fee to adversary's advocate—Decree granting daily fee—Agreement by Advocate to receive lump sum—Advocate not to retain amount awarded in excess of the sum agreed to by him—Right of client to fee allowed.

The rule framed under S. 27 of the Legal Practitioners Act, 1879, which authorises the Court to allow a daily fee for every day after the first day of the final hearing assumes the probability of Advocates charging a daily fee for every day after the first day of the final hearing and recognizes that such a charge would be reasonable and that the client who has to pay it should recover from his opponent what he has had to pay up to reasonable limits.

Legal Practitioners Act (XVIII of 1879)
—(Concluded).

If an Advocate is content to agree with his client to conduct a case for a fixed sum, and neglects to stipulate for a daily fee he has only himself to blame for his oversight. There is no rule of law which entitles an Advocate to retain anything of what he has received from his client's opponents as compensation for the extra days after the first which the hearing took. His client is entitled to the amount allowed as Advocate's fee even if he did not pay so much. *Julian Francis Coelho v. N.M. Gowdasjee, 33 Ind. Cas. 107.*

CHARLES FOX, C.J. and PARLETT, J.

(14) S. 27. See No. 1, *supra*.

(15) S. 32. See No. 3, *supra*.

Legal Representative.

- (1) Appeal—Death of respondent—Application to substitute heirs after six months—Ignorance of death—Whether 'sufficient cause.' See CIV. PRO. CODE (1908), No. 544, 118 P.R. 1916.

(2) Application under C.P.C., O. XXI, r. 3, to bring, on record—Limitation. See CIV. PRO. CODE (1909), No. 539, 35 Ind. Cas. 438.

(3) Brought on record after death of judgment-debtor setting up title of third person—Order, appealability of. See CIV. PRO. CODE (1908), No. 102, 31 Ind. Cas. 393.

(4) Decree whether binding on person not represented in the suit—Death of defendant pending suit—Person having no interest in deceased's estate added as representative—Decree and execution proceedings whether binding on true heir—Decree legally obtained against proper person—Execution proceedings against wrong representative—*Bona fides*—Effect. See CIV. PRO. CODE (1909), No. 7, 31 M.L.J. 222.

(5) Property of deceased Zamindar whether assets in the hands of his legal representative—Decree against a party as the legal representative of a deceased person—Extent of his liability—Liability to account for profits also—Burden of proof. See CIV. PRO. CODE (1909), No. 122, 30 M.L.J. 391.

(6) Property sold in execution of money decree passed against two persons as legal representatives—Suit by one of them to recover possession of property—Suit barred by S. 47, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 95, 14 A.L.J. 846.

(7) Suit for malicious prosecution against manager of joint Hindu family—Abatement—Cause of action—Survival—Applying for setting aside abatement—Refusal—Appeal. See CIV. PRO. CODE (1908), No. 549, 31 Ind. Cas. 4.

(8) Decree—Execution—Effect of bringing one out of several representatives on the record. See EXECUTION OF DECREE, No. 15, 14 A.L.J. 989.

(9) Suit by legal representative to establish his position—Duty of plaintiff. See RELIGIOUS ENDOWMENTS, No. 1, 30 M.L.J. 274.

Legatee.

(1) **Legatee—Right to inspect executor's accounts.** See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 19, 9 S.L.R. 134.

(2) **Application for succession certificate as heir—Right as, not set up—Genuineness of will not gone into—Registration.** See LIMITATION ACT (1908), No. 165, 32 Ind. Cas. 99.

(3) **Decree against executor, in his personal capacity—Attachment of money due to judgment-debtor as executor.** See REFERENCE, No. 1, 9 Bur. L.T. 226.

Legislature, Powers of.

Executive authorities—Legislature, delegation by, to executive. See BEN. ACT V OF 1911 (CALCUTTA IMPROVEMENT), No. 1, 24 O.L.J. 246.

Legitimacy.**Acknowledgment of sonship.**

No statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate; but, where no proof of that kind has been given, such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement, provided his legitimacy be possible. *Mirza Sadik Husain Khan v. Nawab Salyed Hashim Ali Khan*, 31 M.L.J. 607=19 O.C. 192=18 Bom. L.R. 1037=21 C.W.N. 130=(1916) 2 M.W.N. 577=14 A.L.J. 1248=21 M.L.T. 40=38 A. 627=36 Ind. Cas. 104 (P.C.).

LORD ATKINSON and LORD PARKER OF WADDINGTON, SIR JOHN EDGE and MR. AMEER ALI.

Lessee.

(1) **Position of the Inamdar same as Zamindar under Permanent Settlement—Inamdar not a permanent, under Government.** See CROWN GRANTS, No. 1, 31 M.L.J. 483.

(2) **Suit for possession or damages against perpetual hereditary.** See JURISDICTION OF CIVIL COURTS, No. 5, 19 O.C. 339.

(3) **Adverse possession, title by—If can acquire such title against his lessor—Non-payment of rent, if creates adverse possession.** See LANDLORD AND TENANT, No. 32, 24 C.L.J. 453.

Lessor and Lessee.

(1) **Tenancy invalid—Perpetual lease—Tenancy at will.**

Where a perpetual lease has become invalid for want of registration it may be treated as a tenancy at will. *Ram Sarup v. Suraj Din*, 30 Ind. Cas. 258.

KANHAIYA LAL, A.J.C.

(2) **Possession by lessee for over 12 years paying uniform rent—Adverse possession—Perpetual tenancy, claim of.**

Where a lessee remained in cultivating possession of the land in suit for over 12 years and paid rent at the rate entered in the lease deed, in the absence of any evidence to show that he set up any definite title to hold in

Lessor and Lessee—(Concluded).

permanency under the lease, he cannot be considered to be a perpetual lessee by right of 12 years' adverse possession. *Bhagwat v. Rai Krishna Pal Singh*, 30 Ind. Cas. 276.

HOLMS, S.M.

(3) **Covenant in lease reserving to lessor right of re-entry—Validity of condition.**

A condition in a lease reserving to the lessor a right of re-entry with or without resort to the Courts is void as being against law and opposed to public policy. Therefore a lessor cannot justify a re-entry by force under power of a condition of the said kind. *Habib Ullah Shah v. Bakht Ball Singh*, 30 Ind. Cas. 292.

LINDSAY, J.C., and KANHAIYA LAL, A.J.C.

References:—15 Ind. Cas. 857=15 O.C. 295, R.

Letter.

(1) **Pleadings—Written statement—Specific denial—In absence of denial, facts alleged treated as admitted—Practices—Proof of.** See CIV. PRO. CODE (1908), No. 368, 18 Bom L.R. 946.

(2) **Suit on account of dealings, by debtor with Rs. 100 sent by insurance—Acknowledgment of liability—Limitation, if saved.** See LIMITATION ACT (1908), No. 57, 4 L.W. 148.

(3) **Accompanying deposit of title-deeds, giving a personal remedy to the mortgagee, if simple mortgage requiring to be stamped and registered as such.** See TRANSFER OF PROPERTY ACT, No. 82, 31 M.L.J. 347.

Letters of Administration.

(1) **Letters of administration—Grant, order of—Minor heir not made party—Revocation proceeding—Guardian ad litem, appointment of—Contentious suit—Minor not being cited nor being properly represented, effect of.**

A minor, if not sighted nor properly represented in a probate proceeding, is entitled to come in and to have the will proved in a solemn form in her presence.

It is the duty of a Judge, as soon as he is informed of the existence of the minor heir of the deceased in the letters of administration proceeding, to issue notice upon the minor and to have a guardian *ad litem* appointed for her (a).

A revocation case is quite a separate case from the probate or letters of administration proceeding.

If a guardian *ad litem* had been appointed in the letters of administration case, it would have been the duty of the Court to proceed with the case as a contentious case in the presence of the minor represented by the guardian *ad litem*. In that case fresh evidence would have had to be taken and an order made upon the contention. A representative of the minor in the revocation proceeding is not effective for the purpose of making an *ex parte* order in the letters of administration proceed-

Letters of Administration—(Concluded).

ing for the grant, an order in solemn form. **Nabagopal Goswami v. Srigopal**, 23 C.L.J. 79=33 Ind. Cas. 14.

D. CHATTERJEE and CHAPMAN, JJ.

Reference:—(a) 2 C.W.N. 100, R.

(2) Application for letters of administration—Objection by persons claiming as adoptees—Question of adoption when to be gone into. See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 1, U.B.R. (1915), 4th Qr., p. 101.

(3) See EXECUTION OF DECREE, No. 29, 33 Ind. Cas. 169.

(4) Executor, who has not renounced must, when cited in Court, take out probate—Can issue, if he fails, to be a competent applicant. See PROBATE, No. 4, 18 Bom. L.R. 766.

Letters Patent.

- 1.—ALLAHABAD.
- 2.—BOMBAY.
- 3.—CALCUTTA.
- 4.—MADRAS.

—1.—Allahabad.

S. 10—Order granting sanction—Appeal.

An order by a single Judge of the High Court, granting sanction to prosecute the applicant in respect of certain false statements contained in an affidavit is not a "judgment" within the meaning of S. 10 of the Letters Patent and no appeal lies from that order to a Division Bench of the same Court. **Ramjas v. Mahadeo Prasad**, 14 A.L.J. 1230=39 A. 147.

RICHARDS, C.J. and BANERJI, J.

—2.—Bombay.

Cl. 12—Leave of the Court—Jurisdiction of High Court—Suit on hundi—Hundi passed up-country and not made payable in Bombay—Consideration of the hundi being transaction between Bombay merchant and up-country constituent.

The plaintiff, carrying on business in Bombay, filed a suit in the Bombay High Court, to recover the amount of hundis drawn by the defendant on his own firm. The hundis were passed at Bassum in Akola where the defendant resided and where the plaintiff had gone to settle his accounts of dealings with the defendant. A question having arisen whether the Court had jurisdiction to entertain the suit:

Held, that the Court had no jurisdiction to entertain suit, for the hundis were not made payable in Bombay and the fact that the consideration for the hundis was the balance of accounts due by the defendant to the plaintiff in respect of transactions effected in Bombay was no part of the cause of action.

Per **Macleod, J.**—In giving leave under cl. 12 of the Letters Patent in suits on promissory notes or hundis, I have always given leave when the money was payable in Bombay; and refused leave when the money was payable out of Bombay. If there are transactions in Bombay, which result in a credit in favour of the Bombay merchant against an up-country

Letters Patent—(Continued);**—3.—Bombay—(Concluded).**

merchant, and if the Bombay merchant goes to settle his account up-country and accepts a promissory note or hundi in satisfaction of his account, then if he wants to sue on that note in Bombay, he must take the precaution to see that the note is made payable in Bombay. **Sewaram Gokaldas v. Bajrangdat Hardwar Potdar**, 18 Bom. L.R. 57=32 Ind. Cas. 918=40 B. 473.

MACLEOD, J.

—3.—Calcutta.

(1) Cl. 10—Point not argued before single Judge if may be urged in appeal. See LIMITATION ACT (1908), No. 25, 20 C.W.N. 1303.

(2) S. 12—"Suit for land or other immovable property"—What it includes—Suit for compensation for wrong to land whether such a suit. **Sudamdih Coal Co., Ltd. v. Empire Coal Co., Ltd.**, 42 C. 942=31 Ind. Cas. 581. See Final Part, 1915, Col. 915.

(3) S. 15, Order by judge on the Original Side refusing to restore case dismissed for default if a judgment and if appealable—Civ. Pro. Code, 1908, O. XLIII, r. 1, if applies to appeal from one judge of the High Court to others—S. 104, scope and effect of—"Judgment" what is.

An order by a Judge on the Original Side of the High Court under r. 9, O. 1X of the Civ. Pro. Code, refusing to set aside an order of dismissal of a suit under r. 8, is a judgment within the meaning of S. 15 of the Letters Patent and is appealable thereunder.

Per **Sanderson, C.J.** and **Mookerjee, J.**—Such an order is also appealable under cl. (c), r. 1, O. XLIII of the Code of Civil Procedure, which applies to an appeal from the decision of one Judge of the High Court to other Judges of the Court.

Per **Mookerjee, J.**—The law has been substantially altered since the decision of the Judicial Committee in 10 I.A. 4=9 C. 482 was pronounced. The effect of S. 104 of the Civ. Pro. Code of 1908 which is materially different from S. 588 of the Code of 1882 is not to take away a right of appeal given by cl. 15 of the Letters Patent but to create a right of appeal in cases even where cl. 15 of the Letters Patent is not applicable (a). **Sm. Mathura Sundar Das v. Haran Chandra Saha**, 20 C.W.N. 594=23 C. L.J. 443=43 C. 857=34 Ind. Cas. 634.

SANDERSON, C.J., WOODROFFE and MOOKERJEE, JJ.

References:—(a) 33 C. 1323=10 C.W.N. 986, doubted; 40 C. 482, R.

(4) Cl. 15—Judge on leave—Judgment, delivery of—Difference—Reference—Civ. Pro. Code (1908), S. 98—Appeal.

An appeal was heard by a Bench of two judges, one of whom subsequently went on temporary leave; while he was so away from Court; his judgment signed by him was read out by his

Letters Patent—(Continued).

—3.—Calcutta—(Concluded).

colleague who delivered at the same time a separate dissenting judgment :

Held, that the judgments were valid in law and an appeal lay therefrom under cl. 15 of the Letters Patent.

A reference to a third judge under S. 98 of the Code of Civil Procedure can be made only when the point of law on which the judges have disagreed has been stated by both the judges for purposes of the reference. *Adwalta v. Saroj*, 23 C.L.J. 592=34 Ind. Cas. 584.

SANDERSON, C.J. and MOOKERJEE, J.

(5) *Cl. 15—Appeal—Judgment—Code of Civil Procedure, 1908, S. 115—Order refusing application for revision.* *Peary Lal Daw v. Banamall Dey*, 22 C.L.J. 40=30 Ind. Cas. 862. See Final Part, 1915, Col. 915.

(6) *Cl. 15—Judgment—Appeal—Order for security by single Judge.* *Sukhlal Chundermull v. Eastern Bank, Ltd.*, 22 C.L.J. 41=42 C. 735=31 Ind. Cas. 238. See Final Part, 1915, Col. 915.

(7) *Cl. 15—Appeal—Decision under S. 115, Civ. Pro. Code (1908)—Difference of opinion.* *Baljnath Mistri v. Raja Jung Bahadur*, 22 C.L.J. 113=30 Ind. Cas. 906. See Final Part, 1915, Col. 915.

(9) *Cls. 15, 36, 39—Letters Patent appeal—Judgment of reversal passed by single Judge of High Court cancelled—Effect—Position of judge sitting alone—Whether his decision can be revised under S. 115, Civ. Pro. Code—Ss. 110, 115, Civ. Pro. Code—Leave to appeal to Privy Council.*

This was an application for a certificate under S. 110, Civ. Pro. Code. The Court of first instance as well as the lower appellate Court decided adversely to the present applicant. On appeal to the High Court, a single Judge reversed the decree of the lower appellate Court. From this judgment of a single Judge there was an appeal to the High Court under cl. 15 of the Charter, with the result that the judgment of the single Judge was reversed by a Bench of two judges. Thus the first judgment of the High Court reversed the decree of the Court immediately below but this reversal was afterwards in effect cancelled, with the result that the only effective judgment of the High Court affirmed the decision of the Court immediately below (S. 10, Civ. Pro. Code).

A judge sitting alone is not a Court subordinate to the High Court, but performs a function directed to be performed by the High Court (ol. 36, Letters Patent). And thus no decision of a single Judge can be revised under S. 115 of the Code. *Debendra Nath Das v. Bibudhendra Mansingh*, 43 C. 90=33 Ind. Cas. 745.

JENKINS, C.J. and N.R. CHATTERJEE, J.

(9) *Cl. 36.* See No. 6, *supra*.

(10) *Cl. 39.* See No. 8, *supra*.

Letters Patent—(Continued).

—3.—Madras.

(1) Letters Patent appeal—Review of judgment if competent. See REVIEW, No. 1, 9 L. W. 172.

(2) *Cls. 10, 39—Disciplinary proceedings under cl. 10—Not appealable—No power to give leave to appeal to Privy Council. In the matter of a High Court Vakill*, 29 M.L.J. 16=29 Ind. Cas. 879=39 M. 128 (F.B.). See Final Part, 1915, Col. 916.

(3) *Cl. 12—Suit for damages for cutting trees on land outside Madras—Defendant living within its local limits—Jurisdiction—Suit for “land or other immoveable property”—Practices—Original side—Fees paid to advocate who was instructed by Vakill—Whether can be allowed as costs.*

Suit for damages for unlawfully cutting and carrying away certain trees belonging to the plaintiff's estate. The land on which the trees stood was outside the jurisdiction of the Original side of the High Court, but the defendant lived within its local limits. *Held* that the claim for compensation, was a claim for ‘land’ within the meaning of cl. 12 of the Letters Patent, and the Original Side of the High Court had no jurisdiction to entertain it (a).

Held also that a party engaging an advocate through a vakil on the Original side of the High Court is not entitled to the costs of Counsel, and the Judge had no power to grant the fee of such advocate (b). *Y. Y. Srinivasa Ayanagar v. Y. Kannappa Chetti*, 30 M.L.J. 120=33 Ind. Cas. 906.

WALLIS, C.J. and SESHAGIRI AIYAR, J.

References :—(a) 3 M. 192; 3 M.H.C.R. 125; 6 M. 344; 27 M. 157; 28 M. 227; 29 B. 249; 37 B. 494; 37 B. 675; 33 C. 739; 42 C. 912; 20 C. 689; (1693) A.C. 602, R. (b) 1 M. 24; 3 St. Tr. N.S. 1294; (1850) 15 Q.B. 171, R.

(4) *Cls. 12, 15—Partition suit—Lands partly situate within jurisdiction and partly without—Leave to sue, grant of, only discretionary—Order refusing amendment of plaint—Judgment—Appeal—Civ. Pro. Code (1908), Ss. 16 and 17—Properties in different jurisdiction—Successive suits for partition in different Courts, whether barred.*

In the case of suits relating to land situated partly within and partly without the local limits of the original civil jurisdiction of the High Court, the granting of leave to sue under cl. 12 of the Letters Patent (Madras) is purely discretionary and the High Court will not, in appeal, interfere with the exercise of the Judge's discretion.

Pursuant to leave obtained *ex parte* under cl. 12 of the Letters Patent (Madras), a person instituted a suit on the Original Side of the High Court for partition of lands partly situated within and partly without the ordinary Original Civil Jurisdiction of the High Court. The leave was afterwards set aside and the plaintiff's application for leave to amend the

Letters Patent—(Concluded).**—S. Madras—(Concluded).**

plaint by excluding the joint family lands situate outside the jurisdiction, was also dismissed.

Held, on appeal, that the order refusing leave to amend was not a judgment within the meaning of cl. 15 of the Letters Patent and was not appealable (a).

The rule that a partition suit should embrace all the family properties has no application where the properties are situate in different jurisdictions.

Per *Seshagiri Iyer, J.*—Ss. 16 and 17 of the Civ. Pro. Code have not deprived parties of their right to bring successive suits in respect of properties situate in different jurisdictions.

A plaint presented on the granting of a provisional leave loses vitality the moment the leave is withdrawn. *Mahalingam v. Natesa Aiyar*, 3 L.W. 107 = (1916) M.W.N. 146 = 32 Ind. Cas. 423.

WALLIS, C.J. and SESHAGIRI AIYAR, J.
Reference:—(a) 35 M. 1, F.

(5) Ss. 12 and 18. See ACT III OF 1909 (PROVINCIAL TOWNS INSOLVENCY), No. 2, 20 M. L.T. 311.

(6) S. 15—*Complaint under Copyright Act—Discharge of accused—Power of High Court to direct further enquiry.*

Under S. 15 of the Charter Act the High Court is entitled to set aside an order of a Magistrate dismissing a complaint instituted under the Copyright Act. *Chellapaswami v. Singaravelu Mudaliar*, 30 Ind. Cas. 721.

SADASIVA AIYAR and PHILLIPS, JJ.

References:—21 Ind. Cas. 681 = 25 M.L.J. 510 = 14 Cr. L.J. 633 = 38 M. 514, F.

(7) S. 15—*Order of single Judge staying further trial of a suit—Not a judgment—No appeal.* *Palaniappa Chetty v. Chidambaram Pillai*, 18 M.L.T. 312 = 30 Ind. Cas. 942. See Final Part, 1915, Col. 916.

(8) Cl. 15—*Order of single High Court Judge refusing to interfere in revision—Order whether 'Judgment' and whether appealable—Matters of discretion—Interference in appeal—Practice*—S. 115, Civ. Pro. Code (1908). *Srinivasa Iyengar v. Ramaswami Chettiar*, 29 M.L.J. 12 = 18 M.L.T. 46 = 29 Ind. Cas. 846 = 39 M. 235. See Final Part, 1915, Col. 916.

(9) Cl. 15—*Judgment—Appeal—Order setting aside abatement—Sufficient cause—Administrator-General's Act (II of 1874), Ss. 17 and 18—Civ. Pro. Code (1908), O. XXII, rr. 3 and 9—Abatement, order of, if necessary.* *Kyroom Bee v. The Administrator-General of Madras*, 2 L.W. 948 = 31 Ind. Cas. 38. See Final Part, 1915, Col. 917.

(10) S. 15—*Letters Patent appeal if lies against the exercise of discretion by a single Judge under S. 46, Provincial Insolvency Act—Practice.* See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 18, 4 L.W. 51.

(11) Cl. 15. See No. 4, *supra*.

(12) S. 18. See No. 5, *supra*.

(13) Cl. 39. See No. 2, *supra*.

Lex Forl.

(1) Governs suits and execution proceedings. See EXECUTION OF DECREE, No. 13, 18 Bom. L.R. 481.

(2) See FOREIGN JUDGMENT, No. 1, 9 Bur. L.T. 106.

Lex loci.

See FOREIGN JUDGMENT, No. 1, 9 Bur. L.T. 106.

Libel.

Newspaper article—Fair comment—Imputation of motives—Justification—Statement of full facts if necessary—Well founded criticism—meaning of—Statement of facts, when amounts only to comment.

What in form is a statement of facts may, in the circumstances of the case, amount to no more than comment.

To justify the imputation of motives to a person in an article published in a newspaper and complained of as libellous, it is not necessary that all the facts upon which the imputations were based should have been set out therein. This is especially so in cases of public discussions on matters of public interest proceeding in the Press from day to day, where it will be too much to expect the writer in each article to set out all the facts upon which his comment is based, including admitted facts which are within the knowledge of every one interested in the question. An accurate statement of the facts which form the subject of criticism or even a clear reference to them will be sufficient. The defendant, however, will not be protected if he had mis-stated the facts and then commented upon the facts so untruefully stated (a).

The statement that a criticism must be well-founded means no more than that a fair-minded man might, upon the facts, *bona fide* hold that opinion. *Madras Times v. Rogers*, 3 L.W. 67 = 30 M.L.J. 294 = (1916) M.W.N. 267 = 32 Ind. Cas. 408.

WALLIS, C.J. and PHILLIPS, J.

References:—(a) 6 T.L.R. 133, 137, F.; (1908) 2 K.B. 329, R.; L.R. 4 Q.B. 73, 93; 3 B. & S. 776, 777; (1909) 1 K.B. 289, 253; 25 M.L.J. 476, R.

License.

(1) *License obtained to sell drugs—Contract that plaintiff would share gain or loss in consideration of his paying money—Whether contract illegal as being a transfer or sub-lease by licensees—Rules framed under the Excise Act.*

R. 82 framed under the Excise Act prohibits a transfer or sub-lease by a licensee. Where a plaintiff in consideration of the payment of some money contracted with the defendant who had obtained a license to sell drugs that if there was profit the plaintiff would get one anna and in case of loss he would suffer loss to the extent of an anna, held that the contract constituted neither a "transfer" nor a "sub-lease" by the licensee, and the contract was not illegal as being in violation of r. 82 made under the

License—(Concluded).

Exolse, Act. *Shiam Bihari Lal v. Malhi*, 14 A.L.J. 1095=39 A. 107.

RICHARDS, C. J. and BANERJI, J.

(3) *Right of user—License to use land of another, coupled with grant—Revocation of license—Easements Act* (V of 1882), S. 60. *Partap Singh v. Dhurm Singh*, 13 A.L.J. 886=30 Ind. Cas. 581. See Final Part, 1915, Col. 918.

(3) Market established after the Act V of 1884 (Madras), granted—Renewal after one year—If levy of fee for renewal, proper. See **MAD. ACT V OF 1884 (LOCAL BOARDS)**, No. 3, (1916) 2 M.W.N. 253.

(4) *Mandamus—Commissioner of Police—Refusal to issue, to conduct procession, though right established by Civil Court—Apprehension of breach of the peace.* See **MAD. ACT III OF 1888 (CITY POLICE)**, No. 1, 31 M.L.J. 426.

(5) Transfer of property coupled with license—Transfer void for want of writing or registration—Validity of mere license—Such license whether revocable. See **EASEMENTS ACT**, No. 10, 12 N.L.R. 75.

(6) Remedy for wrongful revocation of a. See **TRANSFER OF PROPERTY ACT**, No. 130, 14 A.L.J. 137.

Lien.

(1) Purchase pending attachment—Effect—Void purchase—No, for purchase-money. See **CIV. PRO. CODE** (1908), No. 142, 34 Ind. Cas. 34.

(2) Maintenance—Gift by husband to one who has been maintaining him during illness—Charge. See **HINDU LAW (WIDOW)**, No. 31, 35 Ind. Cas. 666.

(3) Lien for unpaid purchase-money. See **LIMITATION ACT** (1908), No. 187, 33 Ind. Cas. 527.

(4) Widow's, for dower—Whether interest on unpaid dower is chargeable. See **MAHOMEDAN LAW—DOWER**, No. 2, 14 A.L.J. 1055.

(5) Salvage—Subrogation—Prior and subsequent mortgage. See **SALVAGE LIEN**, No. 1, 14 A.L.J. 953.

(6) See **TRANSFER OF PROPERTY ACT**, No. 73, 33 Ind. Cas. 121.

(7) Right of mortgagee to, on money deposited under decree for specific performance. See **TRANSFER OF PROPERTY ACT**, No. 42, 36 Ind. Cas. 968.

Life Estate.

Quere.—Whether the principle of Hindu Law that an alienation by a widow can be validated by the consent of the reversioners can be applied to gifts by life estate owners. *Yeerakkal v. Thirumakkal*, 34 Ind. Cas. 596.

COUTTS-TROTTER and SESHAGIRI AIYAR, JJ.

Life Interest.

See **WILL**, No. 14, 18 Bom. L.R. 943.

Light and Air.

Dominant owner's right to access of—Extent—Alteration of dominant tenement—Effect—Imposition of greater burden on servient owner—Not permissible. See **EASEMENTS ACT**, No. 5, 9 S.L.R. 101.

Limitation.

(1) *Application for execution of decree—Date which limitation begins to run.*

In the case of an application for the execution of a decree, the period of limitation begins to run from the date the decree is directed to bear under the provisions of the Code of Civil Procedure, which is the date on which the judgment is pronounced. The date on which the decree is actually signed is not the date from which limitation begins to run. *Surajdeo Narain Singh v. Musahroo Raut*, 1 Pat. L.J. 359.

ROE and JWALA PRASAD, JJ.

(2) *Suit instituted on insufficient Court-fee on last day of limitation—Balance made up after expiration of period of limitation—Suit not barred—Code of Civil Procedure* (V of 1908), S. 149, O. V, r. 1, O. IV, O. VII, r. 11—*Act XIV of 1882*, S. 582-A.

In this case the suit was instituted on the last day of limitation on an insufficiently stamped plaint. The balance of Court-fee was subsequently paid after the period of limitation had expired, but the Court accepted such payment, held, that under the above circumstances the suit was not barred by limitation (a).

"When the plaint, whatever its defects, is presented to the proper officer, the suit is then and there instituted, and once it has been instituted within the time prescribed, the suit escapes from the bar of limitation, unless such bar be one in existence prior to the suit (b)."

Per *Jwala Prasad, J.*—S. 149 of the present Code has settled antecedently conflicting views as to the law on the interpretation of S. 582-A of the Old Code, but now under the existing Code if a deficient Court-fee be paid within the time permitted by the Court, it will have retrospective effect and validate the plaint as from the date when the suit was instituted.

Per *Jwala Prasad, J.*—If a limit was fixed by the Court for the payment of the deficiency in the Court-fee and the fee was paid within the time allowed, and even beyond the time if the payment was accepted by the Court, the plaintiff's suit would not have been barred. The suit cannot be dismissed when there was no time fixed by the Court and the plaintiff paid the deficit Court fee within a reasonable time after notice of the deficiency and the Court accepted the payment. *Gaya Loan Office, Ltd. v. Aawdh Behari Lal*, 1 Pat. L.J. 420.

ATKINSON and JWALA PRASAD, JJ.

References:—(a) 29 A. 749, *Appr.* (b) 29 A. 749, *F.*

(3) *Money received under decree subsequently reversed—Commencement of limitation.*

When a person receives money under a decree which is afterwards reversed on appeal,

Limitation—(Continued).

the statute of limitation commences to run in his favour only from the reversal (a). **Ashutosh Goswami v. Upindra Prosad Mitra**, 24 C.L.J. 467=21 C.W.N. 564.

MUKERJEE and CUMING, JJ.

Reference:—(a) 19 C.W.N. 1167, *doubted*.

(4) *Mortgage—Award of compensation for breach of penal clause—Amount awarded a charge on mortgaged property.*

Where certain amount was awarded as reasonable compensation for breach of penal clauses in a mortgage-deed it must be considered for the purpose of limitation as a portion of the mortgage money and the amount awarded can be charged against the mortgaged property. **Babu Narendra Bahadur v. Oudh Commercial Bank, Limited**, 30 Ind. Cas. 323.

STUART, A.J.C.

References:—34 C. 150=4 A.L.J. 109=11 C.W.N. 249=5 C.L.J. 106=17 M.L.J. 43=9 Bom. L.R. 301=2 M.L.T. 75=34 I.A. 9; 22 C. 143, R.; 19 O. 19; 24 C. 699=1 C.W.N. 437; 23 I.A. 138=1 C.W.N. 52=19 A. 39=6 M.L.J. 214=7 Sar. P.C.J. 88, D.

(5) *Presentation of plaint returned—Expiry of period of limitation at time of representation.*

A plaint was presented within time, but the Court ordered it to be returned for re-presentation to the proper Court. It was re-presented as ordered by the Court, but only after the period of limitation for the suit had expired. *Held* that the re-presentation of the plaint was a continuance of the suit and therefore no question of limitation arose. **Ganga Prasad Rai v. Ramanand Gir**, 30 Ind. Cas. 544.

BANERJI and RAFIQUE, JJ.

(6) *Principal and Agent—Throwing up work and leaving place of business—Effect of rejoining work.*

Where an Agent threw up the agency at Rangoon and came back to Madras the termination of the agency was the starting point for limitation. The fact that he went back to give evidence and again acted for a time until the Principal sent a successor cannot prevent the running of time as regards the first agency, provided there was not any acknowledgment of liability to account after such termination. **Palaniappa Chetty v. Alagappa Chetty**, 30 Ind. Cas. 691.

WALLIS, C.J. and SRINIVASA AYYANGAR, J.

(7) *Suit for possession by transferee from co-heir not in possession—Suit within 12 years from date of transfer.*

A suit for possession by a vendee from a co-owner cannot be dismissed on the ground that the plaintiff failed to prove his or his vendor's possession within 12 years of the suit. **Ram Parson Upadhia v. Sheikh Kalab Husain**, 36 Ind. Cas. 100.

RAFIQUE, J.

References:—23 Ind. Cas. 562; 26 Ind. Cas. 346=16 M.L.T. 530; 27 Ind. Cas. 1; 27 Ind. Cas. 465=21 C.L.J. 253=20 C.W.N. 51; 28 Ind. Cas. 22=31 C.L.J. 192; 29 Ind. Cas.

Limitation—(Continued).

275; 30 Ind. Cas. 586; 25 Ind. Cas. 573=27 M.L.J. 600=1 L.W. 699=16 M.L.T. 196= (1914) M.W.N. 708; 35 C. 961=12 C.W.N. 127=6 C.L.J. 735; 20 A. 182=A.W.N. (1897) 19; 4 A.L.J. 473=A.W.N. (1907) 195; A.W.N. (1906) 95=3 A.L.J. 334=28 A. 479, R.

(8) See BEN. ACT VIII OF 1869 (LANDLORD AND TENANT PROCEDURE), No. a, 32 Ind. Cas. 510.

(9) See BEN. ACT VIII OF 1885 (TENANCY), No. 95, 35 Ind. Cas. 838.

(10) *Jalkar—Suit for rent of—Bengal Tenancy Act 1885, Sch. III, Art. 2, cl. (b).* See BEN. ACT VIII OF 1885 (TENANCY), No. 94, 33 Ind. Cas. 110.

(11) Appeal against decree not substantially altered by amendment. See BUR. ACT VI OF 1900 (LOWER BURMA COURTS), No. 1, 35 Ind. Cas. 347.

(12) Eviction by Tahsildar under Madras Act III of 1905—Suit by evicted person for possession—Limitation. See MAD. ACT III OF 1905 (LAND ENCROACHMENTS), No. 4, 3 L.W. 315.

(13) Notice by Government to vacate land—Suit for declaration of title—Limitation. See MAD. ACT III OF 1905 (LAND ENCROACHMENT), No. 1, 19 M.L.T. 157.

(14) Suit for compensation for illegal ejectment—Parties. See OUDH ACT XXII OF 1886 (RENT), No. 34, 31 Ind. Cas. 447.

(15) Direction by Revenue Court to file a suit in a Civil Court within a time fixed—Jurisdiction of Civil Court—Limitation. See U.P. ACT III OF 1901 (LAND REVENUE), No. 12, 18 O.C. 343.

(16) Presentation of appeal—On last day of, —Negligence—Inability to get stamps—Unforeseen contingency—If proper ground for extension of time—Limitation Act, S. 5. See APPEAL—GENERAL, No. 12, 12 N.L.R. 171.

(17) Appeal—Death of respondent—Application to substitute heirs after six months—Ignorance of death—Whether 'sufficient cause' to excuse delay. See CIV. PRO. CODE (1908), No. 544, 118 P.R. 1916.

(18) Banned claims whether can be set off. See CIV. PRO. CODE (1908), No. 370, 3 L.W. 24.

(19) Decree amended—Execution of decree. See CIV. PRO. CODE (1908), No. 120, 34 Ind. Cas. 393.

(20) Execution application struck off—Restoration—Objection as to—Jurisdiction. See CIV. PRO. CODE (1908), No. 372, 35 Ind. Cas. 337.

(21) Instalment decree—Effect of not certifying payments—Limitation. See CIV. PRO. CODE (1908), No. 430, 14 A.L.J. 132.

(22) Judgment of Full Bench of Presidency Small Cause Court—Question of limitation—Interference in revision. See CIV. PRO. CODE (1908), No. 228, 19 M.L.T. 24.

Limitation—(Continued).

(23) Mortgage decrees on consent—Preliminary decrees—Final decrees—Running of time—S. 48, Civ. Pro. Code (1908). See CIV. PRO. CODE (1908), No. 121, 23 C.L.J. 573.

(24) Notice issued under O. XXI, r. 22, Civ. Pro. Code—Irregular or defective notice—Effect—Limitation. See CIV. PRO. CODE (1908), No. 445, 19 O.C. 17.

(25) Point of—Judgment of appellate Court not dealing with it—Whether material irregularity—Revision. See CIV. PRO. CODE (1908), No. 229, 3 L.W. 176.

(26) Power of Court to rectify erroneous order. See CIV. PRO. CODE (1908), No. 283, 30 Ind. Cas. 230.

(27) Right of contribution against joint debtor though creditor's claim against him dismissed as barred by limitation. See CONTRIBUTION, No. 4, 19 O.C. 347.

(28) Suit for share in inheritance—Limitation. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 13, 85 P.W.R. 1916.

(29) Adverse entry in Revenue Registers—Suit for declaration—Procedure. See DECLARATORY SUIT, No. 3, 34 Ind. Cas. 775.

(30) Suit against sub-tenant's sub-tenant—Sub-tenant added as party after period of. See EJECTMENT, No. 8, 30 Ind. Cas. 795.

(31) For suit—Burden of proof as to date of birth. See EVIDENCE ACT, No. 12, 3 L.W. 216.

(32) Instalment decree for money—Order directing delivery of possession of land on failure to pay two consecutive instalments—Application for delivery of possession presented more than 3 years from default—Bar of. See EXECUTION OF DECREE, No. 20, 36 Ind. Cas. 978; 8 P.R. 1917.

(33) Redemption decrees—Application for execution—Time if runs from date of decree or date of ascertainment of exact amount. See EXECUTION OF DECREE, No. 7, 20 C.W.N. 950.

(34) Requisites for executing a time-barred decree. See EXECUTION OF DECREE, No. 6, 18 O.C. 371.

(34-a) Execution of decree, whether can be barred by. See EXECUTION OF DECREE, No. 34 (b), 32 Ind. Cas. 699.

(34-b) Amendment of decree. See EXECUTION OF DECREE, No. 34 (a), 32 Ind. Cas. 744.

(35) Application to set aside *ex parte* decrees—Commencement of period of—Adjournment. See EX PARTE DECREE, No. 4, 111 P.L.R. 1916.

(36) Principal and surety—Debt barred by limitation against principal, whether surety liable. See HINDU LAW (JOINT FAMILY), No. 15, 1 Pat. L.J. 497.

(37) See HINDU LAW (PARTITION), No. 9, 34 Ind. Cas. 466.

(38) Suit against Ziladar and Mukhtar for rent collected—Prescribed by Oudh Rent Act—Applicability of, to suits in Civil Courts.

Limitation—(Continued).

See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 4, 19 O.C. 314.

(38-a) Symbolical possession, effect of—Execution purchaser's suit for possession. See LANDLORD AND TENANT, No. 70-a, 32 Ind. Cas. 703.

(39) Lease in favour of two persons—Duration of lease—Limitation when arises. See LEASE, No. 9, 43 C. 332.

(40) Execution—Attachment—Sale proceeding—Application by a mortgagee for holding the sale subject to his mortgage—Dismissal of the application—Suit to establish lien. See LIMITATION ACT (1877), No. 3, 18 Bom. L.R. 782.

(41) Covenant not to raise plea of—Validity—Limitation once commenced to run it can be stopped. See LIMITATION ACT (1908), No. 34, 4 L.W. 48.

(42) Limitation periods to be laid down with clearness and certainty—Subtle distinctions not to be introduced—Limitation it can be made to depend on theory of 'imperilling decree.' See LIMITATION ACT (1908), No. 284, 3 L.W. 521.

(43) See MORTGAGE—GENERAL, No. 54, 32 Ind. Cas. 171.

(44) Decree for sale with provision for recovery of balance of decree amount from the other properties of the mortgagor if sale proceeds are insufficient—Execution—Starting point of. See MORTGAGE—GENERAL, No. 21, 31 M.L.J. 513.

(45) Limitation for exercise of right of redemption after decree. See MORTGAGE—REDEMPTION, No. 12, 19 O.C. 30.

(45-a) Award upon sham arbitration proceedings—Time for recovery of property lost by award when begins to run—Limitation if may be pleaded in defence of award. See PARDA NASHIN LADIES, No. 1, 20 C.W.N. 957.

(46) Partnership—Hindu joint family—Membership of manager not membership of the family—Termination on the death of the Manager—Suit for dissolution—Limitation. See PARTNERSHIP, No. 1, 19 M.L.T. 66.

(47) Pre-emption—Effect of wrong description of property sold in the sale-deed and its subsequent rectification—Mutation—Land under occupation of tenants—Limitation for pre-emption. See PRE-EMPTION, No. 4, 60 P.W.R. 1916.

(48) Amendment of pleadings, when can be allowed—Plea of, affected by proposed amendment—Practice. See PRINCIPAL AND AGENT, No. 5, 31 M.L.J. 682.

(49) Government's right to assess if may be barred by. See BEN. REG. I OF 1885 (ASSAM LAND AND REVENUE), No. 2, 20 C.W.N. 576.

(50) Second suit to recover mortgage money—Failure of consideration—Suit for money had and received. See RES JUDICATA, No. 17, 18 Bom. L.R. 773.

Limitation—(Concluded).

(51) Sale for arrears of Government revenue—Plea of adverse possession. See **SALE FOR ARREARS OF REVENUE**, No. 1, 43 O. 779.

(52) See **SPECIFIC PERFORMANCE**, Nos. 11 and 12, 30 Ind. Cas. 365.

(53) Agreement to assign a decree—Whether will be enforced after decree became barred. See **SPECIFIC PERFORMANCE**, No. 1, 14 A. L. J. 527.

(54) Payments indorsed on the back—Period of, extended by such payments—Payments treated as in discharge of the original debt. See **STAMP ACT** (1899), No. 1, 34 Ind. Cas. 417.

(55) Will appointing executor—Cause of action arising on testator's death—Limitation when begins to run—Position of administrator how different—Suit instituted by administrator *pendente lite*—Substitution of executor on grant of probate—Executor if new plaintiff. See **STRAITS SETTLEMENTS LIMITATION ORDINANCE**, No. 1, 20 C.W.N. 833.

Limitation Act (XY of 1877).

(1) S. 6, Sch. II Art. 175-A—Application to bring legal representative on record—Limitation. See **CIV. PRO. CODE** (1908), No. 539, 35 Ind. Cas. 438.

(2) S. 8 and Art. 89. See **ACCOUNTS**, No. 4, 20 M.L.T. 430.

(3) Art. 11—**Civ. Pro. Code** (Act XIV of 1882), Ss. 287, 278, 283, 283—*Decree—Execution—Attachment—Sale proceeding—Application by a mortgagee for holding the sale subject to his mortgage—Dismissal of the application—Suit to establish lien—Limitation.*

Certain property having been attached in execution of a decree, the plaintiff applied to the Court that the sale should take place subject to his mortgage lien. The Court rejected the application in 1893 and sold the property. The plaintiffs sued in 1910 to recover the mortgage money by sale of the property. The lower Courts held that the plaintiffs having failed to sue within one year from the date of the order of 1893, the suit was barred under Art. 11 of the Limitation Act read with S. 283 of the Civ. Pro. Code, 1882. On second appeal:

Held, that the suit was not barred by time, inasmuch as the order of 1893 having been that the attachment should proceed free from the lien or mortgage claim, must be referred to S. 287 and not to S. 283 of the Civ. Pro. Code of 1882. **Ganesh v. Damoo**, 18 Bom. L.R. 782 = 41 B. G. = 36 Ind. Cas. 627.

BACHELOR, AG. C.J. and **SHAH**, J.

(4) Sch. II, Arts. 12, 95. See **MORTGAGE (REDEMPTION)**, No. 23, 35 Ind. Cas. 404.

(5) Art. 89. See No. 2, *supra*.

(6) Art. 95. See No. 4, *supra*.

(7) Art. 120—*Declaratory decree—Suit by persons in possession for a declaration of title to immoveable property—Cause of action against*

Limitation Act (XY of 1877)—(Concluded).

defendant—Adverse entry in Revenue papers. **Chimnal v. Adal Shah**, 11 P.W.R. 1913 (N.W. F.P.)—83 P.L.R. 1916. See Final Part, 1913, Col. 814.

(8) Art. 120—Sale in 1893 by father—Suit by son to contest it in 1911—Limitation. See **CUSTOMS (PUNJAB—ALIENATION)**, No. 2, 15 P.W.R. 1916.

(9) Art. 134—Change in Limitation Act of 1909—Effect. See **LIMITATION ACT** (1908), No. 233, 3 L.W. 19.

(9-a) Art. 134. See No. 12, *infra*.

(10) Art. 144—*Limitation Act (IX of 1871), Art. 145—Widow—Alienation not binding on the reversion—Alienees holding adverse to daughter for 12 years previous to the Act of 1877—Suit by reversioners after the death of daughter—Whether barred—Adverse possession against ultimate reversioner—Date of commencement.*

One R died in 1833 leaving his widow J and a daughter S. J. sold her husband's properties for purposes not binding on the reversion during her lifetime. She died on 21st April 1865, more than 12 years before the date of coming into force of the Limitation Act of 1877. The alienees were in possession of the lands alienated by J to the exclusion of S who died on 27th June 1901 and a suit was instituted on 7th December 1912 by the reversioners of R for possession of his properties.

Held, that Art. 145 of Act IX of 1871 corresponding to Art. 144 of the latter Acts which gives 12 years from the time when the possession of defendants became adverse to the plaintiff, applied to the suit, and since the possession of the defendants became adverse to the plaintiffs only on the death of S, when they became entitled to possession, the suit was not barred by limitation.

Adverse possession against the ultimate reversioner does not begin until he is entitled to possession. **Neelakanta Rao v. Narayanaswami Aiyer**. 20 M.L.T. 526 = 31 M.L.J. 847. **AYLING** and **SRINIVASA AYYANGAR**, JJ.

(11) Art. 144—*Limitation—Rent, assessment of—Adverse possession* **Maharaja Birendra Kisore Manikya Bahadur v. Gagan Chandra Chakrabarti**, 23 O.L.J. 132 = 30 Ind. Cas. 904. See Final Part, 1915, Col. 924.

(12) Arts. 144, 148, 134—Redemption by one co-owner—Charge—Sale by redeeming co-owner of such property—Suit for redemption by another co-owner—Limitation. See **MORTGAGE (REDEMPTION)**, No. 2, 14 A.L.J. 41.

(13) Art. 148. See No. 12, *supra*.

(14) Sch. II, Art. 175A; See No. 1, *supra*.

(15) Arts. 179, 180—Nature of decree absolute for sale. See **TRANSFER OF PROPERTY ACT**, No. 119, 18 Bom. L.R. 38.

(16) Art. 180. See No. 15, *supra*.

Limitation Act (1908).

(1) Application of the Limitation Act does not apply to applications to a Court to do what it has no discretion to refuse, nor to applications for the exercise of functions of a purely ministerial character. **Moolla Cassim v. Moolla Abdul Rahim**, 9 Bur. L.T. 148=8 L.B.R. 424=35 Ind. Cas. 950.

FOX, C.J. and TWOMEY, J.

(2) Applicability of, to rights set up in defence.

The Limitation Act, 1908, is an Act which is applicable to a suit brought by the plaintiff; a defendant will not be precluded from setting up a right by way of defence, even if he could not have done so as plaintiff by way of substantial claim. **Deodhari Pandey v. Dayanand Pandey**, 35 Ind. Cas. 610.

WOODROFFE and CHOWDHURI, JJ.

(3) Applicability of the— to cases under Bengal Tenancy Act, 1885. See BEN. ACT VIII OF 1885 (TENANCY), No. 96, 34 Ind. Cas. 145.

(4) See REFERENCE, No. 1, 9 Bur. L.T. 226.

(5) Applicability of its provisions to defences. See RES JUDICATA, No. 2, 1 P.R. 1916.

(6) S. 4, 14—*Computation of time—Suit filed in wrong Court—Whether plaintiff entitled to add time during recess of wrong Court.*

A suit on a promissory note was filed in the Subordinate Judge's Court at Agra on June 2, 1913. The limitation expired on June 1, 1913, but the suit could not be filed on that day as it was a Sunday. The Agra Court held that it had no jurisdiction, and on January 21, 1914, returned the plaint to be presented to the Court of the Subordinate Judge at Aligarh. It was so presented on January 22, 1914. The suit was dismissed as barred by limitation:

Held, that, although the plaintiffs might be entitled to deduct the time during which the suit was pending in the wrong Court, they were not entitled to the exclusion of the extra day from June 1, 1913 to June 2, 1913, on which latter date the suit was filed in the Court of the Subordinate Judge of Agra. **Makund Ram v. Ramraj**, 14 A.L.J. 310=35 Ind. Cas. 292.

RICHARDS, C.J., and RAFIQ, J.

(7) S. 5—*Appeal filed out of time under advice of pleader—Pleader misled by change in law—Sufficient cause.*

It is not an inflexible rule of law that in no case can the circumstance that a litigant has, under the erroneous advice of counsel or pleader, presented an appeal out of time, be deemed a sufficient cause within the meaning of S. 5 of the Limitation Act. The true rule is whether, under the special circumstances of each case, the appellant acted under an honest, though mistaken, belief formed with due care and attention, or there was any negligence or inaction or want of bona fides on the part of the appellant (a).

Where, therefore, an appellant filed an appeal in the Court of a District Judge after the

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specified period of 30 days under the advice of a legal practitioner, who was misled by a change in the law of limitation relating to appeal:

Held, that there was sufficient cause within the meaning of S. 5 for not filing the appeal within the prescribed period of limitation. **Aziz Ullah v. Gokal Chand**, 37 P.W.R. 1916=32 Ind. Cas. 640.

SHAH DIN, J.

References:—(a) 12 Ind. Cas. 677; 19 Ind. Cas. 931=17 C.W.N. 807, F.

(8) S. 5—*Appeal from an order of a Munsiff dated 8th June 1914 presented on 1st August 1914, on which date Act III of 1914 came into force, barred by time—Finding as to sufficient cause, a question of fact—Second Appeal—Act III of 1914, S. 41.*

To mention by mistake the name of a deceased person as respondent is immaterial where his representatives are already on the record.

2. Whether there is a sufficient cause for extending limitation for an appeal under S. 5 of Act IX of 1908 is a question of fact which cannot be interfered with in second appeal (a).

3. Ignorance of law is no excuse. The Punjab Courts Act III of 1914 having come into force on 1st August, 1914, an appeal filed on that date from the order of the Munsiff dated 8th June, 1914, is barred by limitation.

4. 30 P.R. 1915=25 P.W.R. 1915 lays down the following three dicta:—

(1) That the Acts of the Legislature, which regulate procedure, though in general retrospective in their effect, must not be interpreted so as to affect prejudicially the vested rights of the parties to suit (b).

(2) That a right of appeal which has accrued is such a vested right.

(3) That the tribunal competent to dispose of appeals instituted before a new Act came into force, but still pending when it came into force, is the tribunal which would have been competent to dispose of them if the appeals had been instituted after the said new Act came into force (c). **Asa Ram v. Budhu Mal**, 43 P.W.R. 1916=88 P.R. 1916=132 P.L.R. 1916=35 Ind. Cas. 67.

JOHNSTONE, C.J.

References:—(a) 25 A. 71; 26 A. 327, F. (b) 13 Ind. Cas. 264; 5 Ind. Cas. 420, D. (c) 30 P.R. 1915=25 P.W.R. 1915, Expl.

(9) S. 5—*Discretionary power of appellate Court to grant or refuse extension of time—When interfered with in second appeal.*

In an application under S. 5 of the Limitation Act for extension of time, it is only in those cases where it can be held that the lower Court has exercised its discretion unreasonably or without proper consideration of the facts before it that the Chief Court is justified in interfering.

Hence where it is found that the lower appellate Court has considered the matter carefully and come to the conclusion that no case has been made out for extending the period of limitation under S. 5 of the Limitation Act, the Chief Court will not interfere with its order

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in second appeal. **Hardhan v. Mam Chand**, 92 P.R. 1916=36 Ind. Cas. 614.

RATTIGAN, J.

References:—26 A. 327 (1); 25 M. 166 (2), R.

(10) S. 5—*Excuse of delay—Presentation of appeal beyond time—Death of defendant after argument but before judgment—Appeal by defendant's heirs after prescribed period—Sufficient cause.*

After the arguments in a case were concluded, but before the judgment was pronounced, the defendant died. The suit was decided against the defendant. His sons, one of whom was an adult and the other a minor represented by his mother as a guardian, presented an appeal from the decree fifty days beyond time. A question having arisen whether the delay should be excused:

Held, that there was no sufficient reason to excuse the delay, inasmuch as the adult son and his mother, who were concerned to prosecute the litigation in their own interests and in the interest of the infant, were negligent, remiss and careless in not prosecuting the appeal in time. **Babu Ganesh Deshmukh v. Sitaram Martand Deshmukh**, 18 Bom. L.R. 751=41 B. 15=36 Ind. Cas. 439.

BATCHELOR, AG. C.J. and SHAH, J.

(11) S. 5—*Time for appeal—Extension of time—Amendment of decree—Whether time for appeal extended by such amendment.*

In case of the amendment of a decree which has no relation to the grounds upon which the validity of the decree is sought to be challenged in appeal such appeal should not be admitted out of time. On the other hand if the grounds on which the appeal is based are intimately connected with the amendment of the decree or if the grounds are directed against the decree only in so far as it has been amended the Court should exercise in the appellant's favour the discretion vested in it by paragraph 2 of S. 5 of the Limitation Act. **Satikantha Baurjee v. Ram Chandra Chatterjee**, 34 Ind. Cas. 556.

SANDERSON, C.J. and MOOKERJEE, J.

Reference:—3 C.L.J. 188, R.

(12) S. 5—*Presentation of appeal to wrong Court—Bona fide mistake—Delay in filing appeal—Saving of limitation.*

A presentation of an appeal to a wrong Court under a bona fide mistake may be sufficient cause within the meaning of S. 5 of the Limitation Act. Where the mother of a minor appellant, who conducted proceedings on behalf of the minor without the advice of a counsel, presented the appeal to a wrong Court under a bona fide mistake and the appeal was returned to her for being presented to the proper Court, a subsequent presentation by her of the memorandum of appeal to the proper Court beyond the period of limitation was excused under S. 5 of the Limitation Act. **Shoo Pal Singh v. Kripala**, 30 Ind. Cas. 211.

LINDSAY, J.C.

References:—21 B. 552; 19 A. 348=A.W.N. (1897) 86, R.

Limitation Act (1908)—(Continued).

(13) S. 5—*Appeal—Presentation after time prescribed—Review of judgment—Time spent in application for—When may be deducted—Sufficient cause.*

The mere fact that the appellant had applied for review is not a 'sufficient cause' for not filing his appeal within the prescribed time and he is not always entitled to be allowed a deduction of time spent in applying for a review of judgment. The question of deduction must depend upon the special circumstances proved in each case. **Dwarka Singh v. Layakat Ali Khan**, 34 Ind. Cas. 44.

CHAMIER, C.J. and JWALA PRASAD, J.

(14) S. 5—*Appeal filed out of time—Time taken by infructuous review if to be excluded—Laches—Court's discretion if should be fettered by rules.* **Sudhakar Raut v. Sadasiv Jahatap Singh**, 19 C.W.N. 1113=31 Ind. Cas. 705. See Final Part, 1915, Col. 929.

(15) S. 5—*'Sufficient cause,' meaning of.* **Gurprasad Singh v. Ram Samajo Singh**, 13 A. L.J. 1101=31 Ind. Cas. 876. See Final Part, 1915, Col. 929.

(16) S. 5—Whether applicable to cases under Insolvency Act. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 63, 60 P.W.R. 1916.

• (17) S. 5. See APPEAL (GENERAL), No. 9, 29 P.W.R. 1916.

(18) S. 5—Appeal presented 34 days out of time—Affidavit not accounting for major portion of delay—Liability of appeal for dismissal. See APPEAL (GENERAL), No. 1, 3 L.W. 109.

(19) S. 5—Appeal—Stamp not obtainable on last day—Next day a holiday—Appeal filed on third day whether in time—Delay of two days. See APPEAL (GENERAL), No. 10, 1 Pat. L.J. 163.

(20) S. 5—Presentation of appeal—On last day of limitation—Negligence—Inability to get stamps—Unforeseen contingency—If proper ground for extension of time. See APPEAL—GENERAL, No. 12, 12 N.L.R. 171.

(21) S. 5—Notice of delivery of judgment. See CIV. PRO. CODE (1908), No. 405, 9 Bur. L.T. 250.

(21-a) S. 5. See CIV. PRO. CODE (1908), No. 263-a, 32 Ind. Cas. 975.

(22) S. 5. See EVIDENCE, No. 6, 32 Ind. Cas. 380.

(23) S. 5. See PAUPER APPEAL, No. 1, 9 Bur. L.T. 69.

(23-a) S. 5. See No. 41, *infra*.

(24) Ss. 5, 12—*Limitation—Appeal—Expiry of time on a holiday—Application to obtain copies after the holiday—Appellant, not entitled to get benefit either of S. 5 or 12, Limitation Act.*

Held, that an appellant who has waited for applying to obtain the necessary copies up to the last day of the limitation when the Court happened to be closed for some holiday, and consequently he was obliged to apply to get

Limitation Act (1908)—(Continued).

them after the time for the appeal had expired, is not entitled to get either the indulgence under S. 5 or the benefit of S. 12 of the Limitation Act (1908). *Guran Rakha v. Bindrabau*, 55 P.W.R. 1916=79 P.R. 1916=125 P.L.R. 1916=35 Ind. Cas. 233.

JOHNSTONE, C.J.

References:—25 B. 584; 25 E. 586, D.

(25) Ss. 5 and 12—*Sufficient cause—Interference by High Court in second appeal—The time requisite for obtaining a copy of the decree, what is—Letters Patent, Cl 10—Point not argued before single Judge if may be urged in appeal.*

It is now settled by a long string of authorities that where a Court after considering all the circumstances of the case has come to the conclusion that sufficient cause has or has not been established within the meaning of S. 5 of the Limitation Act for not filing an appeal within time, the High Court will not interfere in second appeal.

Where a judgment was passed on 27th September 1913 and the decree was prepared and signed on the same day and the annual vacation began on the following day and the Court re-opened on 1st November and the appellants applied for a copy of the judgment on 3rd November and for a copy of the decree on 13th November and both copies were ready and were delivered on 21st November and the appeal was filed on 28th November in the lower appellate Court:

Held—That the whole of the time which elapsed from the delivery of the judgment to the re-opening of the Court on November 1st, 1913, was part of the time requisite for obtaining copies of the judgment and decree, and that this must be so whether the appellant applied for copies on the day on which the Court re-opened or on some later date.

The words of S. 12, Limitation Act, do not appear to lay down any rule that the time requisite for obtaining a copy must be continuous.

The conduct of a case before a single Judge of High Court must not be regarded as a preliminary matter in which the parties and their legal advisers are not called upon to exert themselves. Ordinarily a point which had not been taken before a single Judge would not be allowed to be taken in appeal under Cl. 10 of the Letters Patent. *Debi Charan Lal v. Snehi Mehdi Hussain*, 20 C.W.N. 1303=1 Pat. L.J. 485=55 Ind. Cas. 488.

CHAMBER, C.J. and SHARFUDDIN, J.

References:—27 M. 21; 34 A. 41, R.; 11 Ind. Cas. 339, Diss.; 13 C. 104; 12 A. 461, R.

(26) Ss. 5, 14—*Limitation—Appeal—Sufficient cause under S. 5 of Act IX of 1908—Discretion used by the lower appellate Court cannot generally be interfered with in second appeal—Effect of the change brought in the law of appeal by the New Punjab Courts Act III of 1914—Pre-emption case—Return of plaint for want of jurisdiction—Its representation.*

Limitation Act (1908)—(Continued).

Held that, in second appeals, Chief Court should interfere in exceptional cases only with the discretionary power given to the first appellate Court by S. 5 of Act IX of 1908, particularly when such indulgence has been shown owing to the change brought about by the New Punjab Courts Act III of 1914, on the ground that the appellant was advised (though erroneously) by his legal adviser that the appeal could be presented within 60 days.

Where a plaint in a pre-emption case is returned for presenting it to a competent Court on the ground that the pre-emption money exceeded the Munsif's pecuniary jurisdiction, and after excluding the time under S. 14 of Act IX of 1908, it was a few days late when it was re-filed:

Held, that the suit must be taken as instituted on the day of the first presentation to the District Judge. The proper course in such a case is to send the case to the Court having jurisdiction. *Azam Ali v. Akhtar Hussain*, 18 P.W.R. 1916=33 Ind. Cas. 808.

JOHNSTONE, C.J.

(27) Ss. 5, 14, Sch. I, Art. 11—*Civ. Pro. Code (1908), O. XXI, r. 63—Removal of attachment—Appeal and revision—Advocate's act, how far binding on his client—Agent—Negligence. Mg Tun U v. Palaniappa Chetty*, 27 Ind. Cas. 829=8 Bur. L.T. 93=8 L.B.R. 146. See Final Part, 1915, Col. 930.

(28) S. 6—*Minority—Decree barred by Code of Civil Procedure (1908), S. 48—Application of Limitation Act. Ram Nath Tewari v. Chatarpal Man Tewari*, 13 A.L.J. 826=37 A. 638=30 Ind. Cas. 521. See Final Part, 1915, Col. 931.

(29) S. 6 and Art. 164—*Failing to determine crucial point when deciding question of limitation—Revision—Material irregularity—Application to set aside an ex parte decree—General Clauses Act, X of 1897, S. 6—Minority.*

Where it is essential to a proper decision of a point of limitation to determine whether the provisions of the Limitation Act of 1877 or of the Act of 1908 are applicable and the lower Court fails to determine this question the omission amounts to a material irregularity, and a revision is competent (a).

An application made after the 1st of January 1909 to set aside an *ex parte* decree passed before that date is governed by Art. 164 of the new Act and not by Art. 164 of the old Act. The law to be applied in a case of this kind is the law existing at the time when the application is made (b).

The period laid down in Art. 164 for an application to set aside an *ex parte* decree cannot be extended on the ground of minority under S. 6 of the new Limitation Act of 1908 which is limited to applications for the execution of a decree. *Manohar Lal v. Mussammat Sadiqa Begam*, 101 P.R. 1916.

SHADI LAL AND LE-ROSSIGNOL, JJ.

Limitation Act (1908)—(Continued).

References :—(a) 60 P.R. 1897 (F.B.); 72 P. W.R. 1910 and the Civil Revision 52 of 1914 (Unpublished), R. (b) 12 Bom. L.R. 730; 37 A. 597; 35 M. 678; 90 P.R. 1904, F.

(30) S. 7—*Minor—Cause of action—Death of minor within three years of his attaining majority—Minor's representative can sue within three years on the same cause of action.*

Where a minor acquires a cause of action to sue for possession of property and dies after majority but before the expiry of three years from the date of the cessation of his disability of minority, his personal representatives can, although twelve years have expired since the cause of action accrued, institute a suit on the same cause of action at any time within three years' period which has already commenced in the lifetime of the deceased. *Arjun Ramji Mhankal v. Ramabai Raoji Yithoba*, 18 Bom. L.R. 579=40 B. 561.

SCOTT, C.J. and HEATON, J.

(31) S. 7—*Partnership—Suit for account by representatives of a deceased partner—Parties—Cause of action.*

The cause of action for a suit by the legal representatives of a deceased partner to sue for accounts arises from the partnership contract and the right of each partner to have an account taken upon the dissolution of the firm, and all the representatives must join in the suit. S. 7 of the Limitation Act applies to such a case. *Puthenpurayil Bava-chetty v. Puthenpurayil Kunhi Pathumma*, 33 Ind. Cas. 564.

BAKEWELL and PHILLIPS, JJ.

Reference :—25 M. 26, F.

(32 & 33) S. 7—*Applicability to disqualified proprietors.* See BEN. ACT IX OF 1879 (COURT OF WARDS), No. 1, 20 C.W.N. 852.

(34) Ss. 9, 19—*Acknowledgment of liability—Agreement to refer to arbitration—Conditional promise to pay what is found due, when amounts to acknowledgment—Creditor and debtor, relationship of—Covenant not to raise plea of limitation, effect of—Contract Act, S. 23—Limitation once commenced to run, if can be stopped—Estoppel against statute.*

Where the defendants were denying their liability to the plaintiff in respect of the latter's claim for damages for breach of a contract, but when a suit was threatened they agreed in writing to refer the dispute to arbitration and promised to pay whatever sum the arbitrators may find to be due.

Held, that such writing did not constitute an unconditional undertaking to pay the debt but was only a conditional acknowledgment of liability, and it was clear law that, where there was a promise to pay on a condition, that condition must be fulfilled in order that the promise may operate as an acknowledgment (a).

A mere reference to arbitration which *prima facie* is only a mode of settling disputes and

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not an admission of any liability does not import a subsisting jural relationship of debtor and creditor which must be admitted in order to operate as an acknowledgment.

The English Law is clear that a mere submission to arbitration containing a promise to pay what is found due is not available as an acknowledgment if the arbitration proves abortive unless the submission contains an unqualified acknowledgment of the debt, and there is nothing in S. 19 of the Limitation Act to suggest that the law in India is different.

A covenant not to raise the plea of limitation in case a suit has to be filed is invalid and inoperative since its effect is to defeat the provisions of the Limitation Act and as such falls within S. 23 of the Contract Act.

Parties to a contract may agree to postpone the accrual of any rights under it, but they cannot postpone the period of limitation, since under S. 9 of the Limitation Act it follows that, when once limitation begins to run, it cannot be stopped by any subsequent event.

There can be no estoppel from pleading the provisions of a statute (b). *Bollapragada Ramamurthi v. Thimmanna Gopayya*, 4 L.W. 48=20 M.L.T. 129=31 M.L.J. 231=35 Ind. Cas. 575.

KUMARASWAMI BASTRI and PHILLIPS, JJ.

References :—(a) 29 M. 519, F.; 33 C. 1047; L.R. 6 Ch. App. 822, R. (b) 38 M. 374, F.

(35) S. 10—*New trustee succeeding to the office of former trustee whether legal representative of latter.* See TRUST, No. 2, (1916) 2 M.W.N. 87.

(35-a) S. 10. See No. 140, *infra*.

(36) S. 10, Arts. 14, 120—*Money lying in deposit in Government treasury—Suit to recover money—No bar of limitation operates.* The Secretary of State for India v. *Bapuji Mahadev Govalkar*, 17 Bom. L.R. 641=39 B. 572=31 Ind. Cas. 277. See Final Part, 1915, Col. 935.

(37) S. 11. See FOREIGN JUDGMENT, No. 1, 9 Bur. L.T. 106.

(38) S. 12—*Computation of time—Exclusion—Time for obtaining copies—Dilatoriness of applicant—Time running from signing of decree—Guardian ad litem—Civ. Pro. Code, 1908, O. I, rr. 1, 9, O. XXXII, r. 3—Parties—Non-joinder.*

In appeals, the period of limitation should be calculated from the date on which the decree was actually signed (a).

An applicant for a copy should deposit the required number of folio not later than the first day on which the office of the Court is open after that on which the number of folio was notified to him and in calculating the time required for obtaining a copy the applicant is not entitled to deduct the days during which the preparation of the copy was delayed by his own neglect to furnish the folio. The length of time requisite for obtaining a copy within the meaning of S. 12 of the Limitation Act, 1908,

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ought not to vary with the dilatoriness of the applicant in supplying the required number of folios.

The fact that a guardian *ad litem*, is not formally appointed, but is allowed to represent minors in a suit is not fatal to the suit.

A suit for profits of *'zerait'* land held by defendants in excess of their share wherein all co sharers are not made parties, should be dismissed for non-joinder of necessary parties. **Ram Aray Singh v. Sheonandan Singh**, 1 Pat. L.J. 573=35 Ind. Cas. 868 (F.B.).

CEAMIER, C.J., SHARFUDDIN and KINGSFORD, JJ.

Reference:—(a) 13 C. 104, F.

(39) S. 12—High Court judgment—Application for review—Limitation if runs before the signing of decree. See REVIEW, No. 3, 20 C.W.N. 967.

(40) S. 12. See Nos. 24, 25, *supra*.

(41) Ss. 12, 5—Exclusion of time requisite for obtaining copy of decree—Duty of appellant—Delay in preparing decree due to laches of the officers of Court—Effect—Court directing postponement of preparation of decree—Effect.

A party is not entitled to an allowance for the interval between the delivery of judgment and the signing of the decree under S. 12, Limitation Act, unless the delay in obtaining copies was due to decree not being prepared or signed (a).

If a party has not applied in time for copies of judgment and decrees, he will not be excused on the ground that the decree was not in existence at the date of his application, for the decree relates back to the date of judgment and he must make application for a copy of decrees in reference to that date; and if he does not do so, the delay is not due to time requisite for obtaining a copy (b).

But where the delay in the preparation of the decree was not an administrative delay due to the laches of the officers of the Court, but the Court by its own order directed that the decree should not be drawn up on the day that it gave judgment, but it postponed the drawing of the decree till certain payment is made, the judgment is a provisional judgment and does not become an operative judgment till the date when the preparation of the decree is ordered. In such a case this latter date is the date of the judgment as well as of the decree from which limitation runs (c). **Khudadad wd. Mahomed v. Morlokhan**, 9 S.L.R. 193=34 Ind. Cas. 867.

PRATT, J.C. and BOYD, A.J.C.

References:—(a) 5 S.L.R. 47, R. (b) 1 S.L.R. 71, R. (c) 5 A. 520, R.

(42) S. 12 (2)—Appeal—"Time requisite for obtaining a copy of the decrees"—Calculation—Portions of days whether can be taken into account.

An applicant for copy must use proper diligence in obtaining his copy in the manner prescribed in the rules of the Copyist Department.

Limitation Act (1908)—(Continued).

Where an appellant was instructed to attend Court on a particular day to ascertain whether the copies were ready or whether any further advance of copying fees was required, but he did not so attend and did not, on that day, take any steps towards obtaining the copy, held that that day cannot be deducted from the limitation period as time requisite for obtaining the copy.

Held also that the law of limitation does not take portions of days into account. **Lachman v. Kalya**, 12 N.L.R. 66=34 Ind. Cas. 458.

BATTEN, A.J.C.

(43) S. 14—Suit for recovery of possession by part owner—Other co owners made defendants, settling up their own title—Decree made in their favour by first Court, set aside on appeal—Fresh suit—Suspension of limitation pending prosecution of claim in previous suit—Power of appeal Court to transfer defendants to category of plaintiffs—Benami transaction, test.

Where the sons (B and M) and grandsons by a predeceased son (C) of a deceased Hindu (G), being members of a joint Dayabhaga Hindu family, with a view to deceive the creditors of B and M, in 1891, executed a document whereby they purported to acknowledge that G's widow S was the real owner of properties which in fact they had inherited as G's heirs; and S having begun to deal with the properties adversely to the real owners from January 1892, C's branch of the family in 1896 sued for a declaration of their own title and the title of M's representatives (whom they joined as defendants) to shares in the properties, and the latter associated themselves with the plaintiffs and asked for an adjudication of their right to a one-third share, and a distinct issue in respect of their claim was without objection raised and decided and the Court made a decree on 20th April 1903 in favour of both the plaintiffs and M's representatives; but on appeal the decree so far as it was in favour of the latter was set aside on 22nd February 1904 on the ground that not being plaintiffs they could not be given any relief in that suit, and M's representatives thereupon on 14th November, 1904, instituted a fresh suit for their share.

Held—that though limitation began to run against them from 1892, it remained in suspense, whilst they were *bona fide* litigating their rights in the previous suit, and this suit was therefore not time-barred (a).

That in the previous suit the appeal Court should, in exercise of power possessed under the Civ. Pro. Code, have transferred M's representatives from the category of defendants to that of plaintiffs and maintained the decree passed in their favour by the Original Court.

In cases where it is asserted that an assignment in the name of one person is really for the benefit of another, the real test is the source whence the consideration came. **Shrimati Nrityamoni Das v. Lakhna Chunder Sen**,

Limitation Act (1908)—(Continued).

90 C.W.N. 522 = (1916) M.W.N. 339 = 30 M.L.J. 529 = 3 L.W. 471 = 18 Bom. L.R. 418 = 43 C. 660 = 20 M.L.T. 10 = 24 C.L.J. 1 = 33 Ind. Cas. 452 (P.G.).

VISCOUNT HALDANE, LORD PARMOOR, LORD WRENBURY and MR. AMEER ALI.

References:—(a) 12 C.W.N. 326 = 35 C. 209, affirmed.

(44) S. 14—*Criterion for application of the section—Error must be such as might be committed by a reasonable and prudent man exercising due diligence and caution.*

Held, that the provisions of S. 14 of the Limitation Act are not to be applied indiscriminately to extend the period in all cases in which the plaintiff has acted without fraud.

Held further, that although it is not intended to lay down any hard and fast rule on the subject, yet as a general criterion the rule should be that indulgence under the section should be granted only in cases where the error is one that might be committed by a reasonable and prudent man exercising due diligence and caution (a). **Ramjag Pande v. Bhagwant Dat Pande**, 19 O.C. 367 = 36 Ind. Cas. 702.

STUART, A.J.C.

Reference:—17 O.C. 210, D.

(45) S. 14—*Suit in Revenue Court to eject tenants—Subsequent suit by landlord in Civil Court—Saving of limitation.*

Where a suit was brought by a landlord in the Revenue Court to eject the defendants as tenants, a subsequent suit by him in the Civil Court treating the defendants as trespassers would not be saved from limitation by the operation of S. 14 of the Limitation Act. The time spent by the landlord in the prosecution of the suit in the Revenue Court cannot be excluded in computing the period of limitation for the later suit, as the cause of action in both the suits is not the same. **Dondoo Singh v. Sheo Narain Singh**, 36 Ind. Cas. 770.

STUART, J.C.

(46) S. 14—*Civ. Pro. Code (1909), O. XXIII, rr. 1 and 2—Suit—Withdrawal with liberty to sue—Limitation, if saved.* **A.L.A.R. Arunachalam Chettiar v. Lakshmana Iyer**, 2 L.W. 1002 = (1915) M.W.N. 850 = 18 M.L.T. 385 = 29 M.L.J. 569 = 39 M. 936 = 31 Ind. Cas. 234. See Final Part, 1915, Col. 937.

(47) S. 14—*Suit against Manager, Encumbered Estates, Sind—Institution without previous notice under S. 80, Civ. Pro. Code—Withdrawal—Subsequent suit against him—Computation of period of limitation—Deduction of time spent in former suit—If allowable.* See BOM. ACT X OF 1876 (REVENUE JURISDICTION), No. 1, 9 S.L.R. 167.

(48) S. 14. See Nos. 6, 26, 27, *supra*.

(49) Ss. 14, 18—*Money decree against different defendants at different times.*

A decree for money may be passed against different defendants at different times, and there is no reason for treating those decrees as

Limitation Act (1908)—(Continued).

one. **Sambasiva Aiyar v. Muhammad Husain Rowther**, 31 Ind. Cas. 917.

BENSON and SUNDARA AIYAR, JJ.

Reference:—33 A. 264 (P.G.), D.

(50) Ss. 14, 19—S. 14 *when applies—Due diligence, what amounts to—Plea that money received had been more than repaid—Not an acknowledgment of subsisting liability within S. 19.*

Under S. 14, Limitation Act, the person, who claims an exclusion of time during which a former proceeding was pending, must prove two things, *first*, that he had prosecuted the former proceeding with due diligence; and, *secondly*, that the former Court had been unable to entertain it from defect of jurisdiction or other cause of a like nature (a).

So where each of two plaintiffs came into Court originally to sue separately in respect of a contract which gave them a joint but not a several right, and their error was pointed out to them and they were given every opportunity of rectifying it, and they elected, however, to proceed with their suits as then framed, and by the time that those suits were decided the period of limitation for a fresh suit had expired, *held*, it was impossible to hold in these circumstances that the plaintiffs exhibited that degree of diligence which alone could entitle them to claim the benefit of S. 14 of the Act.

Where a person admitted in a previous case that he had received Rs. 1,000 as earnest money but stated that the sum had been more than repaid by delivery of cotton to the value of Rs. 3,000, such a statement cannot be construed into an admission of a subsisting liability in respect of the Rs. 1,000 within the meaning of S. 19, Limitation Act (b). **Kalu v. Mehru Mal**, 41 P.R. 1916 = 33 P.W.R. 1916 = 32 Ind. Cas. 497.

RATTIGAN and SHADI LAL, JJ.

References:—(a) 19 P.R. 1888, F. (b) 33 C. 1047, D.; 20 M. 239; 25 M.L.J. 261; 18 A. 384, R.

(51) S. 14, cl. 2, *Explanations 1 and 2—Civ. Pro. Code (V of 1908), O. VII, r. 10—Return of plaint—Permission to re-file in proper Court—Order allowing further time—Court, power of—Suit, filing of—Last day—Plaintiff, risk of—Prosecution of a suit in a Court—Return of plaint, termination on.*

The plaintiffs attached certain properties in execution of a decree against one of the defendants. Some of the other defendants also claimed the same properties and their claims were allowed on the 3rd of September, 1908. The plaintiffs brought this suit on the 2nd of September, 1909 in the Court of the Munsiff who had no jurisdiction to try the suit. On the 23rd of June, 1910, the Munsiff ordered the plaint to be returned for presentation in the proper Court and directed the plaintiffs to pay costs. The plaint was returned on the 27th of June, 1910, with the permission to re-file it in the proper Court within five days and an order fixing the amount of costs was recorded on the

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30th June. The suit was re-filed on the 1st of July 1910:

Held, that the order allowing further time must be considered as a nullity.

Held also, that a plaintiff who files his suit on the very last date available to him under the Law of Limitation, takes the risk and the law does not make any provision for extension of time except in case coming under cl. 2 of S. 14 of the Limitation Act.

Held further, that the return of the plaint terminates the connection of the Court with the plaint which it cannot entertain, and though the costs were calculated later, the plaintiffs were not prosecuting the suit in the Court of the Munsiff after that Court had returned the plaint, and the explanation to S. 14 of the Limitation Act cannot be read as extending the time excluded, beyond the time when the plaintiff may be said to have been prosecuting their suit. *Ganga v. Akhil*, 24 C.L.J. 355 = 35 Ind. Cas. 595.

CHATTERJEE and NEWBOULD, JJ.

- (52) S. 15—*Attachment of decree—Exclusion of time occupied by attachment—Civ. Pro. Code, O. XXI, r. 53.*

Where a judgment-debtor, who had obtained a money decree against his decree-holder attached the decree against him in execution of the decree in his favour, under O. XXI, r. 53, Civ. Pro. Code, the effect of the attachment was to stay the execution of the decree against him and on the dismissal of the execution application his judgment-debtor can again execute his decree and for the purpose of such application the period occupied by the pendency of the attachment will be excluded in calculating the period of limitation for execution of that decree. *Kiranhashi Debi v. Chandrika Prasad Singh*, 30 Ind. Cas. 587.

CHITTY and WALMSLEY, JJ.

- (53) S. 15—*Application for execution of decree—Proof of duration of order staying execution.*

In order to bring into force the provisions of S. 15 of the Act it is necessary to point out the injunction or the order staying the execution of the decree and specify the date on which it was issued or made and the date on which it was withdrawn. An adjournment of the hearing does not amount to an injunction or order staying the execution of the decree. *Srimati Thakamoyi Dass v. Nadlar Chand Palmal*, 36 Ind. Cas. 939.

FLETCHER and NEWBOULD, JJ.

- (54) S. 15, Sch. I, Art. 182—*Application for execution 3 years after dismissal of last application*

Where an execution of a decree was not stayed by injunction or order and the decree-holder was not prevented by force or fraud from executing it, an execution application presented more than 3 years after the dismissal of the last application is barred by time.

Assuming that there is a principle in accordance with which the Court may treat an

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application *prima facie* barred by limitation in an application made in continuation of a previous application which has been dismissed it is obvious that the principle can be applied only to those cases where the decree-holder has not been remiss (a). *Mahadeo Prasad Sahu v. Ramchandar Narain Singh*, 35 Ind. Cas. 579.

CHAMIER, C. J., and SHARFUDDIN, J.

References:—(a) 17 C.L.J. 125, D.; 20 C.W. N. 686, R.

(55) Ss. 17, 22. See STRAITS SETTLEMENTS LIMITATION ORDINANCE, No. 1, 20 C.W.N. 833.

(56) S. 18. See No. 49, *supra* and Nos. 159, 194, *infra*.

(57) S. 19—*Suit on account of dealings—Letter by debtor with Rs. 100 sent by insurance—Acknowledgment of liability—Limitation, if saved.*

A debtor wrote to his creditor a letter in the following terms: "I have insured and sent Rs. 100. On receipt of it please credit the said sum of Rs. 100 in our accounts."

Held that the above letter did contemplate and acknowledge the existence of an account between the parties and was a sufficient acknowledgment under S. 19 of the Limitation Act to save a suit based on that account from the bar of limitation. *Reguna Nagendran Chetty v. Kuppusami Aiyen*, 4 L.W. 148 = 36 Ind. Cas. 593.

KRISHNAN, J.

References:—17 M.L.T. 78; 17 M.L.T. 80, F.

(58) S. 19—*Written statement—Allegation that certain persons were necessary parties—Whether acknowledgment of liability—Limitation not saved—Revenue Records—Evidentiary value—Indian Evidence Act, S. 35.*

Where the defendants in the present partition suit made, in the written statement filed by them in a former suit, the following statement, *viz.*,—"Proper parties have not been joined in this suit, such as A and S left a sister B who died after them. It is necessary to join her heirs in this suit. The suit is not maintainable without joining them."

Held, that the above words were not an admission that B's heirs had a share in the estate and did not amount to an acknowledgment of liability under S. 19, Limitation Act (a).

An acknowledgment of liability need not be express. It may be by implication but the implication must be a necessary implication so that the acknowledgment is clear and unequivocal (b).

Revenue Records are not evidence of title, for they are kept for fiscal purposes and it is not part of the duty of the Revenue Officer to record title. But when the facts recorded are facts which it is the duty of the Revenue Officer to record, then his record is evidence of those

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facts under S. 35, Evidence Act. *Bibi Saheb Zadi v. Sayad Mir Mohamad Shah*, 9 S.L.R. 149—32 Ind. Cas. 548.

PRATT, J.C. and BOWD, A.J.C.

References:—(a) 30 C. 699; 9 Bom. L.R. 715, R. (b) 5 C. 744, R.

(59) S. 19—*Acknowledgment of debt—Partnership firm—Receiver, acknowledgment by, how far affords starting date for fresh period of limitation.* *S.M.A. Chetty Firm v. M.L.R.M. A. Chetty Firm*, 29 Ind. Cas. 27—8 L.B.R. 159. See Final Part, 1915, Col. 940.

(60) S. 19—*Power of Court of Wards to acknowledge debt.* See *BEN, ACT IX OF 1879 (COURT OF WARDS)*, No. 4, 43 C. 211.

(61) S. 19—“A fresh period of limitation”—Whether refers to the 12 years prescribed by S. 48, Civ. Pro. Code (1908). See *CIV. PRO. CODE (1908)*, No. 118, 20 C.W.N. 952.

(62) S. 19—*Insolvency of Manager of joint family—Entry of debt in schedule attached to petition—Saving of limitation as against other members.* See *HINDU LAW (JOINT FAMILY)*, No. 33, 36 Ind. Cas. 389.

(63) S. 19—*Admission by partner in insolvency petition—Effect on other partners.* See *PARTNERSHIP*, No. 9, 36 Ind. Cas. 389.

(64) S. 19. See Nos. 34, 50, *supra* and No. 268, *infra*.

(65) Ss. 19 and 20, *scope of—Part-payment and acknowledgment, difference between—Endorsement of payment towards principal signed but not written by debtor, effect of—Limitation if saved.*

Where a simple mortgage document bears an endorsement of payment towards principal signed by the debtor but not in his writing, such payment is ineffectual to give a fresh period of limitation under S. 20 of the Limitation Act. But the endorsement operates as an acknowledgment of liability within the meaning of S. 19 of the Act, and a suit on the mortgage is not barred by limitation (a).

S. 20 of the Limitation Act does not prevent the operation of S. 19 and the two sections are not mutually exclusive. These sections cannot be treated as being one general and the other special.

Per *Napier, J.*—(1) S. 19 only operates against the person who makes the acknowledgment, but S. 20 makes the part-payment good in favour of any suit on that liability.

(2) An acknowledgment under S. 19 need not be addressed to the person entitled but a part-payment under S. 20 must be made only to the person entitled to payment.

An endorsement under S. 20 must be in the actual handwriting of the debtor to have the full effect of a part-payment.

Per *Srinivasa Aiyangar, J.*—*Acknowledgment under S. 19 of the Limitation Act has a different operation from that of part-payments under S. 20 and the English and Indian Law are the same in this respect (b).*

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Effect must be given to an acknowledgment which fulfils the requirements of S. 19 though it may also evidence an ineffectual payment under S. 20. Though the two sections deal with different matters, they can be consistently read together. *Pamulapati Venkata Krishlah v. Kondamud Subbarayudu*, 3 L.W. 576—(1916) 2 M.W.N. 256—36 Ind. Cas. 240.

NAPIER and SRINIVASA AIYANGAR, JJ.

References:—(a) 17 M.L.T. 80, F. (b) 1 De G. and J. and Sm. 122; (46 E.R. 47) 11 A.O. 699, R.

(66) Ss. 19, 20—*Certification of payment by decree-holder—Statement of payment in application for execution if sufficient—Payment whether extends limitation.* See *CIV. PRO. CODE (1908)*, No. 421, 20 C.W.N. 272.

(67) Ss. 19 and 21—*Mention of debt in schedule of insolvency petition—Acknowledgment of debt—Saving of limitation.*

Where an insolvent entered a debt in the schedule attached to his petition in insolvency, it amounted to an acknowledgment of the debt to satisfy the provisions of S. 19 of the Limitation Act. But such an acknowledgment is not made by the insolvent on behalf of any one but himself, in obedience to the statutory duty imposed upon him. *Klaseendoss v. Khatan Makanjee Spinning and Weaving Co. Ltd.*, 36 Ind. Cas. 389.

WALLIS, C.J., and PHILLIPS, J.

References:—9 Ind. Cas. 954=35 B. 383=13 Bom. L.R. 123, F.

(68) Ss. 19, 21—*Debt contracted by deceased co-parcener for no immoral purpose—Infant son if bound—Limitation—Acknowledgment of debt by karta if binds infant—Acknowledgment if must be expressed as made by karta.* *Har Prasad Das v. Bakshi Harihar Prasad Singh*, 19 C.W.N. 860—31 Ind. Cas. 30. See Final Part, 1915, Col. 941.

(69) S. 20—*Interest as such, payment of—Labour in lieu of interest, if can save limitation.*

Where the plaintiff proves that he received 'interest' through the labour of the defendants till within three years before suit, his claim is not barred by limitation. *Swaminatha Pillai v. Mondalayan*, 3 L.W. 552=35 Ind. Cas. 480.

SADASIVA AIYAR, J.

Reference:—29 M. 234, F.

(70) S. 20—*Requisition of valid part-payment for purposes saving limitation.*

To create a fresh period of limitation under S. 20 of the Limitation Act, 1908, the fact of part-payment of a debt must appear in the handwriting of the person making such payment.

The statute requires that the person who made the payment should be the person who should sign the writing as evidence of the payment (a). *Bishun Perakash Narain Singh v. Md. Siddique*, 1 Pat. L.J. 474=35 Ind. Cas. 975.

ATKINSON and JWALA PRASAD, JJ.

Reference:—(a) 28 C. 546, F.

Limitation Act (1908)—(Continued).

- (71) S. 20 — *Part-payment — Entry must appear in debtor's hand-writing — Mere signature not enough.*

The part-payment of a debt must, for the purposes of S. 20 of the Indian Limitation Act, appear recorded in the hand-writing of the debtor. His mere signature to the record of it by another is not sufficient. *Nivajkhan Nathankhan v. Dadabhai Mussee Valli*, 18 Bom. L.R. 973=41 B. 166.

SCOTT, C.J. and HEATON, J.

- (72) S. 20—*Saving of limitation—Payment of interest—Proof necessary—Debiting interest in account book, if sufficient—Payment in reduction of debt, if saves limitation.*

To avoid the bar of limitation in a suit for the recovery of money due on a mortgage deed, a plaintiff must establish, not only that there was payment within 12 years prior to the date of the institution of the suit, but also that there was either an express intimation by the debtor, or proof of the existence of circumstances going to show, that the payment was on account of the interest on the particular debt sued on.

In the absence of express agreement, debiting to interest in the books of account cannot be regarded as payment of interest (a).

Payments made by the debtor in reduction of the general balance of account against him, but without intimating that any of such payments was to be appropriated in satisfaction of the interest due on his debt, do not amount to a payment of interest as such to save the bar of limitation (b). *Muln-ud-din v. Muhammad Ahmad*, 9 P.W.R. 1916=68 P.L.R. 1916=31 Ind. Cas. 782.

SHADI LAL and LESLIE JONES, JJ.

References:—(a) 19 M. 340 at p. 342=6 M.L.J. 177; 29 A. 773=A.W.N. (1907) 263=4 A.L.J. 628, R. (b) 3 B. 198; 4 A. 512=A.W.N. (1882) 114; 7 Ind. Cas. 7, R.

- (73) S. 20—*Labourer—Rendering of services by pannial—Whether amounts to payment of interest.*

In a suit for recovery of balance of money advanced to a pannial (i.e., farm labourer) for wages, under an agreement executed more than 3 years before suit, his continuance in service will amount to payment of interest within the meaning of S. 20, Limitation Act, 1908(a). *Muthukrishna Aiyar v. Pakkiri Yokaran*, 33 Ind. Cas. 134.

SADASIVA AIYAR, J.

References:—(a) 29 M. 234; 24 B. 493, R.

- (74) S. 20—*Money decree not bearing interest—Payment—Application for execution—Certificate.*

Although the decree-holder may either apply to certify the payment before execution or may do so in his application for execution of the decree, the provisions of S. 20 of the Limitation Act are in no way affected by it.

Where a decree does not bear any interest, any payment made by the judgment-debtor

Limitation Act (1908)—(Continued).

must be taken to have been made in part payment of the principal. In that case it must appear in the handwriting of the judgment-debtor or by his agent duly authorised in this behalf in order that a fresh period of limitation may run from the date of such payment under S. 20 of the Limitation Act. *Harendra Chandra Bhattacharjee v. Gajan Chandra Das*, 35 Ind. Cas. 177.

CHATTERJEE and RICHARDSON, JJ.

- (75) S. 20—*Payment of interest not as such, if could be taken as payment of principal—Payment in debtor's hand-writing.*

A payment of interest on mortgage bond not expressly made as such can be taken as payment towards the principal under S. 20, Limitation Act, 1908, so as to give a fresh start of limitation, if the fact of payment appears from a document in the handwriting of the debtor making the same. *Har Chandra Biswas v. Pura Chandra Mookerjee*, 35 Ind. Cas. 638.

FLETCHER and TRUNON, JJ.

- (76) S. 20—*'Payment towards interest' meaning of—Appropriation by creditor towards interest—Effect.* *Nga Twa v. Nga Ba*, U.B.R. (1915), 2nd Qr. p. 80=31 Ind. Cas. 101. See Final Part, 1915, Col. 942.

- (77) S. 20—*Interest added to principal—Payment of interest within the section.* *Subramaniam Chettiar v. Somaundaram Chettiar*, (1915) M.W.N. 756=30 Ind. Cas. 777. See Final Part, 1915, Col. 942.

- (78) S. 20, proviso—*Payment by cheque, if would save limitation—Continuous account, cause of action.* *Kedar Nath Mitter v. Denobandhu Shaha*, 19 C.W.N. 724=42 C. 1043=31 Ind. Cas. 626. See Final Part, 1915, Col. 943.

- (79) S. 20. See Nos. 65, 66, *supra*.

- (80) Ss. 20 and 21—*Joint Hindu family—Intention to separate, unambiguous declaration of—Subsequent management by one member on behalf of all—Acknowledgment by such manager, if binding on the others—Promissory note, suit on, if confined to maker.*

Where, in spite of a document executed by all the members constituting a joint Hindu family definitely indicating their intention to separate from each other, one of the members was allowed to manage the properties on behalf of all, and he acknowledged a debt due by the family before such division, held that, in the absence of any evidence that he was an authorized agent of the other members within the meaning of S. 20, Limitation Act, the acknowledgment was not binding on the other members under S. 21 of the said Act (a).

Quere.—Whether a suit lies on a promissory note against any one except the maker and whether a person can acknowledge a liability which he cannot create. *Bapanna v. Bheemalingam*, 3 L.W. 231=(1916) M.W.N. 162=33 Ind. Cas. 986.

AYLING and NAPIER, JJ.

Reference:—(a) 2 L.W. 1247, R.

Limitation Act (1908)—(Continued).

(81) *S. 21—Scope—'Joint contract,' if includes a surety—Acknowledgment by third party—Remedies of decree-holder.*

The proviso in S. 21 of the Limitation Act is not exhaustive of the persons for whose benefit the protection was intended. The test for determining the effect of acknowledgment by third party will in each case be whether the person who keeps alive the debt had express or implied authority to act on behalf of those against whom limitation is to be arrested. In cases where the liability is several, it will have to be established clearly that the persons to be bound allowed themselves to be represented by the person who makes the part payment (a).

The words 'joint contractor' in S. 21 of the Limitation Act applies also to a surety (b).

Ordinarily a decree-holder is entitled to have all his remedies against a judgment-debtor. Exceptional circumstances will have to be proved to grant any exemption from the general liability. *Kothandaraman Chetty v. Shunmugam Chetty*, 32 Ind. Cas. 608.

SESHAGIRI AIYAR, J.

References:—(a) 28 B. 248=5 Bom. L.R. 1020, F.; 9 Ind. Cas. 8=21 M.L.J. 455=9 M. L.T. 263; 17 Ind. Cas. 619=24 M.L.J. 66=12 M.L.T. 610, R. (b) 32 C. 1071; 33 C. 1273, R.

(81-a) S. 21. See Nos. 67, 68, 80, *supra*.

(82) *S. 22—Suit by a person without indicating in plaint that he was suing on behalf of a Company—Plaint subsequently amended—Not a case of adding new plaintiff.*

Where the plaintiff, in the original plaint, did not say that he was suing on behalf of a Company, and, on objection being taken by the defendant, he stated that he was entirely agreeable that the decree should be in favour of the Company, and that the plaint be amended so that the suit might proceed as being instituted on behalf of the Company, *held*, this was not a case of adding a new plaintiff, for the plaintiff was already on the record, and all he did not make clear in the original plaint was the capacity in which he instituted the suit. *Muthukrishna Pillai v. M.A. Rajam Aiyangar*, 30 M.L.J. 57=33 Ind. Cas. 367.

ABDUR RAHIM and SPENCER, JJ.

(83) *S. 22—Scope and applicability of.*

S. 22 of the Limitation Act does not of itself purport to determine whether the joinder of parties after the institution of the suit shall in all cases necessarily involve the bar of limitation. Such a result must depend upon the consideration of the question whether the joinder was necessary to enable the Court to award such relief as may be given on the suit as framed (a). *Gehimal v. Karmumal*, 10 S.L.R. 38=35 Ind. Cas. 551.

PRATT, J.C. and CROUCH, A.J.C.

Reference:—(a) 29 B. 11, F.

(83-a) *S. 22—Suit against wrong defendant—Name corrected after period of limitation—Clerical mistake—Amendment.*

Limitation Act (1908)—(Continued).

A suit for correction of entry in the record of right describing defendant as Mr. P. J. Forbes, wherein after, period of limitation, on the plaintiff's petition, Miss P. J. Forbes was substituted, having been dismissed as being barred against Miss P. J. Forbes. *Held* that the suit was not barred by limitation, since the mistake was a clerical one and the case was merely of misdescription. *Jogendra Naraya Roy v. Forbes*, 32 Ind. Cas. 872.

(84) *S. 22—Added defendants—Limitation against added defendants—Suit for sale of mortgaged property—Suit brought against mortgagor's son—Addition of mortgagor's widow and daughters as party defendants—Liability of the estate of the mortgagor. Virchand Vajekaran Shet v. Kondra Kasam Atar*, 17 Bom. L.R. 685=39 B. 729=31 Ind. Cas. 180. See Final Part, 1915, Col. 944.

(85) *S. 22. See HINDU LAW—REVERSIONERS*, No. 3, 19 O.C. 221.

(86) *S. 22. See No. 55, supra.*

(87) *S. 23, Arts. 120, 142—Limitation—Suit for determination of rights—Suit for declaration of title—Order under S. 146 of the Code of Criminal Procedure—Specific Relief Act, S. 41—Suit against Magistrate, if maintainable—Continuing wrong—'Dispossession'—'Discontinuance'—Attachment—Continuance of legal injury—Continuance of injurious effects of legal injury—Forfeiture after lapse of prescribed period. Brajendra Kishore Rai Chaudhuri v. Abdul Razac Chaudhuri*, 23 C.L.J. 283=20 C.W.N. 481=31 Ind. Cas. 242, See Final Part, 1915, Col. 946.

(88) *S. 26—Right to discharge surplus water through water course—Easement—Natural right—Proof.*

A plaintiff who seeks to enforce right to discharge surplus water or the existence of an easement is required to prove the acquisition of the easement under S. 26 of the Limitation Act, 1908. *Maung Tha Te v. Ko Shwe Byan*, 35 Ind. Cas. 394.

FOX, C.J., and TWOMEY, J.

References:—1 M. 335; 7 W.R. 498; 20 W.R. 287, R.

(89) *S. 28—Party in possession—His rights not affected by the section. See RES JUDICATA*, No. 2, 1 P.R. 1916.

(90) *S. 28, Art. 144—Adverse possession for more than 12 years. See SPECIFIC RELIEF ACT*, No. 31, 36 Ind. Cas. 11.

(90-a) *S. 30. See No. 237, infra.*

(91) *S. 31, Arts. 132, 135—Mortgage executed before the Transfer of Property Act—Document not purporting to sell the property but containing covenant to relinquish all rights therein—Construction—Document whether mortgage by conditional sale—Law applicable—Remedies under the Transfer of Property Act if available—Suit for foreclosure—Limitation. See TRANSFER OF PROPERTY ACT, No. 8, 36 M. L.J. 338.*

Limitation Act (1908)—(Continued).

(92) S. 31, Art. 135—*Suit for foreclosure—Reg. XVII of 1806—Transfer of Property Act.*

A mortgage by conditional sale was made on February 25, 1806, for a period of six years. It was provided that if after six years, any thing remained due to the mortgagee, they might forthwith enter into possession of the mortgaged property and realize the principal and interest. It further provided that the property would not be transferred so long as any principal or interest remained due, and that, if it was transferred, or if the money due to the mortgagee was not paid, the latter, without waiting for the expiry of the six years, might bring a suit for recovery of the principal and interest and might also get possession "by completion of sale." Nothing was paid on foot of principal or interest on the mortgage. Proceedings under S. 8 of Reg. XVII of 1806 were not taken by the mortgagee. Part of the mortgaged property was transferred by the mortgagor in 1867. In the year 1910 the mortgagee instituted a suit for foreclosure:—

Held, that the suit was barred by limitation, the cause of action having accrued in 1867. **Bansgopal v. Sheo Ram Singh**, 14 A.L.J. 1 = 38 A. 97 = 32 Ind. Cas. 95.

RICHARDS, C J. and RAFIQ, J.

(93) Art. 10. See PRE-EMPTION, No. 1, 60 P.W.R. 1916.

(94) *Sch. I, Art. 11—Civ. Pro. Code, 1882, S. 283, Order under—Suit to set aside.*

Art. 11 of the Limitation Act of 1908 refers only to order passed under Civ. Pro. Code, 1908. So an order under S. 283, Civ. Pro. Code, 1882, passed in 1905, need not be set aside by a suit filed within a year from its date. **T. S. Subba Aiyar v. Subba Aiyar**. 31 Ind. Cas. 250.

SADASIVA AIYAR and NAPIER, JJ.

References:—29 M.L.J. 1; 41 C. 1125; 35 A. 227 (P.G.), R.

(95) Art. 11. See CIV. PRO. CODE (1882), No. 24, 31 Ind. Cas. 444.

(96) Art. 11. See CIV. PRO. CODE (1908), No. 379, 66 P.R. 1916.

(97) Art. 11—Order refusing to recognise mortgage—Suit to set aside the order—Limitation—Applicability of Art. 11 to orders made after full investigation and to orders passed on default. See CIV. PRO. CODE (1908), No. 476, 31 M.L.J. 247.

(98) Art. 11—Suit against order on claim petition—Plaintiff's right to declaration and consequential relief—Sale of property before order on the claim petition. See CIV. PRO. CODE (1908), No. 486, (1916) 2 M.W.N. 207.

(99) Art. 11. See No. 27, *supra*.

(100) Art. 11—A—Order under O. XXI, r. 101, Civ. Pro. Code—Limitation for regular suit. See CIV. PRO. CODE (1908), No. 535, 96 P.W. R. 1916.

(101) Art. 12—*Application of—Setting aside sale.*

Art. 12 of the Limitation Act applies only

Limitation Act (1908)—(Continued).

to parties to the suit or to the execution proceedings arising out of it, and it has no application to strangers (a).

A stranger whose property is sold behind his back without his authority does not need to have the sale set aside at all. **Ma Ng Ma v. Ma Shwe Hail**, U.B.R. (1916), 2nd Qr. 116 = 36 Ind. Cas. 3.

SAUNDERS, J.

References:—(a) 17 M. 316; 1 L.B.R. 53; 4 L.B.R. 40; 11 B. 180, R.

(102) Art. 12—*Mitakebara family—Mortgage-Decree against father—Sons not parties—Sale in execution of decree—Suit by sons to redeem—Maintainability—Limitation. See HINDU LAW (ALIENATION), No. 14, 1 Pat. L.J. 180.*

(103) Art. 12 (a)—*Minor—Suit against a minor—Attainment of majority during suit—Proceedings continued as if he was still a minor—Decree and sale in execution—Validity—Jurisdiction.*

Where, notwithstanding the attainment of majority *pendente lite* by a minor defendant, the suit was continued as if he was still a minor, and a decree was passed against him and his property sold in execution.

Held, that neither the decree nor the sale was a nullity and that the Court had jurisdiction to pass the decree and to sell the property.

Therefore a subsequent suit brought by him more than a year after the sale is barred by limitation. **Seshagiri Row v. Tanguturi Jaganadham**, 19 M.L.T. 93 = 32 Ind. Cas. 391 = 39 M. 1031.

SADASIVA AIYAR and NAPIER, JJ.

(104) Art. 14 — See No. 36, *supra* and No. 207, *infra*.

(105) Arts. 29, 36, 42 and 120—*Wrongful attachment of moveables—Attachment before judgment—Suit for compensation—Period of limitation—Applicability of Art. 29 or 36—Second appeal—Remand to lower appellate Court—Finding of fact—Not open to be disturbed by lower appellate Court.*

Where the defendant attached before judgment certain moveables belonging to the plaintiff which were already, at the instance of another creditor, under attachment in execution of a decree, as if the said moveables belonged to the defendant's debtor.

Held, that a suit for damages for compensation for wrongful attachment was governed either by Art. 29 or by Art. 36 but not by Art. 42 or Art. 120 (a).

Where, on a second appeal, the High Court remanded an appeal to the lower appellate Court for disposal, it was held that the lower appellate Court was not justified in going behind the finding of fact arrived at by its predecessor in office, when such finding was not disturbed by the High Court. **Pandiri Veeranna v. Mandavilli Subba Row**, 31 M.L.J. 257 = 35 Ind. Cas. 98.

SADASIVA AIYAR and NAPIER, JJ.

Limitation Act (1908)—(Continued).

References :—(a) 31 M. 481 = 18 M.L.J. 590; 38 M. 979 = 26 M.L.J. 166; 12 Bom. L.R. 977 (1932); 6 Bom. L.R. 704; 11 B. 133; 10 B. 214; 36 C. 141; 25 O. 692 and 29 A. 615, R.

(106) Arts. 29, 62—Suit for money taken in execution of a decree—Compensation—Money had and received—Limitation.

In execution of a decree against A, certain money due to A was attached. Before that date A had transferred his property to B and the money was legally due to B. The debtor of A paid the money to the bailiff who deposited it into Court and it was paid over to A's decree-holder. Subsequently B brought a suit for the recovery of the money within three years from the date when it was paid. *Held*, that the suit was one for money had and received within the meaning of Art. 62, Limitation Act, and was not barred by limitation, and that Art. 29 was not applicable to it. **Nadar Singh v. Ganga Del**, 14 A.L.J. 728 = 38 A. 676 = 35 Ind. Cas. 86.

WALSH and SUNDAR LAL, JJ.

Reference :—8 B. 17, *Not F.*

(107) Art. 30—Suit for compensation for loss of goods consigned—Limitation. See **RAILWAYS ACT (1890)**, No. 5, 20 C.W.N. 696.

(107-a) Art. 30. See No. 189, *infra*.

(108) Arts. 30, 31, 115—Applicability. See **RAILWAYS ACT (1890)**, No. 1, 20 C.W.N. 790.

(109) Art. 31. See No. 103, *supra*, and No. 189, *infra*.

(110) Arts. 31, 45 and 115—Suit for return of planks consigned or their value, under a bill of lading—Pleadings. **Yenkatasubba Row v. Asiatic Steam Navigation Company**, (1915) M.W.N. 644 = 29 M.L.J. 342 = 2 L.W. 305 = 18 M.L.T. 236 = 39 M. 1 = 30 Ind. Cas. 840. See Final Part, 1915, Col. 951.

(111) Arts. 31, 115—Suit for compensation against Railway Company for non-delivery of goods—Applicability of Art. 31—Common carrier—Special contract limiting his liability—Effect—Risk-note—Whether affects position of a Railway Company. **All Mohamad v. Great Indian Peninsula Railway Company**, 11 N.L.R. 174 = 31 Ind. Cas. 474. See Final Part, 1915, Col. 951.

(112) Sch. I, Art. 32—Easement—Raising wall to a greater height—Additional burden on original easement—Claim not governed by Art. 32. See **EASEMENT**, No. 2, 33 Ind. Cas. 90.

(113) Arts. 32, 143—Suit to eject tenant under S. 155, Bengal Tenancy Act—Limitation. See **BEN. ACT VIII OF 1885 (TENANCY)**, No. 73, 20 C.W.N. 661.

(114) Art. 86. See No. 105, *supra*, and Nos. 208, 209, *infra*.

(115) Arts. 86, 49 and 132—Hypothecation of land with trees—Trees sold by mortgagor to third parties and cut and carried away by the purchasers—Cause of action against purchasers, whether in tort or upon the

Limitation Act (1908)—(Continued).

mortgage—Article applicable—Transfer of Property Act, S. 66.

On the 26th October 1900 the 1st defendant, as the manager of an undivided family consisting of himself and defendants 2 to 9, hypothecated certain immovable properties among others with a cashuarina plantation thereon to the plaintiffs to secure the repayment of a loan advanced by them. In 1905 the trees having become fit for cutting, the 1st defendant sold them to the 12th and the 13th defendants who cut and carried them away. On 26th July 1909, the present suit was instituted against defendants 1 to 9 for enforcing the mortgage security and against defendants 12 and 13 for having, in concert with defendants 1 to 9, cut and removed all the trees and appropriated them to their own use with the knowledge of the mortgages in favour of the plaintiffs, and thereby having impaired the value of their mortgage security to the extent of Rs. 1,000.

Held that, so far as the defendants 12 and 13 were concerned, the action was one on tort, governed by Art. 36 or 49, Limitation Act, 1908, and not one to enforce the security under Art. 132 of the said Act, and that consequently the suit was barred by limitation.

The cases bearing on the subject considered. **Surapudi Munlappa v. Nookala Seshayya Garu**, 3 L.W. 341 = 32 Ind. Cas. 901.

COUTTS-TROTTER and SAINIVASA AIYANGAR, JJ.

(116) Art. 39—Standing crops—Immoveable property—Civ. Pro. Code, S. 13, Cl. (2)—General Clauses Act (X of 1897), S. 3, Cl. (25). **Devarasetti Narasimham v. Devarasetti Venkiah**, 18 M.L.T. 532 = 31 Ind. Cas. 796. See Final Part, 1915, Col. 951.

(117) Art. 42. See No. 105, *supra*.

(118) Sch. I, Art. 44—Minor—Sale of minor's property by guardian—Fraud of minor—Suit to set aside sale barred—Right to recovery of possession of property sold—Extinction of right.

A sale by a guardian of a minor's property is only voidable and is valid until avoided. This avoidance must be by a suit within 3 years under Art. 44, Sch. I, of the Limitation Act, 1908. As the ward cannot recover possession without setting aside the sale, his right to recover possession is also gone (a) **Krishna Dhooe Bhattacharjya v. Bhagaban Chandra Bhattacharjya**, 34 Ind. Cas. 188.

CHATTERJEE and NEWBOULD, JJ.

References :—(a) 23 M. 271 (279); 13 C. 303; 25 B. 337, R.

(119) Art. 44—Transfer of property by guardian—Suit to set aside alienation—Unauthorised alienation by de facto guardian—Alienation by mother—Necessity, proof of—Transfer of Property Act, S. 38. **Balappa Dundappa Todkal v. Channasappa Shirlingappa Patil**, 17 Bom. L.R. 1134 = 33 Ind. Cas. 444. See Final Part, 1915, Col. 952.

(120) Art. 44. See **HINDU LAW (ALIENATION)**, No. 20, 10 S.L.R. 38.

Limitation Act (1908)—(Continued).

(121) Art. 44. See MAHOMEDAN LAW (GUARDIANSHIP), No. 2, 1 Pat. L.J. 188.

(121-a) Art. 44. See No. 266, *infra*.

(122) Sch. I, Arts. 44, 91, 141. See CAN-
CELLATION OF DEED, No. 1, 33 Ind. Cas. 441.

(123) Arts. 44, 91, 144—*Mahomedan Law—Major brother not guardian of minor brother's property—Alienation by major brother—Validity—Suit by minors to recover their shares—Limitation—Position of de-facto guardian.*

According to Mahomedan Law, a brother is not a guardian of the property of his minor brothers and has no legal authority to alienate the property of the latter, and the latter are not bound to set aside the alienation within the shorter period prescribed by Art. 44.

Such an alienation may be treated as a nullity by the minor on attaining majority.

Art. 144, and not Art. 44, governs a suit for possession of the immoveable property alienated by a person who is neither a guardian by Mahomedan Law nor by appointment by Court.

Art. 91 is restricted to a suit between the parties to the instrument or their successors-in-interest, and a plaintiff is not bound to set aside an instrument not executed by himself or by his predecessor-in-title.

The situation of an unauthorised guardian is not bettered by describing him as a *de facto* guardian. *Sajjad Ali v Muhammad Zulfikar Ali Khan*, 83 P.R. 1916=125 P.W.R. 1916=33 Ind. Cas. 943.

SHADI LAL and LESLIE JONES, JJ.

References:—73 P.R. 1890, F.; 28 P.R. 1909; 15 P.R. 1913; 32 A. 393; 34 A. 213 (P.G.), F.; 57 P.R. 1891; 19 P.R. 1902, D.; 23 P.R. 1904, Not F.

(124) Art. 45. See No. 110, *supra*.

(125) Art. 48. See GUARDIAN AND WARD, No. 2, 33 Ind. Cas. 436.

(126) Arts. 48, 49—*Commission agent for sale in possession of jewel—Pledge by him—Suit by owner to recover the jewel or its value from pledgee—Limitation—Rights of pledgee in good faith—Ss. 178 and 108 (Excep. 1), Contract Act—Scope.*

On 19-5-1907, plaintiff respondent entrusted a jewel to K. who undertook to sell it on commission. K, instead of selling, pledged the jewel with the appellant, a money lender, on 20-5-1907. K died 2 months after without redeeming the pledge. On 15-12-1909 appellant took the jewel to plaintiff respondent and asked him to sell it for him. Respondent then came to know that the jewel had been improperly pledged, and on 29-6-1911 sued for the return of the jewel or its value. *Held*, that Art. 49, Limitation Act, applied to the case, and the suit having been brought within 3 years from 15-12-1909, when respondent learnt that the jewel was in the appellant's possession, was not barred (a).

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Held also that the appellant, being a pawnee acting in good faith, was entitled to the protection afforded by S. 178, Contract Act, and to be paid the amount of the pledge with interest.

S. 178 and Excep. 1 to S. 108, Contract Act, deal with cases where the pledgor has other than a limited interest and has lawful juridical possession "unconnected with and independent of any interest therein", that is, such juridical possession as a factor or agent has, in other words, such possession as is had by an agent entrusted as such, and ordinarily having as such agent a power of sale or pledge (b). *Seshappier v. Subramania Chettiar*, 30 M.L.J. 587=19 M.L.T. 396=34 Ind. Cas. 751.

SADASIVA AIYAR and MOORE, JJ.

References:—(a) 5 A. 341; 29 A. 579; 11 Bom. L.R. 926; 12 Bom. L.R. 316, R. (b) 12 B.L.R. 42; 4 C. 497; 8 B. 501; 24 B. 458; 12 Bom. L.R. 316 (335); 27 M. 424 (426), R.

(127) Arts. 48, 49, 62—*Evidence—Suit for value or return of goods on failure of consideration—Secondary evidence of unstamped document, inadmissibility of—Onus of proof.*

In a suit for the value or return of goods delivered to defendant for a consideration which has failed, though the plaintiff cannot prove consideration by secondary evidence of a document which is inadmissible for want of stamp, he can prove that the goods were delivered and that he got nothing in return, which is enough to throw the onus on the defendant to prove that the goods were given as a gift or that in fact some consideration passed for them.

Such suit will fall either under Art. 48 or Art. 49, but not under Art. 62 of the Limitation Act, as receipt of goods cannot be said to be receipt of money within the meaning of that article. *Chami v. Ana Pattar*, 33 Ind. Cas. 661.

COUTTS-TROTTER and SESHAGIRI AIYAR, JJ.

References:—3 A. 788 (793)=A.W.N. (1881) 74, Rel. on.

(128) Art. 49. See Nos. 115, 126, 127, *supra*.

(129) Sch. I, Arts. 49, 115, 145—*Gold deposited with goldsmith to be made into ornaments—Suit to recover—Limitation.*

Where the allegation was that nearly 11 years ago the plaintiff had made over a *tola* of gold to defendants to be made into ornaments, but no time was fixed and the latter put him off from time to time until being pressed by plaintiff on 24th March 1914, he promised to make and deliver the ornaments within 15 days, but failed to do so.

Held—That Art. 145 of Sch. I of the Limitation Act applied to a suit for recovery of the gold deposited.

Art. 145 applies even when the property is not recoverable *in specie* and does not cease to be applicable merely because the defendant refuses to return the property. Such refusal does not bring into operation (Art. 48 or 49.)

Even if Art. 49 applied, limitation would begin running from 8th April 1914 before which there was no refusal.

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If Art. 115 applied, limitation would run from the same date, when the contract was broken. **Gangahari Chakravarti v. Nabin Chandra Banikya**, 20 C.W.N. 292=29 C.L.J. 145=34 Ind. Cas. 959.

MOOKERJEE and NEWBOULP, JJ.

(130) *Arts. 57, 60 and 115—Suit for money of thavanai account—Custom of Natukottai Chetties—Fixing of rate of interest.*

The relationship between the parties to a *thavanai* transaction is that of lender and borrower, that the loan is made for a fixed and certain period of two months at a rate of interest which is fixed weekly by members of the Chetty community for transactions which may be entered into during the ensuing week; the lender cannot demand re-payment before the end of two months for which he has lent the money; if he does not demand it at such time and the borrower does not elect to re-pay it then, the loan is taken to be extended for another full two months at the rate of interest fixed by the weekly meeting of the community for the then period, and so on until the money is re-paid.

Art. 60 of the Limitation Act does not apply to a suit for money lent on *thavanai* account, because the money is not payable on demand according to legal meaning of the terms. Art. 57 of the Act governs the suit and not the residuary—Art. 115. The period of limitation commences from the time when the money was lent. **Annamal Chetty v. M.L.R.M. Lutchman Chetty**, 36 Ind. Cas. 497.

FOX, C.J., and TWOMEY, J.

(131) *Sch. I, Arts. 57, 61, 85—Punjab Loans Limitation Act (I of 1904), Sch. I, S. Nos. 3, 7—Account stated—Closed account—Open and current account—Balance—Interest, rate of—Presumption—Balance struck by father and son—Their respective liability.*

Held that:

(1) An account is said to be stated only when there have been cross demands between the parties and the balance struck then becomes the consideration for the discharge on either side. Such an account stated amounts to a new contract and is a substantive cause of action (a).

Plaintiff advanced loans to defendant from time to time, and in re-payment defendant occasionally passed grain to plaintiff, which the latter sold and credited to the former's account. After some months the accounts were examined and a balance struck in plaintiff's favour. Subsequently defendant borrowed more money from plaintiff and overpaid him in this latter account. Plaintiff, after giving credit in the previous account of this overpayment in the subsequent open account, claimed the balance under the former account availing an oral agreement for re-payment of balance with interest:

(2) *Held*, that plaintiff's suit was on a closed account and not on an open account and that

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it was governed by Art. 64 or by Art. 57 of the Limitation Act as amended by the Punjab Loans Limitation Act and not by Art. 85 of the Limitation Act (b).

(3) When in striking the balance of an account interest at a certain rate is charged, it must be presumed that the same rate is to be chargeable till payment.*

(4) Where the father and the eldest son incur a debt the legal presumption is that they have acted as *harktes* of the family. The father is personally liable and the sons up to their interest in the joint family. **Ishar Das v. Harkishan Das**, 148 P.W.R. 1916=7 P.L.R. 1917=35 Ind. Cas. 577.

SHADI LAL and LE ROSSIGNOL, JJ.

References:—(a) 33 L.J.Q.B. 43=4 B. & S. 407=10 Jur. (N.S.) 336=9 L.T. (N.S.) 378=12 W.R. 76=122 E.R. 546=129 R. R. 827. R. (b) 16 P.R. 1916=118 P.W.R. 1915=30 Ind. Cas. 491. D.

(132) *Arts. 57, 85—Mutual, open and current accounts—Limitation—Test to be applied. See ACCOUNTS, No. 2, 103 P.W.R. 1916.*

(133) *Arts. 59 and 60—Deposit, meaning of—Non-banker trader—Entrustment of money—Nature of relationship.*

Money in the hands of a trader, who is not a banker, will in circumstances such as would make it the money of a customer when the depositor was a banker, be a deposit within the meaning of Art. 60, Limitation Act. **Subramanian Chettiar v. Kadresan Chettiar**, 3 L. W. 168=19 M.L.T. 149=(1916) M.W.N. 186=30 M.L.J. 245=32 Ind. Cas. 965=39 M. 1081.

AYLING and NAPIER, JJ.

(134) *Art. 60—Gift by grandfather—Deposit with a relative—Suit by donee—Limitation. See CONTRACT, No. 5, (1916) M.W.N. 206.*

(135) *Art. 60. See Nos. 130, 133, supra.*

(136) *Arts. 60, 89, 106—Joint purchase, suit to recover money paid for—Transaction, nature of.*

In a suit to recover money paid by the plaintiff to the defendant, to be used in a joint purchase of property:

Held, that, as the defendant was acting as the agent of the plaintiff, within the meaning of Art. 89, Limitation Act, Art. 60 or 106 of the said Act did not apply. **Jetha Ram v. Mehunga Ram**, 66 P.W.R. 1916=33 Ind. Cas. 438.

SHADI LAL and LE ROSSIGNOL, JJ.

(136-a) *Art. 61. See No. 210, infra.*

(137) *Arts. 61 and 120—Suit for contribution—"Payment"—Starting point of limitation.*

Where the holder of a *jols* jointly with other persons paid money due to the landlord in execution of the decree obtained by him for arrears of rent to save the property from sale in execution of the decree, a suit to recover the money by way of contribution is governed by Art. 120 and not Art. 61 of the Limitation Act. The starting point of limitation under Art. 61 did not run from the date on which the money

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was paid but from the date on which the Court accepted the money. *Ananda Mohan Roy Chowdhury v. Maniruddin Mahomed*, 36 Ind. Cas. 392.

CHATTERJEE and SHEEPHANKS, JJ.

(138) Art. 62. See *RES JURICATA*, No. 17, 18 Bom. L.R. 773.

(139) Art. 62 See Nos. 106, 127, *supra*, and Nos. 176, 208, 232, *infra*.

(140) Art. 62 and S. 10. See *CIV. PRO. CODE* (1908), No. 213, 14 A.L.J. 143.

(141) Arts. 62, 97, 116—*Possession not obtained by vendee—Failure of consideration—Accrual of cause of action.* *Janak Singh v. Waladad Khan*, 13 A.L.J. 669=30 Ind. Cas. 410. See Final Part, 1915, Col. 955.

(142) Sch. I, Art. 62, 116—*Mortgage—Mortgagor receiving rents—Suit by mortgagee for amounts improperly collected by mortgagor—Breach of contract—Period of limitation—Practice—Proper method of framing plaint.*

R the defendant mortgaged certain property on 12th September 1898 to H the plaintiff. The property consisted of certain occupancy holdings. As H lived at some distance, the rents were collected for him by an uncle who died in 1906. After 1906, R collected rents and became possessed of the property. In 1913, H sued for recovery of possession of the holdings and of rents collected by R during the last three years immediately preceding the suit. The claim for rent was contested on the ground that the rents have been received for more than six years.

Held that the claim for rent was governed by Art. 62 of the Limitation Act, 1908 and that it was not barred because each time the defendant received rent, he committed a breach of contract (a).

The plaintiff might have claimed in several distinct causes of action although combined in one suit all the rents received within six years of the suit on the ground that each receipt was a separate breach of the mortgage contract or money received to his use.

A practice seems to have grown up of framing claims of this nature as claims for general damages for the original breach of the contract by dispossession. This form of claim is attended with serious risks to the litigant. In future, pleaders would be well advised to frame their claims for what they are in substance, namely, money wrongfully received from time to time as defined by Art. 62 of the Limitation Act or as successive breaches under Art. 116. *Harpal v. Ram Sarup*, 34 Ind. Cas. 173.

WALSH, J.

References:—(a) A.W.N. (1888) 15 and 2 Bom. L.R. 201, R.

(143) Arts. 62 and 120—*Manager of a Jaghir, appointed by Government—Account demanded of moneys received by the manager in respect of plaintiff's share—Article applicable—Civ. Pro. Code* (1908), O. II, r. 2—*Plaint in first suit returned for presentation*

Limitation Act (1908)—(Continued).

to proper Court—No representation—Subsequent suit, if barred—Non-presentation, effect of.

Art. 62 of the Limitation Act only applies to cases where a definite sum of money has been received by the defendant, which the law says he must hold for the use of the plaintiff. That article does not apply to cases where it is sought to recover from the defendant moneys which he ought to have received but which he failed to receive.

A suit against the defendant who had been appointed by the Government as a manager of a Jaghir, asking him to account for moneys which he received as such Manager, to the plaintiff, who is entitled to a particular share therein, is purely a suit for accounts and is governed by Art. 120 of the Limitation Act. Art. 62 does not apply to such a case as the defendant is entitled to receive the money and is bound to pay over what is due to the plaintiff only after the deduction of the legitimate expenses and outgoings, and it cannot be said (and this is the conclusive test) that the money which may be found due to the plaintiff was received by the defendant at any particular point of time that is put down in Art. 62 as the starting point of limitation (a).

O. II, r. 2, *Civ. Pro. Code*, is no bar to a subsequent suit if the plaint in the former suit had been returned for presentation to the proper Court and was not represented. In such a case the prior suit, having been practically withdrawn, must be treated as not having been filed at all. *Subba Row v. Rama Row*, 3 L. W. 192=19 M.L.T. 134=(1916) M.W.N. 188=30 M.L.J. 341=32 Ind. Cas. 899.

ABDUR RAHIM and SRINIVASA AIYANGAR, JJ.

References:—(a) 7 A. 25, F'; 9 B. 111; 22 B. 669; 32 M. 191; 32 C. 527; (1911) 2 M.W.N. 467, D.

(144) Arts. 62, 120—*Calcutta High Court, decision of binding upon Patna High Court, until dissented from by Full Bench—Civ. Pro. Code* (1908), O. XXII, rr. 11 and 9—*Withdrawal of surplus sale-proceeds belonging to the plaintiff by defendant—Suit instituted more than three years from date of withdrawal—Limitation Act* (1908), Art. 62 or 120 applicable.

Where an application for substitution was made more than six months after the appellant's death before the Registrar, and the respondents did not put in any objection before the Registrar to the hearing of the appeal, the application for substitution was treated as an application for the restoration of the appeal after abatement.

The plaintiff, a purchaser at auction-sale of a revenue-paying estate, made default in the payment of Government revenue and the estate was sold and the surplus sale-proceeds were withdrawn by the defendants, the original proprietors, whose names still remained in the register, and a suit was instituted by the plaintiff, for the recovery of the money so withdrawn,

Limitation Act (1908)—(Continued).

more than three years after the date of withdrawal.

Held—that Art. 62 of the Limitation Act applied and the suit was barred by limitation (a).

Money paid to one party with the implied intention that it should finally reach the hands of the party to whom it actually belongs, is money, within the meaning of Art. 62, paid to that party for the use of the actual person in whom the right to receive vests.

The decision by a Divisional Bench of the Calcutta High Court is binding upon the Patna High Court until dissented from by a Full Bench. *Harihar Messrs v. Syed Mohamed*, 20 C.W.N. 983=1 Pat. L. J. 374.

ROE and JWALA PRASAD, JJ.

References:—(a) 32 C. 527: 17 Ind. Cas. 351, R.

(145) Art. 64. See No. 131, *supra*.

(146) Arts. 64, 85—*Punjab Loans Limitation Act—Acknowledgment—Novation—Account stated*. *Jas Ram v. Attar Chand*, 179 P.L.R. 1915=118 P.W.R. 1915=30 Ind. Cas. 491=16 P.R. 1916. See Final Part, 1915, Col. 957.

(147) Sch. I, Arts. 66, 67, 80—*Unregistered bonds, how governed—Bond providing for repayment on happening of certain contingency, suit on—Starting point of limitation*.

Art. 67 of the Limitation Act has to be read with Art. 66 and both these Articles apply to unregistered bonds. Neither of these can properly be applied to a bond which, though it does not specify a particular day for payment, yet in effect lays down that the money due on the bond is payable on a future date upon a certain contingency happening.

Where, therefore, a bond provided that the money due upon it would be paid at the time of payment of a certain sum of money due on two mortgage-deeds executed previously:

Held, that since, according to the true construction of the bond, the money due on it could not be demanded by the plaintiff before the money due on the mortgage-deeds was paid to him, the starting point for limitation was the date of such payment and that Art. 80, Limitation Act, governed the case. *Kirpa Ram v. Churu*, 30 P.W.R. 1916=32 Ind. Cas. 575.

SHAH DIN, J.

Reference:—139 P.R. 1889, D.

(148) Art. 67. See No. 147, *supra*.

(149) Arts. 73 and 80—*Negotiable instrument—Collateral agreement fixing time for payment—Limitation, starting point of—Contract Act, Ss. 62 and 63—Agreements to give time—Validity—Negotiable Instruments Act (XXVI of 1881), S. 32*.

The defendant executed a promissory note to the plaintiffs on 4th August 1909, payable on demand. On the same day he gave a writing worded as follows:—

'Ten months' *thavanai* from the date of the pro-note has been fixed for this note. The

Limitation Act (1908)—(Continued).

plaintiffs instituted the present suit on the said promissory note on 30th June, 1913.

Held, that the suit was governed by Art. 80, Limitation Act, 1908, and not Art. 73, and was within time (a).

Held, further, that, under Ss. 62 and 63, Contract Act, an agreement to give time is operative in India, and that the English decisions to the contrary are inapplicable to this country. *Annammal Chetty v. Valayuda Nadar*, 3 L.W. 98=19 M.L.T. 62=30 M.L.J. 51=(1916) M.W.N. 93=39 M. 129=32 Ind. Cas. 869 (F.B.).

WALLIS, C.J., ABDUR RAHIM and SESHAGIRI AYYAR, JJ.

References:—(a) 19 M. 368; 29 M. 212, *Overruled*.

(150) Art. 75—*Instalment bond, consent not to sue on failure to pay instalment, if would amount to waiver*. *Ram Chunder Banka v. Rawatmull*, 19 C.W.N. 1172=31 Ind. Cas. 672. See Final Part, 1915, Col. 957.

(151) Art. 75—*Instalment bond—Interest payable monthly—Default to pay monthly interest—Date of such default—Limitation—Starting point*. *Vishindas Wadhuram v. Hotomal Ditomal*, 9 S.L.R. 90=31 Ind. Cas. 479. See Final Part, 1915, Col. 958.

(152) Arts. 75 and 132—*Hypothecation bond—Principal payable after 11 years—Interest every year—Condition that principal and interest shall both become due immediately in default of payment of interest—Cause of action, if arises on date of first default—Creditor, whether bound to enforce default clause*.

A mortgage-bond dated 1st November 1898 provided for the payment of the principal on 1st November 1899 and for annual payment of interest at 6½ per cent. per annum. There was a further stipulation, "If I, without paying the interest on the due date and also the principal and interest on the respective due dates according to the aforesaid conditions, allow the same to fall into arrears, I shall pay the principal sum together with interest at 12 per cent. from date of default till the date of payment without raising the plea of future instalment on the liability of the mortgage property." Interest was not paid as provided for. In a suit by the mortgagee in 1911, the defendant pleaded limitation on the ground that the cause of action arose on the date of the first default.

Held, (1) that the above clause reserved an option to the mortgagee to anticipate the due date;

(2) that the right to sue did not accrue until the expiry of the date provided for the payment of the principal (a);

(3) that the mortgagee was not bound to take advantage of the default clause (b);

(4) that Art. 132 and not Art. 75 applied to the case.

A benefit secured to the creditor should not be availed of by the debtor when the former does not want it (c).

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Art. 139 should be given its plain and natural significance and there is no warrant for importing the words of Art. 75 into Art. 132 (d). **Narna v. Ammaul Amma**, 4 L.W. 77 = 20 M. L.T. 176 = 31 M.L.J. 865 = (1916) 2 M.W.N. 125 = 39 M. 931 = 35 Ind. Cas. 418.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—(a) 37 A. 400 (F.B.), Diss. (b) 1 C. 163, (P.C.), F. (c) (1877) W.R. 141; L.R. 18 Equity 290, R.; (1891) 2 Q.B. 569; 4 Q.B. 519, D. (d) 20 M. 245; 22 M. 20; 24 C. 281, *Commented on*.

(153) *Sch. I, Arts. 75, 132—Instalment mortgage bond—Suit for whole amount on default as to an instalment—Acceptance by creditor of part of over-due instalment—Starting point of limitation.*

A suit to recover the whole amount of an instalment mortgage bond under a clause which provides that in default of payment of an instalment all the instalments would become due, is governed by Art. 132, sch. I of the Limitation Act, and would be barred if it has been instituted more than 12 years from the date of default, notwithstanding that the plaintiff has received a part of the over-due instalment, for acceptance of a part of an over-due instalment is not a waiver, and would consequently be inoperative to save the bar of limitation even if the principle indicated in the third column of Art. 75 should be adopted in determining "when the money sued for becomes due" within the meaning of Art. 132. **Reyazaddin v. Ashraf Ali Pal**, 33 Ind. Cas. 606.

N.R. CHATTERJEA and RICHARDSON, JJ.

Reference:—31 C. 83 = 8 C.W.N. 66, F.

(154) Art. 80. See Nos. 147, 149, *supra*.

(155) *Sch. I, Art. 85—"Mutual, open and current account," meaning of—Settled account, opening of. Ebrahim Ahmed Mehter v. S. Abdul Huq*, 27 Ind. Cas. 879 = 8 Bur. L.T. 116 = 8 L. B.R. 149. See Final Part, 1915, Col. 959.

(156) Art. 85—Open, current and mutual account—Limitation. See **ACCOUNTS**, No. 3, 14 A.L.J. 949.

(157) Art. 85. See Nos. 131, 132, 146, *supra*.

(158) Art. 89. See No. 126, *supra*.

(159) *Sch. I, Arts. 90, 120 and S. 18—Suit by principal against agent for neglect or misconduct—When neglect or misconduct becomes known to plaintiff—Fraud of defendant—Keeping plaintiff in ignorance of his right to sue.*

A suit by a principal to recover from his agent unauthorized payments made by the agent and money received by the agent on account of the principal is governed by Art. 90 of the Limitation Act. Time for such suit begins to run not from the date on which the agency terminated or the accounts made over to the principal, but when the neglect or misconduct of the agent actually becomes known to the principal, a reasonable time after the termination of the

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agency, and delivery of the account books being allowed for examination of the accounts.

Neglecting to settle accounts with the object of concealing his misconduct from the principal is not "fraud" within the meaning of S. 18 of the Limitation Act.

Art. 120 is a residuary provision which cannot be applied unless there is no other article specially applicable to the case. **Ardikappa Chetty v. K.A.R. Kadappa**, 9 Bur. L.T. 130 = 36 Ind. Cas. 418.

CHARLES FOX, C.J. and TWOMEY, J.

(260) Art. 91—*Suit to set aside sale-deed giving no present interest in property, on ground of fraud.*

A suit to set aside a sale-deed giving no present interest in property sold, on ground of fraud, is entertainable, if brought within three years from the date of the defendant's attempt to take unlawful possession of the property. **Subramania Mudali v. Kuppammal**, 31 Ind. Cas. 106.

SESHAGIRI AIYAR and NAPIER, JJ.

References:—28 M. 349, F.; 16 M. 311; 25 B. 78; 15 C. 58 (P.C.), R.

(161) Art. 91—*Alienation by Hindu widow—Sham alienation—Suit by reversioner to recover possession of property—Limitation. Manchharam Pranjivandas v. Panubhai Lalubhai*, 17 Bom. L.R. 698 = 40 B. 51 = 30 Ind. Cas. 909. See Final Part, 1915, Col. 960.

(162) Art. 91—Applicability where transaction void or voidable. See **UNDUE INFLUENCE**, No. 1, 34 P.W.R. 1916.

(163) Art. 91. See Nos. 122, 123, *supra* and No. 266, *infra*.

(164) *Sch. I, Arts. 91, 144—Suit for possession—Defendants in possession under a void document—Cancellation not necessary.*

Plaintiffs sued for possession of certain immoveable property and succeeded in proving their title. Defendants were in possession thereof under a document granted long after that under which the plaintiffs claimed. Plaintiffs also asked for the cancellation of this document. *Held*, that it was not necessary for the plaintiffs to ask for the cancellation of the document and their suit was within time, having regard to Art. 144 of Sch. I to the Limitation Act.

Scope of Art. 91 explained. **Bageshra v. Sheo Nath**, 14 A.L.J. 464 = 32 Ind. Cas. 930.

WALSH, J.

(165) *Sch. I, Art. 93—"Attempt to enforce a forged instrument", meaning of—Application for succession certificate as heir—Right as legatee not set up—Genuineness of will not gone into—Registration.*

A widow applied under the Succession Certificate Act for a certificate to enable her to collect the debts owing to her deceased husband and in her petition she stated that her husband left no heirs nearer than herself and she based her right to collect the debts expressly on the ground that she being her husband's widow, she was

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entitled as such to the certificate under the Hindu law. In the petition she made mention of a will and stated that under it she was the legatee of her deceased husband. But nowhere did she base her right to collect the debts upon her position as legatee. The judge declined to go into the question of the genuineness of the will in the proceedings and gave the certificate on the ground that under the Hindu Law she would be entitled to collect the debts. Some time after, she made a further application to have the will registered and after contest and difficulty, the will was registered. In a suit by the reversioners of the husband to declare that the will was a forgery.

Held that the mention of the will in a superfluous paragraph in the certificate proceedings was not an attempt to enforce the will within the meaning of Art. 93 of the Limitation Act (a)

An attempt to register a document cannot be treated as an attempt to enforce it against other person's rights (b). **Yudathu Kamalanabhan v. Yudathu Sattiraju**, 32 Ind. Cas. 99.

COUTTS-TROTTER and SRINIVASA AIYANGAR, JJ.

References:—(a) 24 O. 1 (7) = 23 I.A. 97 (P.C.) R. (b) 30 Ind. Cas. 999 = 17 Bom. L.R. 635. R.

(166) Art. 93—*Suit to declare the forgery of an instrument attempted to be enforced against the plaintiff—Attempt—Trying to have a lease recorded under Record-of-Rights Act (Bom. Act IV of 1903) is not such an attempt.* **Achyut Rayapa Shanbhag v. Gopal Subbaya Shanbhag**, 17 Bom. L.R. 635 = 40 B. 92 = 30 Ind. Cas. 399. See Final Part, 1915, Col. 961.

(167) Art. 93—*Suit by reversioner for setting aside will as forgery and for declaration of invalidity of widow's alienation—Nature of suit.* See HINDU LAW (WIDOW), No. 16, (1916) 2 M.W.N. 325.

(168) *Sch. I, Arts. 95, 96, 116—Mortgage with possession—Suit for refund of money advanced by mortgagee—Fraud.*

The plaintiff sued for recovery of money which he had advanced to the defendant together with damages alleging that the registered mortgage-deed which the defendant executed in his favour stipulating delivery of possession of land mortgaged to him, cannot be enforced as he has discovered that the land is already mortgaged with possession to another person. He stated that the defendant had practised fraud on him.

Held, that Art. 116 of the Limitation Act was applicable to the case and neither Art. 95 nor Art. 96 governed the suit. The plaintiff's allegation as to fraud did not affect the article that applied to the claim. **Bishen Singh v. Dadna**, 106 P.B.R. 1916 = 130 P.W.R. 1916 = 36 Ind. Cas. 262.

RATTIGAN, J.

(169) Art. 96. See No. 108, *supra*.

(170) Art. 97—*Sale of land—Partial disposition—Suit for loss—One for failure of consideration and not breach of covenant for title—Transfer of Property Act, S. 55 (2).* M sold certain land in 1897 to S who re-sold it to the plaintiff in 1898. In 1910 the plaintiff

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was dispossessed of 62 cents of the land in execution of a decree, and brought the present suit for the recovery of the loss sustained thereby.

Held, that the suit was not one on a breach of covenant for title but for money paid upon the existing consideration which afterwards failed and was governed by Art. 97 of the Limitation Act, notwithstanding the failure of consideration was only partial.

Held also, that not only S, the immediate vendor of the plaintiff, but also the original vendor M, was liable. **Meenakshi v. Krishna Aiyar**, 19 M.L.T. 165 = 32 Ind. Cas. 476.

PHILLIPS, J.

(171) Art. 97—*Failure of existing consideration.*

In September 1908, defendant No. 1 contracted with the plaintiff for a price to procure from defendant No. 2 a re-conveyance of certain property to the plaintiff. In November 1908, defendant No. 2 conveyed the property to V, who sued to recover its possession from the plaintiff and obtained a decree in July 1911. In January 1912, the plaintiff sued to recover the consideration money from defendant No. 1. The lower Courts decreed the suit holding that the suit was in time under Art. 97 of the Indian Limitation Act, 1908:—

Held, that, even applying Art. 97 of the case, the suit was time-barred, for, the moment there was a conveyance to V whatever possession the plaintiff was allowed to retain must have been on sufferance and by the grace of V, and defendant No. 1 could have had nothing to do with it. **Gulabchand v. Narayan**, 18 Bom. L.R. 806 = 41 B. 81 = 36 Ind. Cas. 618.

BEAMAN and HEATON, JJ.

(172) Art. 97. See AGENCY, No. 1, (1916) 2 M.W.N. 254.

(173) Art. 97. See No. 141, *supra*.

(173-a) Art. 99. See No. 210, *infra*.

(173-b) Art. 102. See No. 190, *infra*.

(173-c) Art. 105. See MORTGAGE—REDEMPTION, No. 25-a, 32 Ind. Cas. 729.

(174) Art. 106—*Partnership at will—Suit for dissolution and accounts—Limitation.* See PARTNERSHIP, No. 4, 49 P.W.R. 1916.

(175) Art. 106. See No. 136, *supra*.

(176) *Arts. 106, 123, 127, 62—Whether joint family property exists in Mahomedan Law—Two Mahomedan brothers carrying on joint business—Death of one of them—Subsequent businesses carried on by survivor and sons of the deceased—Properties purchased out of earnings of joint business—Suit by heirs of deceased brother for their share—Nature of suit—Suit for account of dissolved partnership—Limitation.* **Mohideen Bee v. Syed Meer Saheb**, 38 M. 1099 = 32 Ind. Cas. 1002. See Final Part, 1915 Col. 962.

(176 a) Art. 109. See No. 208, *infra*.

(177) *Sch. I, Arts. 109, 116—Suit for possession and profits of property usufructuarly mortgaged.*

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Where in a suit by a usufructuary mortgagee to recover possession on the allegation that the defendants—mortgagors had never given him possession over the mortgaged property in accordance with the terms of the contract, brought within six years of the date from which the mortgagee was to have received possession, the mortgagee claimed profits for the entire period of six years, held that the claim for profits was in substance one for compensation for breach of contract in writing registered and was governed by Art. 116 and not by Art. 109 of the Limitation Act 1908. *Nirbhai Jinha v. Tulsi Ram*, 31 Ind. Cas. 894. PIGGOTT, J.

References:—A.W.N. (1888) 15; 30 A. 400, R.

(177-a) Art. 110. See No. 195, *infra*.

(178) Arts. 110, 115, 120—Co-owners—Purchase of undivided moiety—Lease executed in respect of other moiety—Defendant in occupation of whole house without paying rent—Suit for possession of plaintiff's moiety and arrears of rent—Limitation—Fiction of tenancy by sufferance.

Defendant bought an undivided moiety of a house from father of plaintiffs and also executed a lease to him in respect of the other moiety for 3 years. After expiry of the lease, defendant was in possession of the whole house without executing any fresh lease to plaintiffs or paying them rent. Plaintiffs sued for possession of their half of the house after partition and for arrears of rent for 6 years. Held, Art. 120, Limitation Act, applied, as the possession of the defendant after the expiry of the lease might reasonably be referred to his rights as co-owner (a).

Arts. 110 and 115, Limitation Act, presuppose the existence of a contract, express or implied. These two articles would not apply to the circumstances of this case, as the defendant cannot be regarded as a tenant holding over, nor was there any relationship of landlord and tenant subsisting between the parties subsequent to the expiry of the lease.

Quære:—It is doubtful whether in this country the fiction of tenancy by sufferance should be kept up after the Transfer of Property Act (b). *Madar Sahib v. Kader Moideen Sahib*, 39 M. 54=33 Ind. Cas. 705.

AYLING and HANNAY, JJ.

References:—(a) 23 C. 790, *Appl.* (b) (1910) 1 M.W.N. 145, R.

(179) Arts. 110 and 116—Suit for rent—Expiry of kanom—Accrual of rent after the expiry—Article applicable.

A suit for rent on the expiry of a kanom is governed by Art. 116 and not by Art. 110. The kanom tenure involving the taking of an account for the whole period of Kanomdar's occupation is not subject to the legal incidents of a lease in this respect. *Ammoth v. Sankaran*, (1916) 2 M.W.N. 117.

OLDFIELD and SADASIVA IYER, JJ.

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(180) Arts. 110, 116—Registered lease—Suit for recovery of rent by assignees of landlord—Bengal Tenancy Act (VIII of 1885), 8rd schedule Part 1, cl. 2.

A suit by an assignee who is not a landlord is not recognised anywhere in the Bengal Tenancy Act. Such a suit must be governed by Art. 110 of the Limitation Act, whereby limitation is restricted to three years from the date on which it fell due.

S. 116 does not alter this period of limitation merely because a *patni* lease has been registered.

When a *patni* lease provides that rent should be paid in four instalments on four specified days the period of limitation begins to run from the date on which each instalment fell due (a). *Gajadhar Prasad v. Thakur Prasad Singh*, 1 Pat. L.J. 506.

ROE and JWALA PRASAD, JJ.

References:—(a) 27 O. 827, F.; 15 C. 221, D.; 26 A. 138; 17 C. 469, R.

(181) Arts. 110 and 132—Mortgagor and mortgagee—Usufructuary mortgage—Lease by mortgagee to mortgagor—Interest charged on the mortgaged property—Rent not paid—Suit for principal and interest on foot of mortgage—Interest, whether can be decreed. *Thirukkidi Manakkal Vasudevan Attiaseripad v. Konurupettamma*, 2 L.W. 853=30 Ind. Cas. 818, See Final Pat, 1916, Col. 964.

(182) Sch. I, Art. 113—Agreement to transfer by the legal to the beneficial owner—Suit for possession and conveyance—Art. 113, if a bar—Transfer of Property Act, S. 41—Real owner holding out another—Transfer by latter—Notice—Burden of proof whether lies on the purchaser or owner—"Bona fide purchaser for value is a single defence," meaning of—Whether refers to onus—Benamidar having interest in property, if notice or shifts onus.

Where properties were purchased in the name of B for the benefit of A and the profits of the properties were also credited to A in his account books though deducted as payments to B towards amounts due by A to B and subsequently A and B entered into an agreement whereby B was to convey the properties to A on the payment of a certain sum which was already due by A to B and A's heir instituted a suit for recovery of possession of properties on payment if necessary of such sum as may be found due and for the execution of a conveyance.

Held (1) that A was the real or beneficial owner and B had only the legal estate in him;

(2) that such an agreement was not a contract of sale;

(3) that the suit was in effect and substance not one for specific performance but one for recovery of possession;

(4) that the execution of a conveyance was not an essential or necessary relief and Art. 113 of the Limitation Act was therefore no bar to the suit.

Where one man allows another to hold himself out as the owner of an estate and a third person purchases it for value from apparent

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owner, the burden of proving that that third person had actual or constructive notice of the real title is on the person who so allowed the other to hold himself out as the real owner (a).

The facts that the person so held out was more than a mere *benamidar* and had a lien on the property for payments made by him do not make any difference in the principle of law above enunciated.

The fact that the person so held out has an interest of his own in the property is no intimation to a purchaser of the right of the real owner.

The proposition that the defence of a *bona fide* purchaser for value without notice is a single defence and cannot be split up has reference more to the form of pleadings and cannot be treated as decisive of the question of *onus* in all cases in which such a defence is pleaded (b). **Rajah of Karvetnagar v. Saravana Pillai**, 4 L.W. 200=35 Ind. Cas. 983.

ABDUR RAHIM and PHILLIPS, JJ.

References:—(a) 11 B.L.R. 46, F. (b) (1911) 2 K.B. 473; 42 C. 625; 2 B. 299, R.

(183) Art. 113—Suit for specific performance—Limitation. See **CONTRACT**, No. 2, 23 C. L.J. 26.

(184) Sch. I, Art. 113. See **TRANSFER OF PROPERTY ACT**, No. 58, 33 Ind. Cas. 761.

(185) Art. 113—Suit for specific performance of contract to sell—Limitation. See **TRANSFER OF PROPERTY ACT**, No. 57, 9 Bur. L.T. 45.

(186) Art. 113. See **VENDOR AND PURCHASER**, No. 2, 9 Bur. L.T. 86.

(186-a) Art. 113. See No. 211, *infra*.

(187) Arts. 114, 132—*Vendor and vendee—Lien—Sale of mortgaged property—Agreement that vendee should redeem mortgage with purchase-money—Suit by vendor to recover the money—Limitation.*

Where by the terms of sale of a mortgaged property the vendee is to retain part of the price and apply it in redeeming the mortgage, the vendor has no lien over the property for the money left with the vendee, and a suit to recover it from the vendee is therefore not governed by Art. 132 of the Limitation Act, but by Art. 111 (a).

Though a mere recital by the vendor in the sale-deed to the effect that he has received full payment of the purchase-money does not necessarily amount to evidence of a contract which is inconsistent with the existence of the statutory lien for unpaid purchase-money, the lien cannot be treated as existing in respect of any money which is not purchase-money in the proper sense of the term (b). **Mukta Pershad v. Abdul Razaqq**, 33 Ind. Cas. 527.

LINDSAY, J.C.

References:—(a) 33 M. 446=7 M.L.T. 376=5 Ind. Cas. 87; 21 M.L.J. 359=10 M.L.T. 71=10 Ind. Cas. 98, F. (b) 12 A.L.J. 1034=25 Ind. Cas. 209, R.

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(188) Art. 115. See Nos. 108, 110, 111, 129, 130, 178, *supra* and Nos. 208, 209, 211, *infra*.

(189) Sch. I, Arts. 115, 30, 31—Suit by consignor for compensation for non-delivery of goods consigned on a Railway—Applicability of Art. 115—Neither Art. 30 nor Art. 31 applicable. See **RAILWAYS ACT (1890)**, No. 1, 34 Ind. Cas. 130=20 C.W.N. 790.

(190) Arts. 115, 102—Suit by broker for commission—Limitation. See **BROKER**, No. 1, 14 A.L.J. 873.

(191) Arts. 115, 116—*Lease for a term of years—Failure to give possession of part of the demised property—Breach of covenant, whether continuing—Suit by lessee for damages—Commencement of the period of limitation.*

Where the lessor of a term of years fails to give possession of a portion of the land demised to the lessee on account of the obstruction by a person claiming under a paramount title, the breach, whether it be considered as that of a covenant to deliver possession or covenant for quiet enjoyment, occurs once for all on the date of failure to deliver possession and is not continuing but complete and final. Consequently the period of limitation for a suit by the lessee for damages for breach of the covenant commences to run from the date of such failure and not from the close of the term of the lease. **Secretary of State v. Pemmaraju Venkayya**, 19 M.L.T. 318=3 L.W. 443=(1916) M.W.N. 342=30 M.L.J. 575=35 Ind. Cas. 254.

COUTTS-TROTTER and SRINIVASA AIYANGAR, JJ.

(192) Sch. I, Art. 116—*Contract of lease—Suit for possession in the alternative for the return of premium—Mesne profits.*

When a lessee sues for possession of the lands leased or in the alternative for the return of the amount paid as premium and for mesne profits for the period of three years during which he was kept out of possession of the leased lands, the suit apart from the prayer for possession under the lease, is substantially one for damages for breach of contract and is governed by Art. 116 of the Limitation Act. **Kodialball Rymond v. Kodialball Devu Shetty**, 32 Ind. Cas. 245. AYLING and TYABJI, JJ.

(192-a) Sch. I, Art. 116—*Suit on covenant for title in registered sale-deed—Starting point of limitation—Pardanashin woman executing sale-deed, liability of—Denial of receipt of consideration by executant of deed—Onus of proof.*

Certain lands were sold by a registered deed which contained a covenant that if at the suit of any person any portion of the lands should be lost to the vendee, the vendors should refund to the purchaser a proportionate sum of money or would give him other land of same quality from their other property and would further indemnify the purchaser against any expenses he might incur in defending any suit which might be brought to recover the property. It turned out that the vendor had no right to sell

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the lands and the vendee lost them at the suit of a third party. In a suit then brought by the vendee against the vendor on the covenant for damages for breach of the contract.

Held that the suit was governed by Art. 116, Sch. I of the Limitation Act and limitation ran from the date when the lands were lost to the vendee as the result of the suit, and not from the date of the execution of the sale-deed.

A party to a deed who has executed it with knowledge of its contents and with appreciation of the effect it was intended to produce, cannot be exempted from liability under it on the ground that she is a *pardanashin* woman.

Where the execution of a sale deed is proved but one of the executants says that he has not received any portion of the price, the *onus* lies upon him to prove the plea, and he would not be exempted from liability under the deed by the mere fact that the consideration is stated in the deed to have been paid to another of the executants. **Musst. Nani Khanam v. Musst. Maumun**, 33 Ind. Cas. 746.

LINDSAY, J.C.

(192-b) Sch. 1, Art. 116—*Suit for damages for breach of covenant in a registered zur-i-peshgi lease—Failure to include the claim in a former suit—Bar of claim—O. II, r. 2, Civ. Pro. Code, 1908—Reservation of right to bring fresh suit mentioned in plaint in previous suit—Effect.*

O, the predecessor-in-title of the plaintiffs executed a *zur-i-peshgi* lease in favour of T, the defendant. By the terms of the lease, T was to pay the rent payable to the superior landlord for the property and to apply the balance of rent which was fixed at Rs. 221 in liquidation of the mortgage debt. On the expiry of the period of the lease, there was to be a mutual adjustment of accounts and it was agreed that the mortgagor would pay any amount which might be due to the mortgagee and that the property would remain liable for such amount after the expiry of the lease. The lessee failed to pay the rent to the superior landlord, the latter obtained a decree for rent against the mortgagor and in execution of that decree the property was sold on the 23rd November 1904. The *ejara* expired on the 13th April 1905, and on the 11th April 1908, the plaintiffs brought a suit for adjustment of accounts against the defendant and the suit was decreed in part. The present suit was instituted on the 11th April 1911 in which the plaintiffs claimed damages in respect of the loss occasioned by the sale of the property in consequence of the non-payment of rent by the defendant.

Held that the suit was barred by limitation.

A suit for compensation for breach of a contract in writing registered is to be brought within six years from the date on which the contract is broken. The contract to pay the head-rent must be taken to have been broken on the date of the sale, if not earlier.

Held also, that, even if the suit be treated as one founded on mortgage, it is barred by O. II, r. 2 (2), Civ. Pro. Code, the present claim not having been included in the previous suit for adjustment of accounts.

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A mere statement in the plaint of a previous suit that the plaintiff reserved the right of bringing the present suit for damages cannot prevent the suit, from being barred by the provisions of O. II, r. 2 (2), Civ. Pro. Code, 1908, or from being barred by limitation. **Taran Krishna Bhowmik v. Munshi Samiruddin**, 34 Ind. Cas. 51.

CHATTERJEE and RICHARDSON, JJ.

(192-c) Sch. I, Art. 116—Period of limitation—Date of loan—Date of registration—Latter date—Whether starting point. See MORTGAGE—GENERAL, No. 41, 33 Ind. Cas. 111.

(193) Art. 116. See Nos. 141, 142, 168, 177, 179, 180, 191, *supra* and No. 211, *infra*.

(194) Art. 116 and S. 18—*Sale-deed—Breach of covenant for title—Suit for damages—Period of limitation—Date of execution—Starting point—Fraud.* **Pirbhu v. Mt. Wazirbi**, 11 N.L.R. 186=31 Ind. Cas. 877. See Final Part, 1915, Col. 965.

(195) Arts. 116, 110—*Kabuliat—Construction—Grant of rights to defendant to carry on trade in a district—Suit for rent—Limitation.* See CONTRACT ACT, No. 28, 1 Pat. L.J. 37.

(196) Arts. 116, 120 and 132—*Mortgage—Loan of paddy—Limitation for suit.*

Where a loan was taken of paddy and was promised to be returned with interest in paddy, a suit to realize the value of the paddy due by sale of immoveable properties given by way of security for the repayment of the loan is not governed by Art. 132 of the Limitation Act; either Art. 116 or Art. 120 applies. The suit cannot be treated as a suit to enforce payment of money charged upon immoveable property. **Rashbhavi v. Kunjabhai**, 24 C.L.J. 348.

JENKINS, C.J. and HOLMWOOD, J.

(197) Arts. 118, 120 and 125—*Alienation by Hindu widow and her adopted son—Suit by reversioner to set aside alienation after bar of remedy re: adoption—Specific Relief Act, S. 42.*

Per Wallis, C.J.—Where a reversioner neglects to sue for a declaration that an adoption or alienation made by a widow is invalid and not binding on him within the time allowed by law, he does not thereby lose his right to question the adoption or alienation on the death of the widow of the last male owner by instituting a suit for possession to dispute the alienation or adoption on such evidence as may then be available. If, however, the reversioner allows the right to sue for a declaration of the invalidity of an adoption during the lifetime of the widow to become barred by limitation under Art. 116 of the Limitation Act, he cannot be permitted to sue for a declaration that an alienation made by the adopted son is invalid and not binding on him, on the ground that the alienation by the alleged adopted son gives him a fresh cause of action against him and the alienee. As regards the adopted son, the alienation does not involve any further denial of the reversioner's legal character or right of property

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than was involved in setting up the adoption in the first place, which became barred. The starting point of limitation in a declaratory suit of this nature is not the time when the person claiming to be adopted son takes some steps in that character.

Though it may be said that the action of the alienee in taking the property from the alleged adopted son involves a denial of the next reversioner's title and gives rise to a fresh cause of action, at any rate as against him, the remedy provided by S. 42, Specific Relief Act, being discretionary, the Court would refuse to make a declaration against or in favour of the alienee alone after the right for a declaration in respect of the adoption has become barred by limitation.

Per Coutts Trotter, J.—It is competent to a reversioner to sue for a declaration that an alienation made by the widow and an alleged adopted son is not binding on the widow's life interest, although the right to declare the adoption invalid might have become barred by limitation. A reversioner ought to be entitled to keep quiescent until there is a definite and material invasion of his reversionary rights. A reversioner is not bound to enter into litigation in consequence of an adoption which may do him no harm, under pain of finding himself time barred when a definite act of waste is committed against the estate. The reversioner has one remedy while the adoption is a mere possibility of danger to him, and a fresh and separate remedy when the danger actually takes concrete form and the widow seeks to use the adoption as means to alienate the estate. **Kodali Bapayya v. Kodali Akamma**, 36 Ind. Cas. 255.

WALLIS, C.J. and COUTTS-TROTTER, J.

(198) *Art. 120—Suit by Mahomedan heir for share—Limitation—Starting point.*

A suit by one of several Mahomedan heirs for a share of the intestate's property in the possession of another sharer is governed by Art. 120 of the Limitation Act, and the right to sue for partition accrues day by day so long as the right to the suit property exists. **Samakki Abdul Rahman Taragan v. Mohideen Pathumal Bivi**, 30 M.L.J. 104 = 19 M.L.T. 88 = 32 Ind. Cas. 83.

SADASIVA AIVAR and NAPIER, JJ.

*References:—*31 M. 511; 29 Ind. Cas. 275, F.; 37 A. 33, *Not F.*

(193) *Art. 120—Zari-i-Chaharum—Right to sue—Terminus a quo—Completion of sale.*

On January 20, 1909, a house situate within the ambit of the zemindari appertaining to an endowment was sold and the sale-deed was presented for registration on the same day. The registration, however, was completed on January 29, 1909, as provided for in S. 61 (2) of the Registration Act. Thereupon the plaintiffs representing the zemindar instituted a suit for *Zari-i-Chaharum* on January 28th, 1915.

Held that the suit was barred by limitation, the right to sue having accrued to the plaintiff

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from the date of the sale. **Bindheshri v. Somnath Bhadry**, 14 A.L.J. 382 = 35 Ind. Cas. 347.

PIGGOTT and WALSH, JJ.

(200) *Art. 120—Declaratory suit—Title to immoveable property.*

Art. 120 of the Limitation Act applies to suits in respect of title to immoveable property. **Tarak Nath Roy Chowdhury v. Syama Charan Chowdhury**, 36 Ind. Cas. 292.

CHATTERJEA and RICHARDSON, JJ.

*References:—*1 C.L.J. 73, R.

(201) *Sch. I, Art. 120, applicability of—Injunction, prayer for—Entries in record of rights, effect of—Actual claim made on the strength of entry.*

Art. 120, Limitation Act, is applicable to suits for declaratory reliefs, but not for declaratory reliefs with prayer for confirmation of possession and for injunction.

A prayer for injunction is a prayer for consequential relief quite as much as a prayer for confirmation of possession (a).

Entries in a record of rights adversely to a plaintiff do not affect his possession, though they may be used in evidence against him in a suit for declaration of title. Time does not begin to run against him till an actual claim is made on the strength of the entry in the record of rights (b). **Dina Nath v. Rama Nath**, 23 C. L.J. 561 = 34 Ind. Cas. 702.

MOOKERJEE and N.R. CHATTERJEA, JJ.

References:—(a) 6 O.L.J. 427; 22 C.L.J. 415, R. (b) 10 A.L.J. 413; 11 A.L.J. 877, R.

(202) *Sch. I, Art. 120—Declaratory suit—Mutation in favour of mortgagee (plaintiff) refused—Starting point of period of limitation.*

Where mutation in favour of plaintiff in regard to a mortgage is refused on the objection of the defendant, the period of limitation for a declaratory suit against the defendant starts from the date of denial of plaintiff's right in the mutation proceedings, and an order subsequently passed under S. 98 of the Punjab Tenancy Act does not affect the question of limitation applicable to the declaratory suit. **Kalu v. Ram Lal**, 71 P.L.R. 1916 = 91 P.W.R. 1916 = 34 Ind. Cas. 958.

SHAH DIN, J.

(203) *Sch. I, Art. 120—Possession with mortgagee from vendor—Widow of vendor recorded proprietor—Suit for declaration.*

On one Krishna obtaining a pre-emption decree on 2-11-1887 against Ganga Ram, he obtained possession on 2-4-1888 and executed a formal mortgage with possession in favour of certain persons who were tenants of the lands in question. The name of Ganga Ram continued to remain recorded in the village papers. On the death of Ganga Ram his widow applied for mutation of names and that was allowed. Thereupon the mortgagee brought a suit impleading the same widow and their own mortgagor and obtained a declaration of their title as mortgagee only. The present plaintiff

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who since then acquired the rights of Krishna applied for mutation of names but was successfully opposed by Ganga Ram's widow. His subsequent suit for declaration of his proprietary right brought three years after the death of Ganga Ram but more than six years after the death of Krishna's obtaining possession was held not to be barred. *Ramanandi v. Chhajju Singh*, 35 Ind. Cas. 241.

PIGGOTT, J.

References:—20 A. 35, R.; 36 A. 492, F.

(204) *Sch. I, Art. 120—Suit on award.*

A suit on an award cannot be considered to be a suit on a contract. It is governed by Art. 120 of the Limitation Act 1908. *Somasundaram Chetti v. Rangasamy Aiyangar*, 31 Ind. Cas. 816.

WALLIS, C.J. and SESHAGIRI Aiyar, J.

References:—23 M. 593; 33 C. 881; 34 A. 43, F.

(205-206) Art. 120. See Nos. 36, 87, 105, 137, 143, 144, 159, 178, 196, 197, *supra* and No. 232, *infra*.

(207) *Arts. 120, 14—Application for partition of Shamlat rejected by Revenue officer—Suit for declaration of title to share of Shamlat—Limitation.*

Where the Revenue officer rejected the plaintiff's application for partition of the Shamlat, a suit for declaration of his title to a proportionate share of the Shamlat area is governed by Art. 120 of the Limitation Act (1908). As the Revenue officer had no jurisdiction to decide the question of title and as this suit is not one for setting aside his order, Art. 14, Limitation Act, is not applicable to the suit. *Kalu Khan v. Umda*, 47 P.R. 1916=150 P.L.R. 1916=136 P.W.R. 1916=34 Ind. Cas. 546.

SHADI LAL and LESLIE JONES, JJ.

References:—11 P.W.R. 1908; 8 A.W.N. 119; 9 C.L.J. 91, R.

(208) *Arts. 120, 36, 64, 109, 115—Suit under S. 77 (3) (k), Punjab Tenancy Act, by a co-sharer for a share in the profits of a holding—Limitation.* *Khadim Hussain Khan v. Mussamat Murad Bibi*, 5 P.R. 1915, Rev.=32 Ind. Cas. 102. See Final Part, 1915, Col. 966.

(209) *Arts. 120, 36, 115—Suit by some of the co-sharers of a ferry against the others for their share of profits—Limitation.*

A suit by some of the co-sharers of a ferry against the other co-sharers for their share of the profits of the ferry is governed by Art. 120, Limitation Act. Art. 36 or 115 does not apply to such a suit. *Kishun Deyal Singh v. Kishun Deo Jha*, 1 Pat. L.J. 69=35 Ind. Cas. 430.

MULLICK, J.

Reference.—23 C. 799, F.

(210) *Arts. 120, 61, 99—Village belonging to 3 persons in equal share.—Rental, etc., assessed on the sir and khudkhasi held by the lambardar and another co-sharer more than sufficient to cover annual expenses—Arrangement between parties as to demanding contribution from defaulting co-sharer—Suit by lambardar for balance due*

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from defaulting co-sharer—Limitation. *Dundiraj v. Waru Bai*, 11 N.L.R. 156=30 Ind. Cas. 960. See Final Part, 1916, Col. 966.

(211) *Arts. 120, 113, 115, 116—Award signed by both parties—Suit on award—Limitation.* *Harbhaj Maj v. Diwan Chand*, 102 P.R. 1915=34 Ind. Cas. 88. See Final Part, 1915, Col. 967.

(212) *Arts. 120, 124, 131 and 144—Temple Committed—Suit for declaration of superintendence and for production and inspection of accounts—Limitation—Right to declaration of control lost—Right to production of accounts.* See RELIGIOUS ENDOWMENTS ACT, No. 1, 4 L.W. 186.

(213) *Arts. 120, 125—Alienations by a widow—Suit for declaration by remote reversioner—Similar suit by next reversioner—Article applicable—Punjab Limitation Act, I of 1900—Alienations by female proprietors—Non-applicability.*

As regards suits for declaration of invalidity of alienations made by widows beyond their lifetime, Art. 125 is applicable to an action brought by an immediate reversioner, and the suit by a remote reversioner, is governed by Art. 120 (a).

Punjab Limitation Act (I of 1900) does not apply to alienations made by 'female' proprietors (b) *Mussamat Thakar v. Mussamat Ganeshi*, 15 P.R. 1916=33 Ind. Cas. 161.

CHEVIS and SHADI LAL, JJ.

References:—(a) 22 A. 33 (F.B.), R. (b) 33 P.R. 1911 (F.B.), R.

(214) *Sch. I, Arts. 120, 132—Hypothecation decree—Moveable property—Moveable property converted into immovable property—Substituted security—Mortgagee purchasing part of the mortgaged property—Merger—Intention.*

A hypothecation decree is moveable property and the mortgage thereof is one of moveable property which is governed by Art. 120, Sch. I to the Limitation Act. But where the moveable property has become converted into immovable property, the mortgage becomes entitled to the substituted security and also to the larger period of limitation prescribed by Art. 132 of the Limitation Act.

It does not necessarily follow that because a person in the position of a mortgagee purchases a portion of the mortgaged property the mortgage thereby becomes *pro tanto* extinguished. Every thing depends upon the terms of the sale, and unless it is stipulated that the mortgage is to be extinguished or unless there are circumstances from which an intention to extinguish the mortgage in whole or part may be inferred, it cannot be held that the mortgage merges in the purchase. *Jamna Dei v. Lala Ram*, 14 A. L.J. 1025=39 A. 74.

PIGGOTT and LINDSAY, JJ.

(215) *Arts. 120, 132. See HINDU LAW (JOINT FAMILY), No. 15, 1 Pat. L.J. 497.*

Limitation Act (1908)—(Continued).

(216) Arts. 120, 141. See **HINDU LAW (EXCLUSION FROM INHERITANCE)**, No. 1, 14 A.L.J. 11.

(217) Arts. 120, 144—*Sale of occupancy rights—Suit by landlord to dispossess alienee under S. 77 (3) (h), Punjab Tenancy Act—Limitation.*

A suit by the landlords (the proprietary body of the village) under S. 77 (3) (h), Punjab Tenancy Act, to dispossess a person to whom the occupancy rights in the land in suit had been sold, is governed by Art. 120, Limitation Act (1908), and the period of limitation is six years from the date of sale. Art. 144 does not apply to such a suit. **Labha v. Tulsi**, 1 P.R. 1916 (Rev.) = 3 P.W.R. 1916 (Rev.) = 34 Ind. Cas. 523.

DIACK, F.C.

References:—9 P.R. 1904; 135 P.R. 1888; 6 P.R. 1893 (Rev.); 1 P.R. 1898 (Rev.); 7 P.R. 1905 (Rev.), R.; 3 P.R. 1910 (Rev.), Diss.

(218) Art. 123. See No. 176, *supra*.

(219) Art. 124. See No. 212, *supra*.

(220) Art. 125. See Nos. 197, 213, *supra*.

(221) Art. 126—*Sale of ancestral property by Hindu father—Son, a minor at the time—Suit by son to recover possession thereof after twelve years of attaining majority—Suit barred.*

Certain ancestral immoveable property belonged to B and L. B executed a sale-deed in respect of it in favour of J in 1881 when L was a minor. One S brought a suit for pre-emption in respect of it and it was decreed in 1882. The transferees from S were in possession at the date of suit. L came of age in 1895, and the present suit for possession of the property and cancellation of the sale-deed was brought more than twelve years after 1898 by L and his sons. The sons of L were born after 1898:—

Held that the suit was barred inasmuch as L could have brought the suit in 1898, and not having done so his right to the property became extinct and it became the property of the purchasers and ceased to be joint family property, and his sons born subsequently to 1898 were not entitled to question the sale. **Lachmi Narain Prasad v. Kishan Kishore Chand**, 14 A.L.J. 25 = 38 A. 126 = 33 Ind. Cas. 913.

BANERJI and WALSH, JJ.

(222) Art. 126—*Applicability.* See **HINDU LAW (ALIENATION)**, No. 7, 30 M.L.J. 592.

(223) Art. 127. See No. 176, *supra* and No. 254, *infra*.

(224) Art. 130. See **RES JUDICATA**, No. 16, 18 Bom. L.R. 768.

(225) Art. 131—*Recurring right—Demand and refusal—Mere omission to exercise right does not start limitation.* See **INAM**, No. 4, 18 Bom. L.R. 950.

(226) Art. 131. See No. 212, *supra*.

(226-a) Sch. I, Art. 132—*Suit on mortgage—Mortgage-deed giving option to mortgagees to sue or not to sue.*

Limitation Act (1908)—(Continued).

Where according to the terms of a mortgage-deed the mortgagee is entitled to sue for principal and interest if default be made in the payment of interest on an earlier specified date and the deed also gives the mortgagee option to sue or not to sue to enforce the payment, the period of limitation runs from the date of the first default and not from the date fixed for payment of principal. **Tulshi Ram Shukul v. Muhamamad Hadi**, 32 Ind. Cas. 551.

STUART, A.J.C.

References:—20 M. 245 = 7 M.L.J. 222; 19 Ind. Cas. 738 = 16 O.C. 45, R.

(227) Sch. I, Art. 132—*Suit on mortgage for principal and interest—Mortgagee entitled to sue for arrears of interest—Waiver, omission to sue, whether amounts to.* **Jahan Khan v. Chandi Shah**, 122 P.W.R. 1915 = 29 Ind. Cas. 854 = 113 P.L.R. 1916 = 141 P.W.R. 1916. See Final Part, 1915, Col. 969.

(228) Art. 132—*Mortgages given the option of suing for whole debt on default in paying interest or of maintaining the mortgage and suing only for interest—Starting point of limitation—Forbearance to sue—Effect.* **Sham Sundar v. Abdul Ahad**, 71 P.R. 1915 = 153 P.W.R. 1915 = 31 Ind. Cas. 808. See Final Part, 1915, Col. 969.

(229) Art. 132—*Money charged on rents and profits of land, treatment of.* See **NANKAR**, No. 1, 18 O.C. 380.

(230) Art. 132—*Nankar—Whether a charge.* See **NANKAR**, No. 2, 19 O.C. 49.

(231) Art. 132. See Nos. 91, 115, 152, 153, 181, 187, 196, 214, 215, *supra*.

(232) Arts. 132, 62, 120—*Absolute occupancy holding—Foreclosure by subsequent mortgagee—Purchase of the holding by malguzar under S. 38, Central Provinces Tenancy Act (1883)—Suit by prior mortgagees for payment of his mortgage money from the sale proceeds—Limitation—Mofussil pleadings not to be construed strictly.*

One V sued to recover Rs. 2,000 as due on a mortgage of two absolute occupancy fields mortgaged to him by the tenant G on 5—4—1885. Defendants were the legal representatives of one L to whom G's entire holding consisting of 5 fields in all was mortgaged in 1894. L foreclosed and obtained possession on 14—3—1895. The malguzar purchased the holding under S. 38 (5), C.P. Tenancy Act (1883) for Rs. 1,600 as fixed by a Revenue Officer and paid to L in Court on 16—6—1902.

Held, there was no new cause of action and the burden of the mortgage was merely transferred from the holding to the purchase money. Art. 132, Limitation Act (1908), (and not Art. 62 or 120) applied to the case and the claim was not barred (a).

Held also, that it was not the practice to construe Mofussil pleadings strictly (b).

Limitation Act (1908)—(Continued).

Yishwanath v. Sankerlal, 12 N.L.R. 90=34 Ind. Cas. 704.

DRAKE-BROCKMAN, J.C.

References:—(a) 33 C. 92; 27 C. 180; 31 C. 745; 14 C.W.N. 484; 41 C. 654 (660) (P.C.); 7 A. 502, R. (b) 28 B. 567 (572), R.

(233) Art. 134—*Mortgage by conditional sale—Transfer by mortgagee—Redemption.*

Plaintiff, the owner of the suit properties, mortgaged them by conditional sale to one T, who, after the expiry of the time fixed for payment, sold them on 16th June 1893, to one V, who purchased them with the knowledge that T, his vendor, was only a mortgagee. V then sold the properties to the defendant on 13th August 1909 and it was found that the defendant had purchased them without knowledge that T was only a mortgagee. In 1913, the plaintiff instituted the present suit against the defendant for redemption. The Court found that plaintiff had notice of defendant's purchase within three years of suit.

Held that the plaintiff was entitled to redeem.

Art. 134, Limitation Act (1877), has not been materially altered by the substitution by the Act of 1908 of the words "transferred by" for the words "purchased from." **Tholasinga Mudali v. Nagalinga Chetty**, 3 L.W. 19= (1916) M.W.N. 28=32 Ind. Cas. 265.

SADASIVA AIYAR and NAPIER, JJ.

Reference:—1 L.W. 687, F.

(234) Sch. I, Art. 134—*Assignment by mortgagee.*

Art. 134, Sch. I of the Limitation Act will have no effect in event of an assignment by a mortgagee of his mortgage rights and will only have effect if the mortgagee purported to transfer proprietary rights. Thus where a person sets up a title as mortgagee and a title as transferee by gift to the right of equity of redemptions and it is the title as owner which he transferred. *Held* that this was a transfer of proprietary rights by a mortgagee for valuable consideration within the meaning of Art. 134. **Mirza Yar Ali Beg v. Danish Ali**, 32 Ind. Cas. 314.

STUART, A.J.C.

(235) Art. 134, *Purchase of mortgagee rights with knowledge—Whether purchaser allowed to twelve years from date of purchase—Omission of the words 'in good faith' in the Act, effect of.* **Dirpal Singh v. Kallu**, 13 A.L.J. 945=37 A. 660=30 Ind. Cas. 956. See Final Part, 1915, Col. 969.

(236) Art. 134—*Mortgagee, purchaser from, without notice—Adverse possession not perfected—New right, accrual of, to purchaser—Effect on adverse possession.* **Yelayutham Pillai v. Subbaraya Pillai**, 2 L.W. 989=18 M.L.T. 424=(1915) M.W.N. 873=39 M. 879=31 Ind. Cas. 398. See Final Part, 1915, Col. 970.

(237) Sch. I, Art. 134 and S. 30—*Putni lease granted by shabait, if "transfer for valuable consideration"—Non-payment of premium for creation of lease if alters nature*

Limitation Act (1908)—(Continued).

of transfer—Suit by shabait for recovery of possession—Limitation—S. 30, when applies. **Kumar Rameshar Malla v. Ram Chandra Acharya Goswami**, 19 C.W.N. 1082=29 Ind. Cas. 337=43 C. 34. See Final Part, 1915, Col. 971.

(238) Art. 135. See Nos. 91, 92, *supra*.

(238-a) Arts. 136, 144 and 148—*Decree—Interpretation—Charge or mortgage.*

A decree which directed that A should obtain possession of the house in suit from B if B were paid a certain sum did not create a mortgage or a charge. A suit by C to whom such interest as A had in the house was sold subsequently, against B who was never paid according to the decree, for possession on payment of the said sum is governed by Art. 136 and not by Art. 144 or 148 of the Limitation Act. **Raguatha Prasad v. Ketki**, 32 Ind. Cas. 352.

STUART, A.J.C.

Reference:—10 O.C. 17, R.

(239) Sch. I, Art. 137—*Property subject to prior mortgage—Adverse possession—Limitation—Auction purchaser.*

If property subject to prior mortgage is purchased at Court auction, the auction purchaser takes only a right to redeem the earlier mortgage and he cannot set up a plea of adverse possession. **Bhawani Din v. Jhamman**, 35 Ind. Cas. 753.

LINDSAY, J.C.

(240) Arts. 137, 138, 144. See **MORTGAGE—GENERAL**, No. 50, 35 Ind. Cas. 87.

(241) Art. 138. See No. 240, *supra*.

(242) Arts. 138, 142—*Decree-holder purchaser—Suit for possession of lands purchased—Practice—Appeal—New case, if can be set up in—Claim based on prior possession and dispossession by defendant—Plaintiff's possession found against—His remedy—Fraudulent nature of decree, if can be pleaded in defence.*

A suit by a decree-holder purchaser for possession of properties purchased is governed by Art. 138, Sch. I of the Limitation Act.

The plaintiff is entitled to apply the law to the fact established at the trial even though he had failed to prove what he came to prove.

Where a decree-holder purchaser sued for possession of lands purchased on the basis of his prior possession and dispossession by defendants and fails to prove that he ever obtained possession of the lands, he is nevertheless entitled to succeed if he can show that his claim is not barred by limitation under Art. 138 of the Limitation Act. The rule of estoppel by reason of inconsistent positions does not apply to such a case.

In such a case the person in possession can set up the fraudulent nature of the decree in answer to the decree-holder purchaser's suit for possession.

A plea of limitation can be raised at any stage of a case. **Bankay Behary Lal v. Bhagwan Das Marwarl**, 34 Ind. Cas. 897.

MULLICK, J.

Limitation Act (1908)—(Continued).

(243) *Art. 139—Mortgage to lessor—Redemption of mortgage—Determination of tenancy—Malabar Tenants' Improvement Act (I of 1900), Ss. 5 and 6.*

In a suit brought to recover possession from a lessee, the lease being executed by the mortgagee of the land, it was contended that the suit was barred under Art. 139, as the mortgage had been redeemed more than 12 years before suit and the tenancy had then come to an end.

Held, the lease was not determined by the redemption of the lessor's mortgage. The cause of action under Art. 139 would, in cases to which the Malabar Tenants' Improvement Act I of 1900, applies, arise only when the tenant has been paid the value of improvements made by him (a). **Erroma Menon v. Sankunni Menon** (1916) 2 M.W.N. 324.

OLDFIELD and SADASIYA AIYAR, JJ.

References:—(a) S.A. No. 841 of 1914; (1913) M.W.N. 339, F.

(244) *Arts. 139 and 144—Suit by landlord to recover possession from tenants—Denial of landlord's title more than 12 years before suit—Bar of suit by adverse possession.*

Plaintiff sued to recover possession from the defendants who were alleged to be his tenants. It was admitted in the plaint that the defendants had for many years not paid any rent to him. The defendants denied their liability to pay rent. It appeared that in certain settlement proceedings which took place more than 12 years before the present suit a contest arose between the plaintiff on the one side and the defendants on the other side, the defendants contending that they were exempted altogether from the liability to pay rent as they held the lands on a *brahmottar* grant. The Settlement Officer came to the conclusion that rent was not being paid and therefore the Record of Rights was published to the effect that the defendants held a jote for which rent was not being paid. *Held* that, as the defendants had set up a claim more than 12 years before the present suit that they were not liable to pay rent on any ground and as no suit was brought within 12 years from the date of the denial of the plaintiff's title the present suit was barred by limitation. **Gour Chandra Chakraborty v. Maharaja Birendra Kishore Manikya Bahadur**, 36 Ind. Cas. 829. FLETCHER and RICHARDSON, JJ.

(244-a) *Art. 140—Rent—Right to collect—Suit by grantor of mokarari for life to evict Zerbharndar of grantee after his death.*

Art. 140, Limitation Act, 1908 does not govern a suit by a grantor of a *mokarari* for life to evict the *Zerbharndar* of the grantee after his death. The right to collect rents must be based not only on possession but also upon title. A *Zerbharnder* of a *Mokararidar* for life holding over after the death of the *mokararidar* can collect rents due before final notice to quit has been served on him by the grantor of the *Mokarari*. **Lalji Sasby v. Shamlal**, 32 Ind. Cas. 827.

SHARFUDDIN and ROE, JJ.

Limitation Act (1908)—(Continued).

References:—27 C. 156=27 I.A. 216=4 C.W. N. 274, R.

(245) *Arts. 140, 141—Evidence Act, S. 108—Suit by reversioner—Widow, disappearance of—Presumption of death—Burden of proof resting on plaintiff to show that he was—Suing within twelve years of the widow's death.*

The plaintiff sued in 1911 as a reversioner to recover possession of property alienated by a Hindu widow. The widow had disappeared in 1865 and was not heard of since 1870. The Court of First Instance decided in plaintiff's favour and held on the point of limitation that, under S. 108, Evidence Act, the Court should presume that the widow died at the time of the suit and that therefore the suit was in time. This decision was reversed and the suit was dismissed by the lower appellate Court on the ground that the presumption of the widow's death at the time of the suit would not be drawn, and that the *onus probandi* lay heavily on the plaintiff to show when the widow died, and that consequently the suit was not shown to be within time. The plaintiff having appealed:—

Held, that it lay on the plaintiff to show affirmatively that he had brought his suit within twelve years from the actual death of the widow (a).

Art. 141 of the Limitation Act is merely an extension of Art. 140, with special reference to persons succeeding to an estate as reversioners upon the cessation of the peculiar estate of a Hindu widow. But the plaintiff's case under each article rests upon the same principle. The doctrine of non-adverse possession does not obtain in regard to such suits, and the plaintiff suing in ejectment must prove, whether it be that he sues as a remainderman in the English sense or as a reversioner in the Hindu sense, that he sues within twelve years of the estate falling into possession, and that *onus* is in no way removed by any presumption which can be drawn according to the terms of S. 108, Evidence Act. **Jayawant Jivanrao Deshpande v. Ramachandra Narain Joshi**, 18 Bom. L.R. 14=40 B. 239=33 Ind. Cas. 484.

SCOTT, C.J. and SHAH, J.

Reference:—(a) (1837) 2 M. & W. 694.

(246) *Arts. 140, 141—Hindu widow's estate, nature of—Life estates in English law—Trespasser's right to tack period of possession of previous trespasser—Rule of primogeniture, application of, to collateral succession—Sanad, applicability of, to cases governed by the special provisions of cls. (1) to (10) of S. 22 of Act I of 1869.*

The estate of the Hindu or Mahomedan female referred to in Art. 141 of the Second Schedule of Act IX of 1908 need not be an estate created in the same way as the particular estate upon which the estate in remainder or reversion contemplated by Art. 140 leans, that is to say by grant or devise, nor need it necessarily be an estate characterised by the same incidents which attach to such a particular estate.

Limitation Act (1908)—(Continued).

Limited estates of the type of the estate taken by a Hindu female in property inherited from a male are not life estates in the sense in which that term is understood in English law, but they present certain points of resemblance to them which have led the Legislature to assimilate them for the purposes of limitation to life estates in the strict sense of the term.

When successive trespassers have been in possession of an estate adversely to the claimant, the subsequent trespasser, if his title was not quite independent of the previous trespasser, can, in pleading limitation as a bar, tack the period during which the previous trespasser has remained in possession on to the period during which the estate was held by the subsequent trespasser himself.

In ascertaining the single heir to the estate of an Oudh Taluqdar, whose name was entered in List 2, the case being one to which the special provisions of cls. (1) to (10) of S. 22 of Act I of 1869 do not apply, the limitations in the *sanad* granted to the Taluqdar cannot be appealed to as all such limitations had been wholly superseded by the Act.

The rule of primogeniture does not regulate the succession to a separate property as between collaterals who have not been co-parceners with the propertus in a joint family governed by Mitakshara law—all the more so when the property in dispute has not been the property of a joint family since its grant by the British Government made after the annexation, even if it be presumed to have been such property before it. *Ghisa Singh Thakur v. Thakur Gajraj Singh*, 18 O.C. 289=33 Ind. Cas. 371.

LINDSAY, J.C. and STUART, A.J.C.

(247) Art. 141. See Nos. 122, 216, 245, 246, *supra*.

(248) Arts. 141 and 144—*Reversioner, suit by—Adverse possession against widow, if effective against reversioner—Limitation Act of 1859 and subsequent Limitation Acts, difference between.* *Shrinivasa Raya v. Ramappa Hebbara*, 2 L. W. 751=18 M.L.T. 226=30 Ind. Cas. 991. See Final Part, 1915, Col. 973.

(249) Art. 142—Vacant site—Neighbour tethering cattle—Possession whether adverse. See ABANDONMENT, No. 2, 108 P.W.R. 1916.

(250) Art. 142—Applicability of. See ADVERSE POSSESSION, No. 3, 116 P.W.R. 1916.

(251) Art. 142—Purchase of permanent tenure in execution sale—Suit against purchaser for ejectment—Limitation. See LANDLORD AND TENANT, No. 22, 24 C.L.J. 40.

(252) Art. 142—Presumption of possession following title when arises—Evidence unworthy of credit on both sides—Effect. See POSSESSION, No. 5, 1 Pat. L.J. 146.

(253) Art. 142. See Nos. 87, 242, *supra*.

(254) Arts. 142, 127—Suit for share of coparcenary property—Conversion to Islam—Separation—Onus of proof—Limitation. See HINDU LAW (JOINT FAMILY), No. 2, 57 P.R. 1916.

Limitation Act (1908)—(Continued).

(255) Sch. I, Arts. 142, 144—*Jalkar—Suit to recover possession of—Limitation.*

A case of disputed possession of a *Jalkar* as to who is entitled to collect the rents thereof is governed by Art. 142, Sch. I of the Indian Limitation Act.

A plaintiff suing to recover possession of a *jalkar* on the ground that it belonged to him and that the defendants had dispossessed him cannot succeed unless he proves his possession of the *jalkar* at any time within twelve years before the institution of his suit. *Madhab Chandra Mandal v. Nagendra Nath Sen*, 34 Ind. Cas. 841.

WOODROFFE and CHAUDHURI, JJ.

References:—14 C.L.J. 572=12 Ind. Cas. 305; 16 C. 473=16 I.A. 23, R.

(256) Arts. 142, 144—Suit for possession. See CONSIDERATION, No. 1, 18 Bom. L.R. 810.

(257) Art. 143—Denial of landlord's title—Forfeiture—Suit by landlord for possession—Limitation. See LANDLORD AND TENANT, No. 12, 57 P.W.R. 1916.

(258) Art. 143—Permanent tenancy—Denial of landlord's title—Forfeiture—Option to condone first forfeiture and base his suit on subsequent denial—Limitation. See LANDLORD AND TENANT, No. 1, 56 P.W.R. 1916.

(259) Art. 143. See No. 113, *supra*.

(260) Sch. II, Art. 144—*Land—Possession by trespassers—Effect—Adverse ab initio to all persons.*

D, the owner of land in dispute, died long ago. His widow married B after D's death. B got D's land mutated in his name as far back as 1875. In 1903, S the nearest collateral of D died and the sons of S brought this suit against the sons of B by D's widow on 4th July 1914 to recover the land.

Held that the suit was not one to recover land from an alienee but from a trespasser and that the suit was barred by limitation under Art. 144 of the Limitation Act (a).

Held, further, that the defendants' possession had been *ab initio* adverse to all descendants of the common ancestor D and the plaintiffs (b). *Kahla Singh v. Dala*, 113 P.R. 1916.

CHEVIS, J.

References:—(a) 18 P.R. 1895 (F.B.) and 26 P.R. 1911, *distinguished*. (b) 106 P.R. 1906, F.

(261) Art. 144. See BUDDHIST LAW (JOINT FAMILY), No. 1, 9 Bur. L.T. 84.

(262) Art. 144—Adverse possession of right to redeem. See MORTGAGE (USUFRUCTUARY), No. 2, 14 A.L.J. 498.

(263) Art. 144—Suit for possession—Plaintiff or his predecessor never in possession—Defendant whether must prove adverse possession—Entry in revenue map whether proof of title. See POSSESSION, No. 2, 8 L.B.R. 264.

(264) Art. 144. See BEN. REG. I OF 1886 (ASSAM LAND AND REVENUE), No. 8, 24 C.L.J. 62.

Limitation Act (1908)—(Continued).

(265) Art. 144. See Nos. 90, 123, 164, 212, 217, 240, 244, 248, 255, 256, *supra*, and No. 269, *infra*.

(266) Arts. 144, 44, 91—*Hindu Law—Joint family—Alienation by managing member—No necessity—Suit by a member of the family to set aside the alienation—Limitation—Twelve years.*

Arts. 44 and 91, Limitation Act, do not apply to a suit to set aside an alienation made by a manager of joint family property, and such a manager does not alter the real relations between the parties by calling himself guardian of his minor co-parceners. The period of limitation for such suits is 12 years. **Asaram v. Ratansingh**, 12 N.L.R. 12=32 Ind. Cas. 242. BATTEN, A.J.C.

References:—8 C. 656; 25 A. 407; 15 Bom. L.R. 882; 14 M. 26; 28 A. 30 (32); 32 A. 397; 24 C. 77; 6 M.L.A. 393; 13 C.W.N. 815; 13 A.L.J. 94; 13 C.L.J. 277, *L.*

(267) Art. 145. See No. 129, *supra*.

(268) Art. 148 and S. 19—*Redemption—Onus probandi—One mortgagor redeeming the entire mortgage—Acknowledgment. See MORTGAGE (REDEMPTION), No. 14, 14 A.L.J. 334.*

(269) Sch. I, Arts. 149, 141—*Island arising in the sea within territorial limits—Title in Crown—Crown opposed by squatters—Crown if must prove that squatters had not acquired title by adverse possession—Onus—Madras Forest Act (V of 1882)—Afforestation, notification of, objection to—Trial before Forest Officer—Appeal to District Court—Decision of District Court, if final—Limitation of ordinary incidents of litigation to be express.*

The territory of the Crown does not cease at low water mark and its right over what extends seawards beyond that is not merely of the nature of jurisdiction or the like. The law in this respect is the same in India as in the United Kingdom. The Crown is the owner, and owner in property, of islands arising in the sea within the territorial limits of Indian Empire.

Where Government seeking to constitute into a reserved forest certain islands which had formed in the bed of the sea near the mouth of the river Godavari within much under three miles of the mainland, was opposed by certain persons who preferred claims before the Forest Officer under the Madras Forest Act, and the Forest Officer having rejected them, they appealed to the District Court as provided by the Statute:

Held—That the decision of the District Court in such cases was not final.

When proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders and decrees, the ordinary rules of the Civ. Pro. Code apply; and when an ordinary Court of the country is seized of a dispute relating to a legal right to possession of, and property in, land, it

Limitation Act (1908)—(Continued).

would require a specific limitation to exclude the ordinary incidents of litigation (a).

Nothing is better settled than that the onus of establishing property by reason of possession for a certain requisite period lies upon the person asserting such possession; and it would be contrary to all legal principles to permit a squatter to put the owner to a negative proof that the possession of the squatter was not long enough to fulfil all legal conditions.

The position of the objectors to afforestation in this case was in law the same as that of persons bringing a suit in an ordinary Court of Justice for a declaration of right by adverse possession, with this difference only that the period of 12 years provided by Art. 144 is extended by Art. 149 to 60 years (b).

The statement of law by the High Court that "It rested upon the Crown to prove that it had a subsisting title by showing that the claimant's possession commenced or became adverse within sixty years" was erroneous on the above view of the onus and also because the fact that islands formed in the sea belonged to the Crown was fundamental, and until adverse possession against the Crown was complete that fact formed "subsisting title" and it was not incumbent on the Crown to fortify that fundamental position by any enquiry into possession or the acceptance of any onus on the subject. **The Secretary of State v. Rajah Chellakani Rama Rao**, 31 M.L.J. 324=20 C.W.N. 1311=(1916) 2 M.W.N. 224=39 M. 617=4 L.W. 486=20 M.L.T. 435=14 A.L.J. 1114=18 Bom. L.R. 1007=25 C.L.J. 69=95 Ind. Cas. 902 (P.C.).

LORD SHAW, LORD SUMNER, LORD PARMOOR, SIR JOHN EDGE, MR. AMER ALI and SIR LAWRENCE JENKINS.

References:—(a) 39 I.A. 197=16 C.W.N. 961, *D.*, and its ratio examined; 11 M. 309, *Appr.* (b) 7 C.L.R. 364; 9 M. 175, *R.*

(270) Art. 158—*Award—Objections when to be filed—Calculation of time. See AWARD, No. 1, 14 P.W.R. 1916.*

(271) Art. 164—*Application to set aside ex-parte decree—Decree passed when Act of 1877, Art. 164, Sch. I, in force—Law applicable. Jla Bibi v. Ilahi Baksh*, 13 A.L.J. 837=37 A. 597=30 Ind. Cas. 573. See Final Part, 1915, Col. 978.

(272) Sch. I, Art. 164. See *EX PARTE DECREE*, No. 4, 111 P.L.R. 1916.

(273) Art. 164. See No. 29, *supra*.

(274) Arts. 165 and 181—*Execution of decree—Application by judgment-debtor to be restored to possession of property seized in excess of the decree—Code of Civil Procedure, 1908, S. 47, O. XXI, r. 100.*

Where a judgment-debtor applies to be restored to the possession of property seized by the decree-holder in excess of what has been decreed, the application is one under S. 47 of the Code of Civil Procedure, and is governed by Art. 181, Limitation Act, and not by Art. 165, which,

Limitation Act (1908)—(Continued).

read with reference to the context in which it is used, contemplates the case of a person other than the judgment-debtor who applies to be restored to possession under O. XXI, r. 100 of the Code of Civil Procedure. **Abdul Karim v. Islamun-nissa Bibi**, 14 A.L.J. 401=38 A. 389=34 Ind. Cas. 231.

PIGGOTT and WALSH, JJ.

References:—21 M. 494, Diss.; 25 A. 343, D.

(275) Art. 166. See CIV. PRO. CODE (1908), No. 98, 4 L.W. 400.

(276) Art. 166—Mortgage decree—Execution sale—Purchase by decree holder—Application by judgment-debtor to set aside sale—Limitation. See MORTGAGE (GENERAL), No. 19, 20 C.W.N. 1243.

(277) Art. 171—Application to set aside abatement of appeal—Sufficient cause—Limitation. See CIV. PRO. CODE (1908), No. 548, 12 P.W.R. 1916.

(278) Art. 173—Decree of High Court—Application for review when to be presented. See REVIEW, No. 2, 3 L.W. 244.

(279) Arts. 180 and 182—Execution sale—Decree holder-purchaser—Delivery, application for, six years after sale made absolute—Article applicable.

An application by a decree-holder-purchaser for delivery of possession of the properties purchased by him in Court auction is not an application to execute the decree and is governed by Art. 180, Limitation Act. **Ramaswami Aiyar v. Abdul Aziz Saib**, 3 L.W. 191=19 M. L.T. 164=32 Ind. Cas. 993.

SADASIVA AIYAR and MOORE, JJ.

Reference:—32 M. 136, F.

(280) Sch. I, Art. 181—Act XV of 1877, Sch. II, Art. 179 Code of Civil Procedure (V of 1908), O. XXXIV, rr. 3 and 5—Application to make final a conditional decree for sale of mortgaged properties.

An application for a final decree for foreclosure or sale is an application under the Code of Civil Procedure, for it is made under O. XXXIV, r. 3 or r. 5 which expressly requires an application.

An application for such a final decree presented after the passing of the Code of Civil Procedure, 1908, and of the Limitation Act, 1908, is governed by Art. 181 of the present Limitation Act (a).

On July 6th, 1908, the appellant obtained a conditional decree for sale of certain mortgaged property. In March 1913 he applied for a final decree.

Held that the application was barred by limitation under Art. 181, Sch. I to the Limitation Act. **Bala Ram Nalk v. Kanhai Bharan Mahapatra**, 1 Pat. L.J. 364.

CHAMLER, C.J. and SHARFUDDIN, J.

References:—(a) 16 Ind. Cas. 790; 19 C.W. N. 649, F.

(281) Art. 181. See No. 274, *supra*.

(282) Arts. 181, 182. See CIV. PRO. CODE (1908), No. 120-a, 32 Ind. Cas. 39.

Limitation Act (1908)—(Continued).

(283) Sch. I, Art. 182—Execution opposed by judgment-debtor alleging payment and asking for certification thereof—Plea successful in first Court, but reversed on appeal—Second appeal by judgment-debtor—Limitation, if suspended during pendency of second appeal.

When a decree-holder is obstructed by violence or fraud and litigation is necessary to get rid of such obstruction, the execution is suspended during such litigation. But the mere pendency of an appeal from a decision which has removed all obstacles from the decree-holder's way cannot give him a right to defer execution until the disposal of such appeal. **Kartick Chundra Mondal v. Nilmani Mondal**, 20 C.W.N. 586=32 Ind. Cas. 931.

HOLMWOOD and IMAM, JJ.

References:—30 C. 407, 413; 37 C. 796=15 C.W.N. 337=12 C.L.J. 328, Rel. on.

(284) Art. 182—Decree—Appeal against one portion or by one defendant, if saves limitation as regards the other portion or against other defendants—Rule, if different when the decree of First Court consists of two independent decrees—Limitation periods to be laid down with clearness and certainty—Subtle distinctions not to be introduced, if not warranted by language—Final decrees, if two, can exist—Imperilling decree, theory of, limitation, if can be made to depend on.

All periods of limitation being more or less arbitrary, it is of the highest importance that they should be laid down with clearness and certainty. Subtle distinctions, not warranted by the language of the Legislature, should not be introduced by the Courts.

In a suit for recovery of money from two persons, there cannot be two final decrees, one by the Court of First Instance and the other by the Court of Appeal.

The question of limitation ought not to be made to depend upon the difficult and doubtful point whether an appeal by one of the defendants or as regards a part of the decree of the First Court imperils the decree passed against the other defendants or the other portion of the decrees.

Quare.—Whether, when the decrees of the First Court itself consists of two definitely independent decrees, an appeal against one of such decrees saves limitation as regards the other decree? (a).

When the transferee of a decree has not been recognized by the Court, the decree-holder on record is entitled to execute the decree in spite of the transfer (b). **Art Chetty v. Theerthamalai Chetty**, 3 L.W. 521=34 Ind. Cas. 791.

SADASIVA AIYAR and MOORE, JJ.

References:—(a) 22 Ind. Cas. 685, Considered. (b) 29 M.L.J. 693=2 L.W. 1142, F.

(285) Art. 182—Transfer of Property Act, S. 88—Mortgage decree—Execution—Decree absolute, prayer for, absent in the application—Prayer for sale, if implies prayer for making decree absolute.

Limitation Act (1908)—(Continued).

A mortgage decree was passed on 6th July 1901. The first application for execution was made on 6th July 1904, but this did not contain a prayer for making the decree absolute. The next two applications were made on 22-3-1907 and 23-9-1909 and these contained a prayer for a decree absolute. The next application was on 5-7-1910, but this contained only a prayer for sale. Every one of the above applications was returned for amendment and not represented. The last application was made on 5th July 1913 and this too did not contain a prayer for making the decree absolute.

Held that a prayer for sale implied also a prayer for making the decree absolute and that the application was not barred by limitation. **Natesa Udayan v. Annasami Udayan**, 3 L. W. 468 = 34 Ind. Cas. 756.

OLDFIELD and SADASIVA AIYAR, JJ.

References:—(1915) M.W.N. 643; 17 M.L. T. 424; 32 Ind. Cas. 39, F.

(286) *Art. 182—First execution application in 1907—Dismissal for non-payment of batta—Claim petition to property attached under first application—Claim rejected—Suit by claimant also rejected on appeal—Second application in 1912, it can be treated as a continuation of the first—Application if barred by limitation.*

Plaintiff presented his first application for execution on 27th April, 1907. Certain properties were attached in pursuance of that application which were claimed by one N as his own but his claim was rejected.

N then brought a suit to establish his right to the property which was decreed by the first Court but was dismissed on appeal on 11th August, 1911. Meanwhile, the first application for execution had been dismissed for non-payment of batta by the plaintiff. He then brought his second execution application on 22nd October, 1912.

Held, that the first execution petition having been dismissed for the plaintiff's own default in paying batta and that dismissal having had nothing to do with the claim or suit brought by N, the second application could not be treated as a continuation or a revival of the first application, and that the second application being made after more than three years from the date of the first one was barred by limitation. **Yellampalle Venkatappa v. Matam Nanjappa**, 4 L.W. 112 = (1917) M.W.N. 139 = 35 Ind. Cas. 594.

SPENCER and KRISHNAN, JJ.

Reference:—31 M. 71, D.

(287) *Sch. I, Art. 182—Execution of decree—Petition praying for relief not granted by decree—If saves limitation—Civ. Pro. Code, S. 52.*

A decree-holder presented four successive applications for the execution of his decree. In two of these he only asked for the issue of notice to the judgment-debtors. In two others, he prayed for notice and arrest of the judgment-debtors, in spite of the fact that the decree to

Limitation Act (1908)—(Continued).

be executed did not make them personally liable. The Court dismissed all the applications except the last in which it directed notice to issue.

Held that it cannot be said that the action of the decree-holder was not *bona fide*.

An execution petition which asks for a relief not granted by a decree may give a fresh starting point for limitation.

Any mistake or error in an execution petition will not necessarily render such an application a nullity.

Under certain circumstances a decree may be executed against a judgment-debtor personally, even though the original decree only provided for payment of money out of property in his possession. **Ramachandra Naidu v. Tripathi Naidu**, (1916) 2 M.W.N. 128 = 35 Ind. Cas. 614.

SPENCER and KRISHNAN, JJ.

References:—(a) (1914) M.W.N. 157; 17 M. 76, F.

(288) *Sch. I, Art. 182—Decree transferred to another Court—Decree not returned by that Court—Application to the Court that passed the decree—No jurisdiction to execute the decree—Application not made to proper Court—Bar of limitation not saved—Civ. Pro. Code, 1882, Ss. 223, 224, 228 and 230.*

The plaintiff obtained a decree in O. S. No. 11 of 1903 on the file of the District Court of Vizagapatam. The decree was transferred to the District Munsif's Court of Parvatipur for execution on the 3rd of October 1904. The decree holder got certain immovable properties attached, but the petition was dismissed on the 10th of March 1905, and no further steps were taken in the District Munsif's Court. On the 13th December 1907 when the copy of the decree was not returned by the District Munsif of Parvatipur, the decree-holder applied to the District Court of Vizagapatam for the sale of property attached by the District Munsif and for notice to the judgment debtor. The application was returned for amendment of certain defects, and it was again presented to the District Court without having been amended and was recorded by the Court without any further action being taken thereon. On the 27th of April 1910, the decree-holder made the present application to the District Court for notice and for realisation of the amount by sale of the properties already attached by the District Munsif of Parvatipur. The District Munsif returned the copy of the decree sent to him for execution with a certificate of non-satisfaction only on 3rd August 1910.

Held that, having regard particularly to Ss. 223, 224, 228 and 230, Civ. Pro. Code, 1882, the petition of the 13th December 1907 which was presented to the District Court was not made to the proper Court, and that the proper Court to which the application should have been made was the Court of District Munsif of Parvatipur, as that was the Court whose duty it then was to execute the decree so far as it could be executed by that Court.

Limitation Act (1908)—(Continued).

Held also that, consequently the petition dated the 27th April 1910 was, when made, time-barred under Art. 182 of the first schedule of Indian Limitation Act, as no application had been made within three years in accordance with law to the proper Court for execution or to take some step-in-aid of execution. *Held* further that the application of 27th April 1910 was not made to the proper Court. **Maharaja of Bobbili v. Sree Rajah Narasaraajc Peda Balaria Simhulu Bahadur Garu**, 31 M.L.J. 300 = (1916) 2 M.W.N. 541 = 4 L.W. 558 = 24 C.L.J. 478 = 14 A.L.J. 1129 = 20 M.L.T. 472 = 18 Bom. L.R. 909 = 39 M. 640 = 21 C.W.N. 162 = 36 Ind. Cas. 682 (P.C.).

LORD CHANCELLOR, LORD ATKINSON
and SIR JOHN EDGE.

(289) *Sch. I, Art. 182—Application for Adjournment—When saves limitation—Step-in-aid of execution.*

An application for adjournment evidently for obtaining an encumbrance certificate and filing draft proclamation is a step-in-aid of execution and saves the bar of limitation (a). **Ravur Munisami Naidu v. Pandala Muthial Naidu**, 33 Ind. Cas. 79.

SADASIVA AIYAR and MOORE, JJ.

Reference:—(a) 38 M. 695, *fr.*

(290) *Art. 182—Execution of amended decree—Date of order of amendment—Starting point of limitation.*

As a decree bears the date on which judgment is delivered in a case the date of amendment of a decree must on the analogous principle be held to bear the date of the judgment ordering the amendment. So an application to execute an amended decree presented more than three years after the date of the order granting the amendment is barred by limitation, though it is less than three years from the date on which the amendment was actually made. **Nirit Lal Jha v. Kumar Kalamand Singh**, 36 Ind. Cas. 533.

ROE and PRASAD, JJ.

(290-a) *Art. 182—Execution—Application by some only of the decree-holder's legal representatives on their own behalf—Whether sufficient to save limitation.* **Yasudevapatta Joshi Maha Patro v. Narayanapanigrahi**, 18 M.L.T. 517 = (1916) M.W.N. 112 = 31 Ind. Cas. 853. See Final Part, 1915, Col. 979.

(291) *Art. 182—Execution petition—Return for amendment—No representation—Step-in-aid.* **Gopisetti Narayanaswami v. Muthyala Venkatratnam**, 2 L.W. 1207 = 32 Ind. Cas. 816. See Final Part, 1915, Col. 979.

(292) *Art. 182—Execution application, not giving dates of prior applications—Return for amendment—Representation not made—Step-in aid of execution—Limitation Act (1908), Art. 182—Applying in accordance with law, construction of, if affected by O. XXI, r. 17, Civ. Pro Code—Practice.* See CIV. PRO. CODE (1908), No. 441, 4 L.W. 103.

(293) *Sch. I, Art. 182.* See EXECUTION OF DECREE, No. 19, 24 C.L.J. 462.

Limitation Act (1908)—(Continued).

(294) *Art. 182—Batta memo, for issue of notice to judgment debtor under S. 248, Civ. Pro. Code (1889)—Whether step-in-aid.* See EXECUTION OF DECREE, No. 1, 3 L.W. 34.

(295) *Art. 182.* See Nos. 54, 282, *supra*, and Nos. 304, *infra*.

(296) *Art. 182 (5)—Application for execution—Limitation—Step-in-aid of execution—Application by decree-holder certifying payment of portion with a prayer to strike off execution on satisfaction—S. 148, Civ. Pro. Code (1908).*

An Application by the decree-holder certifying payment of a portion of the decretal amount of Court is a step-in-aid of execution of the decree within the meaning of Art. 182 (5) of the Limitation Act, provided the payment asserted has actually been made. The fact that there is in the application a prayer that the execution case might be struck off after satisfaction does not take it out of the operation of the above rule.

Where an application for execution filed within time, which had been returned for amendment of certain formal defects, was re-filed after the period of limitation had expired and after the time allowed by the Court for the purpose, with an application explaining the delay and the petition was accepted.

Held, that the Court had in fact in the exercise of its discretion enlarged the time under S. 148, Civ. Pro. Code, though there was no express order to that effect. **Gopal Prashad Bhagat v. Rajendra Lal Panja**, 20 C.W.N. 615 = 34 Ind. Cas. 625.

N. R. CHATTERJEA and ROE, JJ.

(297) *Art. 182 (5)—Mortgage-decree—Execution application by widow—Subsequent application by adopted son—Widow disputing adoption—Widow's application, if enures for benefit of adopted son.*

An application for the execution of a decree by the widow of a deceased decree-holder will not enure to the benefit of the adopted son, when the widow claims hostilely against the adopted son.

The widow cannot be treated as the representative of the adopted son to the prejudice of the judgment-debtor. **Saminatha Asari v. G. Gopalakrishna Aiyangar**, 4 L.W. 291.

OLDFIELD and SADASIVA AIYAR, JJ.

(298) *Art. 182 (5)—Decrees for delivery of property, mesne profits and costs—Transfer of jurisdiction—Execution application to what Court to be made—Application not presented to "proper Court"—Whether a step-in-aid of execution and saves limitation.* See CIV. PRO. CODE (1908), No. 77, 31 M.L.J. 90.

(299) *Art. 182, Cls. (5) and (6)—Suit for arrears of rent in respect of separate tenancies—Passing of single decree—Execution application in respect of one tenancy—Saving of limitation.*

Plaintiffs instituted a suit for rent against defendants who hold under them three distinct tenancies under three separate contracts.

Limitation Act (1908)—(Continued).

The plaintiffs obtained a decree which specified different sums as being realisable from the different tenures. The decree-holder applied for execution of the decree so far as it related to one of the tenures. The question was whether this application saved the decree from limitation in respect of the realisation of the other sums mentioned in the decree, which were directed to be realised from the other tenures. *Held* that the decree having recognised the plaintiff's right to bring to sale distinct tenures for the realisation of the arrears leviable respectively therefrom, the position of the plaintiffs was as if he had brought three distinct suits for rent against the defendants, one in respect of each tenancy. The single decree passed must be construed as three distinct decrees made for the benefit of the plaintiffs and the rule of limitation applicable would be the same as if three separate decrees had been passed. Therefore the prior application in respect of the sum decreed so far as one of the tenancies was concerned cannot operate to save limitation for the sums due under the other tenancies. **Dhirendra Nath Sarkar v. Nischiotapore Co.**, 36 Ind. Cas. 398.

MOOKERJEE and CUMING, JJ.

References:—19 W.R. 30=10 B.L.R. 258, (F.B.); 6 W.R. Misc. 18; 10 B.L.R. 259-N=10 W.R. 10; 25 W.R. 310, R.

(300) *Art. 182 (6)—Issue of notice under O. XXI, r. 22, Civ. Pro. Code—Calculation of limitation from date of order issuing notice.*

Where a notice is issued in execution of a decree under O. XXI, r. 22, Civ. Pro. Code, the period of limitation under Art. 182 (6) of the Limitation Act begins to run from the date of the order of the Court issuing the notice. **Lala Ram Kumar Lal v. Maharaja Keshto Prasad Singh**, 36 Ind. Cas. 999.

ROE and KINGSFORD, JJ.

References:—27 B. 622=5 Bom. L.R. 594; 30 A. 546=5 A.L.J. 524=A.W.N. (1908) 245=4 M.L.T. 446, F; 22 W.R. 481; 24 Ind. Cas. 90=20 C.L.J. 15; 6 C.W.N. 656; 10 C.W.N. 303=4 C.L.J. 530; 1 M.L.T. 395=30 M. 30=16 M.L.J. 548, R.

(301) *Art. 183—Application to enforce Privy Council order—Revivor, meaning of.*

On 22nd January 1915 an application for execution of an Order of Her late Majesty in Council dated the 28th November 1899 was made to a Subordinate Judge to whom the execution proceedings were transferred:

Held, that the application was governed by Art. 183 of the 1st Schedule of the Limitation Act, 1908, according to which an application to enforce an Order of the Sovereign in Council must be made within 12 years from the date on which a present right to enforce the order accrued to some person capable of releasing the right, provided *inter alia* that, where the order has been revived, 12 years shall be computed from the date of such revivor.

Where, on an application for execution, notice is issued under S. 216 of the Code of Civil

Limitation Act (1908)—(Continued).

Procedure, 1877, or S. 248 of the Code of Civil Procedure, 1882, and the Court has decided that the decree is still capable of execution and makes an order for execution, there has been a revivor within the meaning of the article.

Where an Order in Council is transmitted to a Subordinate Court for execution without any notice being given to the judgment-debtors, it would not be a revivor of the order. **Tribikram Deo Narayan Singh v. Badri Misser**, 20 C.W. N. 1051=1 Pat. L.J. 385=36 Ind. Cas. 633.

CHAMBER, C.J. and JWALA PRASAD, J.

(302) *Sch. I, Art. 183—Decree of High Court—Limitation—Execution of decree—Transfer of decree—Question of limitation to be decided by what Court—Revivor of decree—Issue of notice under S. 245-B, Civ. Pro. Code (XIV of 1882). Chatterput Singh v. Daya Chand Marwari*, 11 Ind. Cas. 216=23 C.L.J. 641. See Final Part, 1911, Col. 707.

(303) *Art. 183—Decree of original side of High Court against two judgment-debtors—Revivor of decree on notice to one of them—Decree not revived as against the other. James Russel McLaren v. Veeriah Naidu*, 38 M. 1102=32 Ind. Cas. 1003. See Final Part, 1915, Col. 981.

(304) *Sch. I, Arts. 183 and 182 (5) and (6)—“Revivor,” meaning of—It covers every one of the matters in Art. 182, cls. (5) and (6)—Application for transmission of decree and order permitting same, if revivor—Issue of notice under S. 248, Civ. Pro. Code (1882), if proper—Application for execution if to follow or precede transmission and to be made to which Court—Question whether decree capable of execution if may be determined on application for transmission—Order, if quasi-judicial and may be delegated to Registrar—Civ. Pro. Code (1882), S. 637.*

The word “revivor” in Art. 183 to Sch. I of the Limitation Act does not mean the same thing as one or more of the matters which are mentioned in Art. 182, cls. (5) and (6) to Sch. I of the Act.

To constitute a “revivor” of a decree within the meaning of Art. 183 of Limitation Act, there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it; and such determination must be by a Court or person duly qualified to make it.

An application for transmission of a decree is not an application for execution.

No notice under S. 248 of the Civ. Pro. Code of 1882 can be properly issued upon such an application. The notice required by that section must, when the decree has been transmitted, be issued by the Court to which the decree has been sent for execution and which is the Court to decide whether the application is capable of execution.

R. 370 of Mr. Belchamber's Rules of the Original Side was not consistent with the Code of 1882.

Where, on an application being made for the transmission of a decree of the Original Side of

Limitation Act (1908)—(Concluded).

the High Court, the Registrar issued notice under S. 248, Civ. Pro. Code, on the judgment-debtor to show cause why the decree should not be executed against him and, the judgment-debtor not appearing, ordered execution to issue as prayed.

Held—That the application and the order did not operate as a revivor of the decree.

That, looking into the substance of the matter, there was no determination that the decree was capable of execution.

That to determine whether the decree was or was not capable of execution was a judicial act which could not be delegated to the Registrar under S. 637 of the Civ. Pro. Code of 1882.

For *Mookerjee, J.*—S. 230 of the Code makes it plain that the application for execution must be presented to the Court to which the decree has been transmitted for execution. **Chatterpat Singh v. Rai Bahadur Salta Soomarmull**, 20 C.W.N. 899=23 C.L.J. 645=43 C. 903 (F.B.)=36 Ind. Cas. 602.

SANDERSON, C.J., WOODROFFE, MOOKERJEE, CHITTY and N.R. CHATTERJEA, JJ.

Limitation (Ancestral Land Alienation) Act.

See PUN. ACT I OF 1900.

Limitation (Land) Act.

See PUN. ACT I OF 1904.

Liquidation.

Decree in favour of bank—Revision proceeding by defendant judgment-debtor—Liquidation of bank during pendency of revision proceedings—Leave of Court if necessary to proceed with revision petition. See COMPANIES ACT (1882), No. 6, 91 P.R. 1916.

Lis Pendens.

- (1) *Mortgage suit and lease by mortgagor after decree, but before sale—Auction-purchaser not affected by lease or by payments by lessee—Proceeding, where ceases to be contentious.*

Lis pendens continues in a mortgage suit up to the time of actual sale of the property and hence the lease by the mortgagor after decree but before sale does not bind the auction-purchaser.

The view of the Bombay High Court that the *lis pendens* depends upon the active prosecution of applications for enforcing the decree not approved.

A person who obtains a lease when a *lis* subsists takes considerable risks and any payments made by him to the judgment-debtor do not bind the purchaser.

For *Bakewell, J.*—The contentious proceeding terminated with the decree and therefore the lease does not fall within S. 52 of the Transfer of Property Act. **Ramaswami Aiyangar v. Govinda Iyer**, 20 M.L.T. 512=5 L.W. 443=31 M.L.J. 839.

ABDUR RAHIM, OFFG. C.J. and SESHAGIRI IYER, J.

Lis Pendens—(Concluded).

- (2) *Application of doctrine of lis pendens to execution proceedings—Effect of attachment and sale during pendency of suit.*

The doctrine of *lis pendens* applies to execution sales also. As an attachment of property in execution of a decree does not confer any title upon any one and only prevents the property being alienated by the person to whom it belongs during the continuance of the execution proceedings, a sale held in pursuance of such attachment does not confer on the auction-purchaser any right to the prejudice of the decree-holder in a suit relating to the same property and decreed before the auction sale, although the attachment was from before the institution of the suit. **Kunj Behari Lal v. Ram Sahai**, 30 Ind. Cas. 213.

LINDSAY, J.C.

- (3) *Transferee not party to suit—Power of Court to bind transferee by result of litigation.*

Where a transfer is made during the pendency of a suit in respect of it, the transferee will be bound by the result of the proceedings notwithstanding the fact that his name does not appear upon the record. **Syed Husain v. Bank of Upper India, Ltd.**, 30 Ind. Cas. 289.

LINDSAY, J.C. and KANHAIYA LAL, A.J.C.

- (4) *Lease by mortgagor after mortgage decree but before sale, whether binds the auction-purchaser—Nature of mortgage decree—Transfer of Property Act, Ss. 52, 58. See SMALL CAUSE COURT, JURISDICTION OF, No. 1, 20 M.L.T. 512.*

Loan.

Mortgage of paddy—Limitation for suit. See LIMITATION ACT (1908), No. 196, 24 C.L.J. 348.

Loans for Improvement of Land Act.

See ACT XIX OF 1883.

Loans Limitation Act.

See PUN. ACT I OF 1904.

Local Boards Act.

See MAD. ACT V OF 1884.

Local Investigation.

By Court. See CIV. PRO. CODE (1908), No. 573, 35 Ind. Cas. 314.

Local Self-Government Act.

See BEN. ACT III OF 1885.

Lost Deed.

Alleged to be insufficiently stamped—Presumption that documents accepted by Court are properly stamped. See STAMP, No. 1, 18 Bom. L.R. 904.

Lost Document.

- (1) Appellate Court's right of interference—Original document lost, proof of. See EVIDENCE ACT, No. 49, 31 Ind. Cas. 579.

- (2) Proof of. See EVIDENCE ACT, No. 32, 32 Ind. Cas. 399.

Lost Grant.

Presumption of, in absence of proof of legal title, on the basis of user exercised and enjoyed. See *LEASE*, No. 6, 20 C.W.N. 1135.

Lottery.

(1) Agreements by way of wager—Suit to recover anything alleged to be won a wager. See *CIV. PRO. CODE* (1908), No. 592, 9 Bur. L.T. 228.

Lottery Act.

See *ACT V OF 1844*.

Lubbai.

Lubbais — Hindu converts to Mahomedanism—Special usage excluding females from succession—Valid. Ghinnappa Rowther v. Ibrahim Rowther, (1915) M.W.N. 866=29 M.L.J. 763=39 M. 664=30 Ind. Cas. 806 See Final Part, 1915, Col. 982

Lucknow.

Confiscation of rights after mutiny in Oudh—Waiver of rights of confiscation in Lucknow City—Waiver confined to Mohallas of the city—Villages included within Municipal limits, rules relating to. Sheodat Prasad (Pandit) v. Lalla Suraj Ball, 18 O.C. 138=30 Ind. Cas. 296. See Final Part, 1915, Col. 982.

Lunacy Act.

See *ACT IV OF 1912*.

Lunacy District Courts Act.

See *ACT XXXV OF 1858*.

Lunatic.

(1) *Sale of property by the certificated guardian—No previous permission of the Court—Suit by sons of lunatic to recover their shares—Part of the sale money applied in discharge of mortgage executed by and binding on plaintiff's father the lunatic—Equity—Obligation to pay a proportionate share of such amount.*

Where property belonging to plaintiff's father a lunatic had been sold by the certificated guardian of the lunatic but without obtaining the previous permission of the District Court, and a portion of the sale money had gone towards the discharge of a mortgage executed by the lunatic the plaintiffs cannot recover their shares without being liable to pay a proportionate part of the sum so applied in discharge of the mortgage it being their duty to discharge such mortgage debt. *Mata Ghulam v. Rajpal Singh*, 31 Ind. Cas. 422.

LINDSAY, J.C.

(2) *Guardian when to be appointed. See ACT XXXV OF 1858 (LUNACY DISTRICT COURTS), No. 3, 96 P.L.R. 1916.*

(3) *Manager. appointment of, if bars an adoption by the lunatic—Finding of lunacy, effect of—Construction of Statute—Capacity to write an intelligent letter, if conclusive test of sound mind—Adoption by a lunatic, when valid—Adoption, whether amounts to alienation of property. See ACT XXXV OF 1858 (LUNACY DISTRICT COURTS), No. 2, 3 L.W. 290.*

Lunatic—(Concluded).

(4) *Decree, validity of, if can be raised in execution—Judgment against a—Lunatic not represented by a legal guardian—Right of suit to set aside decree. See EXECUTION OF DECREE, No. 16, 24 C.L.J. 375.*

(5) *Execution sale of lunatic's properties—Lunatic not represented by a guardian—Validity of sale—Setting aside of sale if necessary—Defendant if can plead invalidity of sale in a suit for possession. See EXECUTION SALE, No. 1, 3 L.W. 301.*

(6) *Unenforceable contract of sale, vendor being a lunatic—Right of purchaser—Refund of money paid. See CONTRACT ACT, No. 67, 32 Ind. Cas. 804.*

Mafidar.

(1) *Mafidar—Owner in cultivating possession of land—Right of former to recover share of produce—Whether exists.*

A mafidar brought a suit against the recorded proprietor who is in cultivating possession for the value of one-half share of produce claimed for kharif 1912. The *muafi* was granted about 1828 A.D. by the Maharajah Ranjit Singh to one B 'ba sgha dharmath sur ba ivaz puja path.' On enquiry after annexation in 1849, the mafidar was found in possession and the grant was accordingly confirmed for life. On his death, it was resumed by order dated 12-6-1862 but was again released by order dated 8-6-1863 in favour of his son, the present plaintiff. The grant appears to have been continuously enjoyed up to the present. The Courts below decreed revenue only.

Held that it is quite possible that a proprietor should hold land and pay rent as a tenant-at-will under his own occupancy tenant or under his own mortgagee who would then be in the possession of a landlord.

No assignee of land revenue as such is entitled to a share of the produce, nor is mere receipt by him of such a share in the past sufficient to give him a title in the future. To secure the latter, it is necessary that in addition to the position of mafidar or assignee, his status should include certain elements or incidents of proprietary right or ownership explained in r. D1 31 framed under the Land Revenue Act of 1871 on the analogous subject of the settlement of revenue assessable on resumed assignments with the ex-assignees or their heirs (a).

If the owner was in cultivating possession of the land concerned, the mafidar would not be entitled to a sub-settlement; as a result of which he would of course have no title to take a share of the produce from the cultivating owner (b).

Held that as it had not been proved that the plaintiff had at any time any proprietary interest or had ejected tenants or admitted new ones, he was not entitled to realise a share of the produce from the tenant who had been in

Mafidar—(Concluded).

cultivating possession since 1862. **Sant Bhim Sain v. Fazal**, 2 P.R. 1916 (Rev.).

FAGAN, F.C.

References:—(a) & (b) 10 P.R. 1886, Rev.; 4 P.R. 1887, Rev., 2 P.R. 1889, Rev. and 14 P.R. 1892, Rev., *Ref. to*; 1 P.R. 1885, Rev., *Dissented from*.

(2) Whether a zemindar. See ACT VIII OF 1873 (NORTHERN INDIA CANAL AND DRAINAGE), No. 1, 32 Ind. Cas. 556.

Mahal Lands.

Grant to females for common enjoyment—Death of one of them—Decree against latter—Attachment in execution of rents after her death—Invalidity. See EXECUTION OF DECREE, No. 27, 33 Ind. Cas. 83.

Mahant.

(1) Declaratory suit for removal of a, in possession and declaration that plaintiff has the right to nominate a successor—Consequential relief for possession. See DECLARATORY DECREE, No. 1, 95 P.R. 1916.

(2) Muth or asthal—Position of—Appointment of married man as successor—Validity—Succession to muth or asthal—Usage of each muth to be proved and applied. See HINDU LAW (RELIGIOUS ENDOWMENTS), No. 1, 20 C.W.N. 802.

(3) Powers of See RELIGIOUS ENDOWMENTS, No. 2, 31 P.W.R. 1916.

Mahomedan Law.

1.—ACKNOWLEDGMENT.

2.—ALIENATION.

3.—CUSTOM.

3-a.—DIVORCE

4.—DOWER.

5.—GIFT.

6.—GUARDIANSHIP.

7.—HIBABIL-EWAZ.

8.—INHERITANCE.

9.—LEGITIMACY.

10.—MARRIAGE.

11.—PRE-EMPTION.

12.—RESTITUTION OF CONJUGAL RIGHTS.

13.—SUCCESSION.

14.—WAKF.

15.—WILL.

—1.—Acknowledgment.

Son — Son acknowledged should not appear to be son of another—Acknowledgment of legitimate sonship. Usmanmiya Abdullamiya v. Vali Mahomed Husainbhai, 17 Bom. L.R. 693=40 B. 28=20 Ind. Cas. 904. See Final Part, 1915, Col. 981.

—2.—Alienation.

(1) Father's assent—When not binding on sons—Law applicable to Bhatti Rajputs of Mausea Kum. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 2, 4 P.R. 1916.

(2) See MORTGAGE (GENERAL), No. 49, 35 Ind. Cas. 56.

Mahomedan Law—(Continued).**—2.—Alienation—(Concluded).**

(3) Mahomedan family governed by Marumakkatayam Law. See SUCCESSION CERTIFICATE ACT VII OF 1889, No. 1, 31 Ind. Cas. 446.

—3.—Custom.

Mahomedan Law—Custom—Rajput Mussalmans—Custom permitting widow to take life-estate in husband's entire property—No proof—Bengal, N.W.P., and Assam Civil Courts Act XII of 1887, S. 37—Effect of the section.

Held that it was not established by evidence in this case that a custom obtained among the Rajput Mussalmans under which a widow got a life-estate in her husband's entire property in case of his death without issue. (Per *Tudball and Rafique, JJ.*; *Walsh, J. doubting*) (a).

Per *Walsh, J.*—S. 37 of the Bengal, North-Western Provinces and Assam Civil Courts Act means that the Mahomedans are governed by the Mahomedan Law and the Hindus by the Hindu Law and that neither of them against their will should be subjected to the law of the other or to the English or any other law. The section does not apply to a dispute between the Mahomedan themselves or on the other hand to a dispute between the Hindus themselves; where, for example, a point is raised by a Mahomedan himself that he, if it can be proved in fact, should be allowed by the law to apply to himself an exception to the general Mahomedan Law which would otherwise be applicable to him. The section must be read to mean that the Mahomedan Law is not to be applied to a Hindu against his will, but a man is free to adopt for himself any special custom which he pleases. *Raja v. Allahditya*, 33 Ind. Cas. 114.

TUDBALL, RAFIQUE and WALSH, JJ.

References:—(a) 18 Ind. Cas. 571=17 C.W.N. 37=17 C.L.J. 143=12 M.L.T. 611=(1913); M.W.N. 27=15 Bom. L.R. 76; 1 Agra (F.B.) R. 39; 9 M.I.A. 195, R.

—3 a.—Divorce.

Condition in Kabinnama—Restitution of conjugal Rights—Husband having other wives.

The condition in a Kabinnama that the husband should live with the wife in her father's dwelling house and if he broke this condition she would be entitled to divorce him is void under the Mahomedan Law (a).

Where in an appeal against the dismissal of a suit by the plaintiff for restitution of conjugal rights, it was represented that the appellant had deposited the amount of the prompt dower in the lower Court and that he had set apart a separate hut within his compound for the residence of the defendant, *held* that under these circumstances there was no reason why the plaintiff should not be given a decree for restitution of conjugal rights. *Imam Ali Patwari v. Arfatunnessa*, 32 Ind. Cas. 707.

N. R. CHATTERJEE and NEWBOULD, JJ.

References:—(a) 18 C.W.N. 693=21 Ind. Cas. 87, R.

Mahomedan Law—(Continued).**—4.—Dower.**

- (1) *Transfer of property to wife in lieu of relinquishment of dower whether sale or Hiba-bil-ewaz—Hiba-bil-ewaz—Act XVIII of 1876, S. 9—Hiba-bil ewaz, effect of, on right of pre-emption.*

Where a Mahomedan transferred certain property to his wife in lieu of relinquishment of her claim to dower the amount of which was specified, *held*, that the transaction was not one of sale but of *hiba-bil-ewaz*.

Held further, that a *hiba-bil ewaz* is not a sale within the meaning of S. 9 of Act XVIII of 1876 and confers no right of pre-emption under Chap. II of that Act. **Ram Prasad v. Rahat Bibi (Mussammat)**, 18 O.C. 367 = 33 Ind. Cas. 622.

STUART, A.J.C.

- (2) *Widow's lien for dower—Whether interest on unpaid dower is chargeable—Usury—Abrogation of—Act XXVIII of 1855—Equitable considerations.*

Where a Mahomedan widow had been in possession for a number of years of her deceased husband's landed property under her lien for unpaid dower, and the other heirs sued her to recover possession of their shares and prayed for accounts, and the question arose whether in taking such accounts she was entitled to interest on her dower:

Held, that it would be inequitable to make her account for the profits except on the terms of allowing her reasonable interest on her dower debt.

The question whether the Mussulman rule relating to usury was or was not abrogated by Act XXVIII of 1855 discussed but not decided.

Compensation for forbearance to enforce a money payment is best calculated on the basis of an equitable rate of interest. The rules of equity and equitable considerations commonly recognised in the Courts of Chancery in England are not foreign to the Mussulman system, but are in fact often referred to and invoked in the adjudication of cases. **Hamira Bibi v. Zubaida Bibi**, 11 A.L.J. 1055 = 38 A 581 = 21 C.W.N. 1 = 20 M.L.T. 505 = 4 L.W. 602 = 18 Bom. L.R. 999 = 31 M.L.J. 799 = (1916) 2 M.W.N. 551 = 36 Ind. Cas. 87 (P.C.).

LORD ATKINSON, LORD PARKER OF WADDINGTON, SIR JOHN EDGAR AND AMEEB ALI.

- (3) *Dower, claim for—Cause of action for dower distinct from that for share in inheritance—Res judicata—Oudh Laws Act, S. 5—Means of husband at the date of enforcement of contract, to be considered.*

Held, that the cause of action for a claim for dower is distinct from the cause of action for a share in the inheritance.

Where a Mahomedan husband sued for the recovery of his share out of the property left by his wife on her death in possession of her mother and the mother did not plead as a defence the non-receipt of her share out of the dower which fell due on her daughter's death,

Mahomedan Law—(Continued).**—4.—Dower—(Continued).**

held, that it did not operate to bar as *res judicata* a subsequent claim by the mother for her share in her daughter's dower money.

Held also, that in fixing the amount of dower, under S. 5 of the Oudh Laws Act, the Court is not to take into consideration the means of the husband at the time he entered into the contract of dower, but his means at the time it is sought to enforce the contract. **Amir Khan v. Musammat Sikandar Begam**, 19 C.C. 171 = 36 Ind. Cas. 49.

MAHOMED ALI, A.J.C.

- (4) *Dower, claim for, in a suit for share, in the inheritance—Nikah during subsistence of muta marriage, validity of—Childless Shia widow's right to succeed to her husband's property—Dower, matters to be considered in determining, whether excessive or not—Oudh Laws Act, S. 5.*

Held, that it being a clear principle of Mahomedan Law applicable alike to Shias and Sunnis that the estate of a deceased Muhammadan is, before its distribution among the persons who are entitled as heirs, liable for the debts which were owing by the deceased at the time of his death and that the claim of the wife for dower is a debt which is chargeable against the general estate of deceased husband, where the claim is made after his death, it is competent for the widow of a deceased Muhammadan to put forward her claim for dower in a suit brought by one of several heirs for his share in the estate of the deceased.

Where a husband and wife during the subsistence of a *muta* marriage entered into a marriage in the *nikah* form, but before doing so the husband surrendered the unexpired portion of the *muta* period, *held*, that the second marriage by *nikah* was valid.

Held further, that under S. 5 of the Oudh Laws Act the first matter to be considered is whether the sum agreed upon is excessive with reference to the means of the husband. It is not found to be so it is unnecessary to go any further and there is no occasion to discuss the status of the wife for the purpose of reducing the amount.

Held also, that the expression "means of the husband" as used in S. 5 of the Oudh Laws Act signifies the value of the husband's estate at the time of his death, in cases where the claim is made by a widow.

Held further, that the principal matters to be considered in determining whether any sum fixed for dower is reasonable or excessive are the extent and nature of the claims of the various persons who, as heirs, are entitled to divide the estate. If it were made to appear that the payment of a certain sum on account of dower would reduce the divisible estate to such an extent as to leave the heirs poorly provided for, it might reasonably be held that such a sum was excessive.

Mahomedan Law—(Continued).**—4.—Dower—(Concluded).**

It is settled law that a childless Shia widow is not entitled to any share in the landed property of her deceased husband. But where the property consists in the right to receive a fixed annual sum of money in the nature of a rent charge, the widow is not excluded by the rule of Shia law from participation in property of this description.

Conduct of counsel, in the matter of cross-examination of witnesses examined on commission, commented upon. **Baqar Mirza v. Mehdi Hassan**, 19 O.C. 246.

LINDSAY J.C. and KENDALL, A.J.C.

(5) *Decree for dower in favour of widow, form of—Onus of proof—Assets of deceased person, whether includes annuity.*

A decree for dower in favour of a Mahomedan widow can be passed only against the assets of her deceased husband. A personal decree against the person in possession of the assets is not proper.

A defendant who relies on the happening of an event in discharge of his liability is bound to prove its happening. The onus is not on the plaintiff to prove that it had not happened.

The assets of a deceased person who had been in enjoyment of an annuity, e.g., a *wasika* pension which ceased on his death cannot include any money due on account of annuity after the date of his death. **Ali Muhammad Khan v. Mueet Sajjadi Begam**, 33 Ind. Cas. 516.

LINDSAY, J.C.

Reference:—(a) 7 O.C. 176 D.

(6) *Non-payment of dower—Right of widow stepping into possession of her husband's property—Right heritable.* **Majidmian Baxumian v. Bibi Sahab Jan**, 17 Bom. L.R. 770=40 B. 34=30 Ind. Cas. 870. See Final Part, 1915, Col. 586.

(7) *Dower debt, extinguishment of.* **Inayat Ali Salyed v. Jalton Bibi Mussammati**, 18 O. C. 263=22 Ind. Cas. 362. See Final Part, 1915, Col. 997.

(8) *Advancement—Mehar—Conveyance of property in consideration not necessary satisfaction of mehar.* See CONSIDERATION, No. 1, 18 Bom. L.R. 810.

—5.—Gift.

(1) *Hiba-bil-ewaz (gift for a consideration)—Delivery of possession—Consideration (ewaz).*

Under the Mahomedan Law a voluntary gift is not valid unless it is also accompanied by delivery of the thing given so far as it is capable and admits of delivery. In the case of a gift for consideration, (*Hiba-bil-ewaz*) delivery of possession is not necessary, but, actual payment of consideration and a *bona fide* intention on the part of the donor to divest himself *in presenti* of the property and to confer it upon the donee are necessary and must be proved.

Mahomedan Law—(Continued).**—5.—Gift—(Continued).**

In this respect, the Mahomedan Law is not affected by anything enacted in the Transfer of Property Act or the Trusts Act. **Mirza Sadik Husain Khan v. Nawab Salyed Hashim Ali Khan**, 31 M.L.J. 607=19 O.C. 192=18 Bom. L.R. 1037=21 C.W.N. 130=(1916) 2 M.W.N. 577=14 A.L.J. 1248=21 M.L.T. 40=38 A. 627=36 Ind. Cas. 101 (P.C.).

LORD ATKINSON and LORD PARKER OF WADDINGTON, SIR JOHN EDGE and MR. AMEER ALI.

(2) *Separable gifts—One portion invalid—Gift, in lieu of dower—Hiba-bil-ewaz—Ordnance Estates Act (1 of 1869), ss. 8, 10, 15—Primaogeniture—Property alienated by talukdar—Waqf of profits of land—Mortgage of property bequeathed.*

If a gift in regard to a certain property is invalid, its invalidity would not affect another and a separable portion of it (a).

According to Mahomedan Law, a gift made in lieu of dower is a *hiba-bil-ewaz*, for the validity of which the delivery of possession is not essential. The consideration of a *hiba-bil-ewaz* may or may not be adequate and it is enough to perfect such a gift that some *ewaz* or consideration should be given and there should be an intention to divest oneself *in presenti* of all interests in the property (b).

Where a *sanad* whereby an estate was granted to a *talukdar* lays down the rule of primogeniture, that rule would not apply to persons to whom the estate has been alienated in whole or in part by the holder thereof in his life time or to the property that has been alienated (c).

The Mahomedan Law does not recognise a *waqf* of the profits of land apart from the land itself. In some cases, the disposition may, *prima facie*, appear to convey an immediate interest, and yet the intention may not be to give it operation during the lifetime of the testator; when that is so, the disposition will take effect as a *wasalat*.

According to the Shia Law, such a bequest may take effect in favour of some of the heirs without the consent of the other heirs, if it does not affect more than one-third of the estate, or if it exceeds one-third, it is made for the performance of such religious duties as are incumbent upon the testator (d).

A subsequent mortgage is not necessarily inconsistent with the rights conferred by a bequest. **Qasim Ali Khan v. Ahmad Shah**, 32 Ind. Cas. 516.

STUART and KANHAIYA LAL, A.J.CS.

References:—(a) 2 O.C. 244, R. (b) 23 M. 70; 2 C. 184 (198); 28 A. 439 (448)=10 C.W.N. 706=3 A.L.J. 405=8 Bom. L.R. 387=4 O.L.J. 295=33 I.A. 68=9 O.C. 106=1 M.L.T. 106 (P.C.). R. (c) 22 Ind. Cas. 267=16 O.C. 277, R. (d) 2 C.L.J. 166, R.

(2-a) *Donee in possession—Effect of registered deed of gift.*

Mahomedan Law—(Continued).**—5.—Gift—(Concluded).**

Where a deed of gift was executed in favour of a person already in possession and was registered, the gift becomes complete, though mutation of names was not effected. **Muhammad Yakub Khan v. Musammat Nazlatan**, 36 Ind. Cas. 200.

RICHARDS, C.J. and RAFIQUE, J.

(3) *Gift to minor son—Reservation of rents for life—Possession—Validity of such gift—Mutation of names—Lease as guardian—Tests.* **Rahman Bi v. Mahomed Fatima Bibi**, (1915) M.W.N. 430—31 Ind. Cas. 545. See Final Part, 1915, Col. 989.

(1) *Gift by father in favour of son—Collector's certificate, transferred to son's name—Gift deed and title deeds retained by father—Father living with members of his family in one item and collecting rents of another item on his own behalf—Constructive delivery.* **Muhammad Sulfalla Sahib v. Yajthuddin Sahib**, 2 L.W. 1018 = (1915) M.W.N. 876 = 31 Ind. Cas. 231. See Final Part, 1915, Col. 990.

(5) *Assignment of an incorporeal right—Requirements under Hanafi Law.* See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), No. 1, 4 L.W. 330.

(6) *Gift by Mahomedan—Proof—Application of S. 123, Transfer of Property Act.* See TRANSFER OF PROPERTY ACT, No. 36, 14 A.L.J. 119.

—6—Guardianship.

(1) *Guardian for marriage is subject to the control of Court—Marriage of girl of 12 years to an infant aged ten months—Validity—Profligate—Presumption of continuance of profligacy under S. 114, Evidence Act—Interference with findings of fact when justifiable in second appeal.*

An apparent finding of fact will not be binding on a Court of second appeal, if it is either based on no evidence or proceeds on a misapplication of the law to the facts found.

It is a cruel and abominable thing to bind in wedlock a girl of 12 years who is approaching puberty to an infant in arms.

A marriage contracted by a father of a minor 'to one who is not an equal' is not lawful when it is known that the father acted carelessly or wickedly in the matter. The Mahomedan Law subjects the paternal guardian for marriage to the control of the Courts.

Under S. 114, Evidence Act, ill. (d), a person who is once proved to be a profligate is presumed to continue as such during his life time. But the presumption is rebuttable. **Mussammat Shahul v. Allah Bachayo**, 9 S.L.R. 196 = 34 Ind. Cas. 504.

FRATT, J.C., and CROUCH, A.J.C.

(2) *Mother's right to guardianship—Alienation of minor's property by mother—Validity—Art. 44, Limitation Act (1908).*

According to strict Mahomedan Law, a mother is not the natural guardian of her

Mahomedan Law—(Continued).**—6.—Guardianship—(Continued).**

children, and where she is not the duly authorised guardian either, an alienation of the minor's property by her, which is not found to be for the benefit or advantage of the minor, is void. **Sheikh Rajab Ali v. Sheikh Wazir Ali**, 1 Pat. L.J. 188 = 34 Ind. Cas. 85.

CHAPMAN and ATKINSON, JJ.

Reference :—16 C.W.N. 339, F.

(3) *De facto guardian, release by: if should be set aside, when not binding—De facto guardian, release by, when to be upheld—Family settlements, when not binding on minor—Test—Mother, power of as de facto guardian—'Delay defeats equities,' limitations to the maxim—Laches and inconvenience, when no bar to re-opening of settled matters—Evidence debts proved prima facie by acceptance by major members—Compromise, views of parties as to, if absolute.*

A conveyance by a *de facto* guardian of a Mahomedan minor need not be set aside by him after attaining majority, if the document is not binding on him (a).

A release deed executed by the mother and *de facto* guardian of a Mahomedan minor will not be upheld unless it is shown to have been beneficial to the minor so as to justify the mother in entering into it as the *de facto* guardian.

Per *Seshagiri Iyer, J.*—II, in pursuance of a general purpose of settling family affairs and of bringing peace among the members of the family, separate releases are executed by the members of the various branches of the family in favour of the sole senior member of one branch, each of such releases will be valid and binding as one of a series of transactions by which the family arrangement was secured (b).

Under the Mahomedan Law, a mother is not the *de jure* guardian of her infant son, and as a *de facto* guardian, her powers of binding her son's interests are very limited.

It is well established that, under the Mahomedan Law, a transaction will not be upheld against a minor unless it is found to be to his manifest advantage or for necessity (c).

When a major member of a family executes a release deed on the footing that certain debts exist, the deed is *prima facie* evidence of the existence of such debts.

A person whose conduct is not above board will not be permitted to plead *laches* on plaintiff's part, and the inconvenience that may be caused to him by re-opening certain matters is no bar to the plaintiff's suit.

The maxim that 'delay defeats equities' should not be applied to a case where want of fair dealing and inequality have been proved to exist.

The tests to be satisfied before transactions by way of family compromises, entered into on behalf of infants, can be upheld, are :

(1) In forming the agreement of compromise there must have been a full disclosure of all

Mahomedan Law—(Continued).**—6.—Guardianship—(Continued).**

material circumstances in the knowledge of the parties thereto. It is immaterial whether the information withheld was asked for by the other contracting parties or not (d) :

(2) all the members of the family should have been treated impartially, (e) and

(3) if the parties be not on equal terms but one of them stands in such relation to the other as renders it incumbent on him to give a fuller account of the matter or question in dispute than he has done, the Court, although no intentional fraud may be imputable to such person, will not support the compromise (f).

A family arrangement will not bind a minor if it is unconscionable in any way.

The proposition that a compromise should be judged, not by what the Court concludes to be the rights of the parties, but by what was regarded as just and proper by those who entered into the transaction, is subject to the proviso that the transaction should have been entered into honestly and with a view to secure full justice to the various parties to the instrument, that, although mistakes in calculation or in the ascertainment of rights might exist, there was no undue advantage taken by one of the members of the family and that there was an honest desire to put an end to litigation and secure family peace. *Abdul Hussain Rowthan v. Ibrahim Rowthar*, 3 L.W. 379 = 19 M.L.T. 346 = 35 Ind. Cas. 243.

WALLIS, C.J. and SESHAGIRI AIYAR, J.

References:—(a) 34 A. 213, F. (b) 35 B. 75, R. (c) 8 A. 324; 32 M. 276; 23 M.L.J. 244, R. (d) L.R. 9 Ch. 414, R. (e) 10 C.L.J. 503, R. (f) 1 W. and T.L.C. 234, 248, R.

(4) *De facto guardian—Settlement for minor's benefit, if void—Powers of de facto guardian—Partnership—Death of one partner—Accountability of the continuing partners to the representative of the deceased—Indian Contract Act, S. 241—Indian Trusts Act, S. 88—III. (f).*

Plaintiff's father and the defendants, all belonging to the class of Cutch Memon Mahomedans, were trading as partners till October 1907, when plaintiff's father died. In November, accounts were taken of the amount due to plaintiff, then a minor, one year old, and a settlement arrived at that Rs. 16,000 was due. This amount was left in the hands of defendants who were to pay interest at 7½ per cent. The mother, and maternal grandfather of plaintiff, and two other respectable gentlemen were parties to the settlement which was registered. The interest amounting to Rs. 100 a month was regularly paid by defendants and used to be received by the plaintiff's maternal uncle, who now brought this suit as his next friend, for accounts; and for a share of profits, since plaintiff's father's death.

Mr. Justice Bakewell on the Original Side, held that the settlement was void, as the plaintiff was not properly represented, his mother not being his legal guardian, and no record the

Mahomedan Law—(Continued).**—6.—Guardianship—(Continued).**

suit, without even giving credit to sums regularly paid after the death of plaintiff's father. In appeal:—

Held, reversing, the decree of Mr. Justice Bakewell, that plaintiff is not entitled to maintain this suit and ask for an account.

In cases of urgent and imperative necessity, or where the transaction from its nature must necessarily be beneficial to the minor, a *de facto* guardian can alienate the property of the minor, whether moveable or immoveable—other acts of a *de facto* guardian, if of a similar nature, are also binding (a).

The view of the law of the learned Judge on the Original Side was quite, erroneous regarding the nature of the settlement, as the settlement had been set aside without any allegations being made against its *bona fide* character.

The settlement having been accepted and acted upon for so many years by the minor's mother, his maternal grand-father, and even his present next friend, the next friend cannot now be allowed to turn round and say it was unauthorised and therefore should be set aside, without even alleging that the settlement was not fair and *bona fide* or that it was liable to be opened on account of errors.

Seshagiri Aiyar, J.—A minor who is entitled to claim the assets of his deceased father in a partnership is not entitled to claim as of right a share in the profits of the concern. There is no fiduciary relation between the surviving partners and the legal representatives of the deceased partner. The amount due to the deceased is a loan and nothing more (b).

It is always a very difficult process to find out to what exactly the profits earned in the trade are due, whether it is the capital left by the deceased, or to the capital brought in by the other partners or to other things. Therefore there are innumerable difficulties in the way of an account being taken. Discretion must be left in the Court in such matters to act on behalf of the minor (c).

III. (f) to S 88 of the Indian Trusts Act goes further than the operative portion of the section itself and does not enunciate good law. *Rajee Siddick Haje v. Mohamed Hushum Sait*, (1916) 2 M.W.N. 341.

ABDUR RAHIM, O.C.J. and SESHAGIRI AIYAR, J.

References:—(a) 34 A. 213 (P.C.), D.; 37 M. 514; 3 L.W. 379; 38 A. 92, F. (b) 5 E. and (A. 656, F.; 1 Haro 253 at p. 272, R. (c) 41 C. 914 (P.C.), F.

(5) Majority under Mahomedan Law—Effect of Act IX of 1875 (Majority). See GUARDIANS AND WARD'S ACT, No. 12, 20 M.L.J. 21.

(6) Major brother as guardian of minor brother's property—Alienation by major brother—Validity—Suit by minors to recover their shares—Limitation—Position of *de facto* guardian. See LIMITATION ACT (1908), No. 123, 83 P.R. 1916.

(7) See MORTGAGE—(GENERAL), No. 49, 35 Ind. Cas. 56.

Mahomedan Law—(Continued).**—8.—Guardianship—(Concluded).**

(8) Mortgage by *de facto* guardian for minor's benefit—Validity. See MORTGAGE (GENERAL), No. 1, 14 A.L.J. 18.

—7.—Hiba-bil-ewaz.

Transfer of property to wife in lieu of relinquishment of dower—Whether sale or hiba-bil-ewaz—Effect of hiba-bil-ewaz on right of pre-emption. See MAHOMEDAN LAW (DOWER), No. 1, 18 O.C. 367.

—8.—Inheritance.

(1) Succession—Custom—Ancestral and self-acquired properties—*Oudh Estates Act*, 1869 (1 of 1869), Ss. 3, 9 and 10—*Talukdar—Primogeniture—Presumption of custom as to non-talukdari property arising from inclusion of estate in list 2—Burden of proof of custom—Wajib-ul-arz, evidentiary value of statements in.*

Under the Mahomedan Law all classes of property follow one rule of devolution. That law makes no distinction between ancestral and self-acquired property, and recognises no principle of differentiation in the matter of lineal and collateral succession, as is the case under the Hindu Law of the Mitakshara school. Under the Mahomedan law if a custom governs the succession to the ancestral estate, the presumption is that it attaches also to the personal acquisitions of the last owner left by him on his death; and it is for the person who asserts that these properties follow a line of devolution different from that of the ancestral estate to establish it.

Where in Oudh a summary settlement of the Government revenue was made with one J.A.K., a Mahomedan, on January 22, 1859, a Talukdari sanad was granted to him on October 17, 1861, and his name was entered as a Talukdar in the first and second of the lists prepared under the Oudh Estates Act, 1869 (Act I of 1869), but it was contended that as J.A.K. had died before the Act came into force it applied neither to him nor to his Taluk.

Held, that the lists which the Chief Commissioner was directed to "cause to be prepared" under S. 8 of the Act were obviously in course of preparation long before the passing of the Act, and the limit of six months was clearly meant as a limit for their completion and not for their initiation; and that J.A.K. was a Talukdar within the meaning of the Act and he had acquired, as declared by S. 3 thereof, "a permanent, heritable and transferable right" in his estate.

Held, also, that the inclusion of J.A.K.'s name in list 2 also was, by virtue of S. 10, conclusive evidence of the fact that there was a pre-existing custom attaching to his estates on which their inclusion in that list was based; and that in the case of a Mahomedan Talukdar the existence of the pre-existing custom gave rise to a presumption that the custom applied to non-talukdari property, and the person who alleges that there is a different course of succession in

Mahomedan Law—(Continued).**—8.—Inheritance—(Concluded).**

respect of the non-talukdari property must prove his allegation (a).

A *wajib-ul-arz* is a village administration paper, prepared by a village official, in which are recorded the statements of persons possessing interest in the village relative to existing rights and customs; and as such they are of considerable value in the determination of such rights and custom; but statements which merely narrate traditions and purport to give the history of devolution in certain families not even of the narrators, stand in no better position than any other tradition. *Murtaza Hosain Khan v. Mohammad Yasin Ali Khan*, 20 M.L.T. 362=14 A.L.J. 1083=18 Bom. L.R. 884=4 L.W. 538=31 M.L.J. 804=(1916) 2 M.W.N. 555=38 A. 564=25 C.L.J. 1=21 C.W.N. 410=19 O.C. 290=36 Ind. Cas. 299 (P.C.).

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References:—11 I.A. 51; 11 I.A. 135, *Exp*; 40 I.A. 170=14 M.L.T. 110; 1 I.A. 228, *Dist*; 29 I.A. 82, R.

(2) Nature of interest of co-owners—Definite shares and separate interests—No joint interest—Possession by one co-owner for benefit of all.

The heirs of a deceased Muhammadan take definite shares and have separate interests. As they have no joint interest in the inheritance the possession of one co-owner cannot be presumed to be for the benefit of all the heirs. The joint ownership in the sense of the family system as known to Hindu Law is not recognised by the Muhammadans. *Ram Parson Upadhia v. Sheikh Kalab Husain*, 36 Ind. Cas. 100.

RAPIQUE, J.

(3) Bhutta Tarkhans of Multan city—Law applicable. See CUSTOMS (PUNJAB)—INHERITANCE AND SUCCESSION, No. 13, 85 P.W.R. 1916.

(4) Memons of Cutch—Settlement in East Africa—Law applicable—Presumption—Domile. See CUTCHI MEMONS, No. 1, 20 C.W.N. 362.

(5) Suit by Mahomedan heir for share—Limitation—Starting point. See LIMITATION ACT (1908), No. 198, 30 M.L.J. 104.

(6) See MAHOMEDAN LAW (DOWER), No. 4, 19 O.C. 246.

—9.—Legitimacy.

Sonship—Legitimacy, presumption of—Essentials—*Muta marriage*, features of. *Akbar Hussain Sahib v. Shoukhah Begam Saheba*, 2 L.W. 1191=18 M.L.T. 525=31 Ind. Cas. 657. See Final Part, 1915, Col. 997.

—10.—Marriage.

(1) Restitution of conjugal rights—Effect of apostasy.

There can be no valid marriage between a Mahomedan and a Burmese Buddhist.

Mahomedan Law—(Continued).

—10.—Marriage—(Continued).

An apostate Mahomedan wife by the apostasy cancels the marriage.

If a woman, who has become a Mahomedan and been married according to Mahomedan ceremonies, subsequently apostatizes, the marriage is cancelled by the apostasy.

A Mahomedan cannot get a decree for restitution of conjugal rights against his wife apostatized from Mahomedanism.

Quere.—If a Burmese woman, who is converted to Mahomedanism for the purpose of a marriage with a Mahomedan, can by estoppel be placed in a worse position than if she had been a real Mahomedan at the time of the marriage. **Ali Asghar v. Mi Kra Hla U**, 8 L.B.R. 461 = 36 Ind. Cas. 279.

ORMOND, J.

- (2) Nasab—Rule as to social inferiority of the husband whether mandatory—Social inferiority of husband—No ground for annulling marriage—*Sumis*—*Shias*—*Ante-nuptial conditions*—*Breach thereof*—*Effect*.

Held that, among Muhammadans, the inferiority in the social status (*nasab*) of the husband does not render the marriage invalid *ab initio* nor does it justify the Court in dissolving the nuptial tie.

As regards ante-nuptial stipulations, the law appears to be that when a marriage contract is entered into subject to an essential condition of a reasonable nature, not opposed to the policy of Muhammadan law, the Court may set aside the marriage on the breach of that condition, unless the condition has been waived or the breach thereof has been acquiesced in, by or on behalf of the wife.

A girl not *sui juris* given in marriage by her father, cannot, in the absence of fraud, avoid the marriage merely on the ground of the husband's social inferiority (*a*).

It is a moot point of sunni law whether a marriage otherwise lawfully contracted by an adult woman can be, or must be, set aside by a Civil Court at the instance of the so-called guardians (that is of the relatives, who would be guardians, if the woman had been a minor), if they can prove such social inequality on the part of the bridegroom, as would injuriously affect the family credit or interest. But the doctrine of Shia school is clear that social inferiority on the part of the husband affords no ground for the cancellation of the marriage. **Jamali Ali Shah v. Mir Muhammad**, 119 P. R. 1916.

JOHNSTONE, C.J. and SHADI LAL, J.
Reference:—(a) 1 Agra H.C. 130, *Dist.*

- (3) Marriage of girl of below the age of 15 after the death of her parents—Uncle or grandmother, if entitled to consent—Proof that she had attained puberty and consented to marriage, in the absence of guardian's consent, essential—Burden of proof—Legal evidence—Hearsay evidence, objection to admission of—Hearsay statements recorded

Mahomedan Law—(Continued).

—10.—Marriage—(Concluded).

by Commissioner, if should be allowed to be read in Court.

According to Mahomedan law, a girl becomes a major on the happening of either of two events, *first*, the completion of her fifteenth year, and *second*, on her attainment of a state of puberty at an earlier period. The burden of proving that a girl has in either of these ways reached her majority rests upon those who allege it and rely upon it. And this must be done by legal evidence.

The evil consequence of the admission of hearsay evidence is not merely that it prolongs litigation, and increase its cost, but that it may unconsciously be regarded by judicial minds as corroboration of some piece of evidence legally admissible and thereby obtain for the latter quite undue weight and significance.

The reading of undoubtedly hearsay evidence recorded by a Commissioner who is not empowered to rule out evidence on the ground of inadmissibility disapproved.

Held, on the evidence, that the respondent who had sued the appellant (who at the time of the marriage ceremony was an orphan girl under 15 years of age) for restitution of conjugal rights had failed to establish, *first*, that the appellant had attained puberty before the date of the marriage; and, *second*, that she was not then merely given away by her grandmother (she not being authorised by law to do so), but had herself consented to the marriage and the performance of the ceremony. **Mussammat Atkia Begum v. Muhammad Ibrahim Rashid Nawab**, 36 Ind. Cas. 20 = (1917) M.W.N. 261 (P.C.) = 21 C.W.N. 345.

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- (4) Apostasy, effect of—*Motive*, immaterial. **Ghaus v. Mussammat Fajil alias Mariam**, 123 P.W.R. 1915 = 29 Ind. Cas. 857 = 114 P.L.R. 1916. See Final Part. 1915, Col. 999.

- (5) See MAHOMEDAN LAW (DOWER), No. 4, 19 O.C. 246.

(6) Guardian for marriage is subject to the control of Court—Marriage of girl of 12 years to an infant aged ten months—Validity—Profligate—Presumption of continuance of profligacy under S. 114, Evidence Act. See MAHOMEDAN LAW (GUARDIANSHIP), No. 1, 9 S.L.R. 196.

(7) Pre-nuptial agreement that husband would live with wife at her father's house—Validity—Public policy. See MAHOMEDAN LAW (RESTITUTION OF CONJUGAL RIGHTS), No. 1, 9 S.L.R. 199.

—11.—Pre-emption.

- (1) Khandesh District—Pre-emption does not exist in the district either as a rule of law or as a rule of justice, equity and good conscience—Bombay Reg. (IV of 1827), cl. 26.

The Mahomedan rule of pre-emption is not operative in the District of Khandesh, as a rule

Mahomedan Law—(Continued).**—11.—Pre-emption—(Concluded).**

of law, nor can it be accepted in that District as a rule of justice, equity and good conscience. **Mahomed Beg Amla Beg v. Narayan Meghaji Patil**, 18 Bom. L.R. 81=32 Ind. Cas. 933=40 B. 358.

BACHELOR and SHAN, JJ.

(2) Talab-i-Ishtishad—How made.

The second demand for pre-emption (*talab-i-ishtishad*) cannot be made by letter, where the pre-emptor is able to make the same in person. **Muhamad Khalil v. Muhammad Ibrahim**, 14 A.L.J. 148=38 A. 201=33 Ind. Cas. 349

RICHARDS, C.J., and TUDBALI, J.

(3) Performance of talabs—Talab-i-ishtishad not unnecessary.

In a suit for pre-emption governed by the Mahomedan Law the performance of *talab-i-ishtishad* is not an unnecessary formality when the *talab-i-muwasiyat* has been performed.

Origin of texts discussed. **Mohammad Ahmad Said Khan v. Modho Prasad**, 11 A.L.J. 1111=39 A. 133=35 Ind. Cas. 911.

RICHARDS, C.J., and RAFIQ, J.

(3-a) Price, mention of—Appeal—Suit under Rs. 5,000 and decree above Rs. 5,000.

In the performance of the ceremony of *Talab Musabat*, what is necessary is an expression by the pre-emptor in clear and explicit terms that he demands to make the purchase and it is not necessary that he should, at the time of the performance of the ceremony, make any mention of the price.

There is no authority in Mahomedan Law that if the pre-emptor fails to state, while making the immediate demand for pre-emption that he is willing to pay the price named in the sale deed, or such a sum as a Court may award, he loses the right of pre-emption.

The claim of a co-sharer to pre-empt is not barred by the pendency of a proceeding for partition of a joint-estate.

An appeal to a District Judge from a suit for pre-emption valued honestly at Rs. 4,500 by the plaintiff but decreed at the value of Rs. 7,000 held not to be incompetent especially as no objection was taken either before the District Judge or in the memorandum of appeal to the High Court. (a) **Nuri Mian v. Ambica Singh**, 32 Ind. Cas. 893.

SHARFUDDIN and ROW, JJ.

References:—38 C. 639=12 Ind. Cas. 464, D.

(4) *Equity and justice—Clog on transfer—Delay*. **Mi Amla v. Karam Ali**, 8 Bur. L.T. 239=32 Ind. Cas. 438. See Final Part, 1915, Col. 1000.

(5) Pre-emption suit by Hindu—Applicability of Mahomedan Law of sale. See PRE-EMPTION, No. 10, 20 C.W.N. 1048.

—12.—Restitution of Conjugal Rights.

Pre-nuptial agreement that husband would live with wife at her father's house—Validity—Public policy.

Mahomedan Law—(Continued).**—12.—Restitution of Conjugal Rights—(Concluded).**

As between Mahomedans, a pre-nuptial agreement that the husband would live with the wife at her father's house is opposed to public policy and is not binding on the husband. **Chato v. Khudabux Wd. Jio**, 9 S.L.R. 199=34 Ind. Cas. 420.

PRATT, J.C. and BOYD, A.J.C.

References:—28 C. 751; 34 M. 398; 7 Bom. L.R. 605, R.; 17 C. 670, D.

—13.—Succession.

(1) See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 8, 9 Bur. L.T. 236.

—14.—Wakf.

(1) *Wakf—Servitor of Wakf property realizing rent of a site in consideration of his services—Mahomedan Law—Mutwalli, whether can create permanent encumbrance—Right of successor to challenge such encumbrance—Erection of buildings by servitor on wakf property—Suit for his ejectment—Defendant, whether entitled to compensation—Mutwalli to prove the building belongs to wakf property.*

1. A *mutwalli* has no right to create a permanent encumbrance on *wakf* property. His creating a permanent or hereditary post of a servitor of that property is in the nature of a permanent alienation of or encumbrances over such property.

2. Anything in the nature of a permanent alienation of, or encumbrance upon, *wakf* property created by a *mutwalli* is not binding upon his successors, if it is challenged within 12 years from the date of the successor's appointment (a).

3. Where a document executed by the *mutwalli* of a mosque stated that the office of *charkhban* had been filled by a certain person and the word "*alalduam*" occurred in the closing passage of the document:

Held (1) that, inasmuch as the words following the word "*alalduam*" related to the duties of the grantee and not to his privileges, this could not be taken as intended to create a permanent and for all time irrevocable alienation of rights in *wakf* property.

(2) That there was nothing to show that the post was to be held in the incumbent's family for ever, and that the *charkhban*, was liable to dismissal like any other servant of the mosque.

4. Where in a suit by the *mutwalli* for possession of certain shops belonging to the mosque by the ejectment of the servitors, it appeared that they had erected certain shops on a site belonging to the mosque and the *mutwalli* had allowed them to stand unchallenged for a long time:

Held, that, under the circumstances, the defendants were in equity entitled to claim the value of the buildings (b).

5. In such a case the onus of proving that the building in dispute wholly or partly belongs

Mahomedan Law—(Continued).**—14.—Wakf—(Continued).**

to the *wakf* property lies on the *mutwalli* **Fazi Ilahti v. Zafar Ali**, 36 P.W.R. 1916=32 Ind. Cas. 558.

CHEVIS and LESLIE JONES, JJ.

References:—(a) 30 P.R. 1908=35 P.W.R. 1908 (F.B.); 27 B. 515=5 Bom. L.R. 274, F. (b) 21 A. 496 (P.C.); 16 A. 328=A.W.N. (1894) 99; 27 M. 211=14 M.L.J. 25; 20 B. 1; 23 B. 1, D.

- (2) *Registration Act* (1909), S. 17—*Wakf—Subsequent trusteesnama appointing a co-mutawalli—Registration—Civ. Pro. Code* (1909), O. XXXIX, r. 1—*Deputy Commissioner taking action under Punjab Court of Wards Act*, Ss. 11, 12—*Injunction to restrain alienation and registration of a document—Validity of—Aligarh College a beneficiary—Sub-Registrar a trustee of that College—Authority to register—Registration Rules*, r. 174—*Mahomedan Law—Hajr—Injunction, whether a prohibitory order—Wakf, construction—Direction of payment of debts—Whether suspension of—Failure of objects—Bequest to poor—Mutawalli, whether wakf can be a.*

One R was the owner of certain property which was situate in the Punjab and the Province of Agra. He created a *wakf* of the property in the Province of Agra on 25th August, 1908 by a deed appointing himself the first *mutawalli* and remained in possession as such till his death in December of that year. The deed of *wakf* was registered by a Sub Registrar who was a trustee of the Aligarh College which was also one of the beneficiaries under the trust. Before the execution of the deed of *wakf*, on the 24th August 1908, the Deputy Commissioner of Karnal, on being approached by the defendants, who were the legal heirs of R, took action under S. 11 of the Punjab Court of Wards Act and for the protection of the estate took possession of it under S. 12, but the next day the possession had to be given up under the order of the Commissioner. On the 30th August the Deputy Commissioner issued an injunction restraining R from alienating his property pending inquiry under S. 11. But on 9th November executed a *trusteesnama* framing rules for the management of the trust property and mentioned six persons, the plaintiffs being among them, to succeed to him as trustees and appointed one Q as a *co-mutawalli*, to assist him. This deed was not registered. On the death of R the defendants took possession. On a suit being brought by the plaintiffs, held that, by the *trusteesnama*, the *wakif* only appointed Q to help him as a *co mutawalli* and did not purport to transfer property to any person or modify the terms of the *wakfnama* in any way, and therefore it was not compulsorily registrable under S. 17 of the Registration Act.

Held also that the action of the Deputy Commissioner of Karnal, in restraining R from alienating his property, was *ultra vires*, inasmuch as there was no proceeding pending

Mahomedan Law—(Continued).**—14.—Wakf—(Continued).**

before him in which there was any danger of the property in dispute being wasted or alienated, and S. 492 of the Code of Civil Procedure, 1882 (O XXXIX, r. 1 of the Act of 1908) did not apply.

Held further that rule 174 of the Rules made by the Inspector-General of Registration did not make the registration of the deed of *wakf* invalid simply because the Sub-Registrar was a trustee of the Aligarh College. Moreover the defect, if any, was one of procedure and could not vitiate the proceedings.

Held also that the rule of *hajr* under the Mahomedan law did not apply to this case, because there was no order of prohibition except the order of the Deputy Commissioner which was *ultra vires*.

The deed of *wakf* directed that the mortgages on the dedicated property should be paid first and then the income was to be applied to certain charities among them being an Islamia School. On failure of any of these the *wakf* was to be applied to the poor and indigent. It was proved that the Islamia School mentioned in the *wakfnama* had never existed at any time.

Held that *wakf* subject to a mortgage was valid and the condition as to payment of mortgage did not amount to a suspension of the *wakf* for an indefinite time.

Held also that the *wakf* did not fail by reason of the non-establishment of the Islamia School, but it continued for the benefit of the poor, the doctrine of *Cypres* being applicable.

Held also that a *wakif* can appoint himself a *mutwalli* of the *wakf* property. **Rustam Ali Khan v. Muntaq Husain**, 14 A.L.J. 554=35 Ind. Cas. 718.

BANERJI and TUDBALL, JJ.

Reference:—(1845) Fulton, 345, F.

- (2) *Masjid inam—Mutawalli—Lease of wakf property for more than three years—Voidable only—Inam Settlement Register—Evidentiary value.*

A *Mutawalli* has the power of leasing agricultural land for three years and with the sanction of the Kazi for a longer term.

A lease, granted in the usual course of management and in the customary manner, may be for a longer term than the prescribed period.

A lease for over three years, granted by a *mutawalli* is not void but only voidable.

Lease and sale distinguished.

Though there have been sub-divisions of an *inam*, that cannot convert it to a personal *inam* if it was originally *Devadayam*.

The *Inam Settlement Register* is not of much value in determining the particular class to

Mahomedan Law—(Continued).**—15.—Wakf—(Continued).**

which an *inam* belongs. **Balu Mudali v. Durvasulu Pillai**, 4 L.W. 74=(1916) 2 M.W.N. 276=34 Ind. Cas. 570.

SRINIVASA AIYANGAR, J.

(4) **Wakf—Mutwalli—Uncertain and fluctuating body of persons appointed executors—Sust by a person appointed by such body.**

A Muhammadan made a *wakf* and appointed his wife as the *mutwalli*. No power was given to the wife to appoint a successor to herself. He provided that, after the death of himself and his wife, the pious residents of the town (*rausai qasba saiful Khur*) and *ulmai deen Muhammad Amil b'il hadiss* should look after the *wakf*. The wife died in 1911. The plaintiff alleging that he had been elected as a *mutwalli* by the *raises* at a meeting convened for the purpose, brought the suit for declaration of right and injunction; *Held*, that the suit was not maintainable because the plaintiff had not been validly appointed, the persons alleged to have appointed the plaintiff being an undefined, uncertain and fluctuating body of men as to whom it was impossible to say whether they did or did not answer the qualifications required of them by the *wakf*. **Muhammed Shafi v. Dost Mohammad**, 14 A.L.J. 895=36 Ind. Cas. 204.

WALSH and SUNDAR LAI, JJ.

(5) **Public religious or charitable trusts—Mosque—Appointment and succession of trustees or mutawallies—How far the rule laid down by the founder is to be followed—Discretion of Kazi or Court—Code of Civil Procedure (1882), S. 539—Appointment of trustees and settling scheme of management for a religious institution—Discretionary powers of Civil Court.**

The Mussulman Law, like the English Law, draws a wide distinction between public and private trusts. Generally speaking, in a case of a *waqf* or trust created for specific individuals or a determinate body of individuals, the *Kazi*, whose place in the British Indian system is taken by the Civil Court, has, in carrying the trust into execution, to give effect, so far as possible, to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well known example, the *Kazi's* discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefaction; but as regards management which must be governed by circumstances he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interests of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of the management which he may find either not practicable or not in the best interests of the institution.

In giving effect to the provisions of S. 539 of the Code of Civil Procedure (1882), and in

Mahomedan Law—(Continued).**—15.—Wakf—(Continued).**

appointing new trustees and settling a scheme, the Court is entitled to take into consideration not merely the wishes of the founder, so far as can be ascertained, but also the past history of the institution, and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustees in the future. **Mahomed Ismail Ariff v. Hajee Ahmed Moolla Dawood**, 14 A.L.J. 741=20 C.W.N. 1118=(1916) M.W.N. 460=20 M.L.T. 110=4 L.W. 269=18 Bom. L.R. 611=31 M.L.J. 290=24 C.L.J. 198=9 Bur. L.T. 141=43 C. 1085=36 Ind. Cas. 30 (P.C.).

VISCOUNT HALDANE, SIR JOHN EDGE,
MR. AMEER ALI and SIR LAWRENCE
JENKINS.

(6) **Registered deed of wakf—Real or nominal transaction—Subsequent conduct of settlor—Voluntary settlement—Void as against creditors—Dedication reserving life-estate to settlor in the income of property, if valid.**

In cases where the question is whether there has been a real dedication, the production of a registered instrument in writing making a transfer of the property would no doubt be strong *prima facie* evidence of such dedication. But it is also competent to parties interested in the matter to prove that the instrument was merely nominal and that in fact there was no real dedication. The user of the property subsequent to the alleged dedication has always been held to furnish excellent evidence of the reality or otherwise of the transaction (a).

A dedication of his property by a Mahomedan which does not create an immediate *wakf* of the properties, but gives a life-estate in the income to the grantor himself as a beneficiary under the trust may be valid under Mahomedan Law (b).

Where a Mahomedan trader in involved circumstances executed and got registered a deed of *wakf* comprising all his immoveable properties, reserving to himself the use of the entire income of the properties till his death, and appointing his son as manager after his death, on a specified salary, and where it was found that both before and after the alleged dedication, the creditors of the settlor were pressing for payment, and that the residue of the settlor's estate was not sufficient for the payment of his debts, and that sometime after the execution of the *wakf*-deed, the settlor himself mortgaged some of the properties comprised therein and gifted away others to his children, and that the sons of the settlor also dealt with and treated the properties as their own, it was held that under such circumstances, the so-called *wakf* was a voluntary settlement and therefore void as against the creditors of the settlor. **Mulla Yeettil Ussain v. Subramania Iyer**, 31 M.L.J. 431=35 Ind. Cas. 877.

AYLING and SRINIVASA AIYANGAR, JJ.

Mahomedan Law—(Continued).**—14.—Wakf—(Continued).**

References:—(a) 15 A. 321; 12 M. 387 at p. 392; 18 C. 10 at p. 18; 27 C. 242 at p. 251, F.; 10 C.W.N. 449, D. (b) 13 W.R. 235 at p. 237; 17 C. 498, F.

(7) Will—Shia and Sunni Sects.

By the law of the Shia sect of Mahomedans as well as by that of the Sunni sect a valid *wakf* can be created by the will. *Izzat-un-nissa Begam v. Musatt. Kaulz Fatima Begam*, 19 O.C. 69=36 Ind. Cas. 643

STUART and PANDIT KANHAIYA LAL, J.Cs.

(8) Proof of dedication—Allegation of custom governing succession opposed to general rules—Burden of proof.

Where no record of actual dedication of property as *wakf* has been traced dedication may be inferred from the actual user of the property for such purpose.

Where a custom as to succession to *wakf* property is set up in opposition to the general rules of Mahomedan Law the burden of establishing such a custom lies heavily on the person who sets it up and there must be such evidence as would amount to a clear proof of the existence of such custom. It must be shown to have been certain, invariable and continuous by clear and unambiguous evidence.

Where such custom is proved it must be construed strictly. *Haji Mukhl Gazi v. Mastanshah*, 36 Ind. Cas. 951.

HAYWARD, A.J.C.

References:—13 B. 555=7 Ind. Dec. (N.S.) 368; 1 C. 186=19 W.R. 8=3 Sar. P.C.J. 174=8 M.J. 151=2 Suth. P.C.J. 744=1 Ind. Dec. (N.S.) 119; 14 M.L.A. 570=17 W.R. 552=12 B.L.R. 396=2 Suth. P.C.J. 603=3 Sar. P.C.J. 108=20 E.R. 898; 3 I.A. 259=26 W.R. 55, R.

(9) Trustee absconding—Incapacity of trustee—Nature of incapacity—Legal effect

The incapacity of a trustee means the mental or physical incapacity and does not apply to the case of a *mutwalli* absconding for fear of arrest.

Where property was dedicated by a document called *wakfnama* and the document provided that the executant, who was a *mutwalli*, becoming incapacitated the person in whose favour it was executed should act as the *mutwalli* in his place, the absconding of the executant by reason of the fear that the police were after him did not incapacitate the executant to give room for his nominee. *Sriwati Bibi v. Abdul Jabbar Daftary*, 36 Ind. Cas. 919

FLETCHER and NEWBOULD, JJ

(10) Lease of wakf house property for more than a year—Sanction of kazi—Earnest money paid to mutwalli for a lease—Right to recover—Contract—Partial guarantee for performance—Default—Effect—Act IV of 1882, S. 8.

Sanction of the kazi is necessary to validate a lease of *wakf* house property for more than a year.

Mahomedan Law—(Continued).**—14.—Wakf—(Continued).**

When such a lease has been made improperly and many years afterwards it is impugned before the Court, the Court would not disturb the arrangement which was made in the ordinary course of management of an estate for the benefit of the beneficiaries (a).

But that does not in any way debar a person from seeking at the outset of the negotiation to obtain the best title which the transferor is capable of giving him and to insist upon the transferor doing all that is necessary and that he is capable of doing to give him a good title, although he entered into the bargain with full knowledge that the transferor was a *mutwalli* and that the property was *wakf* house property.

A *mutwalli* who receives earnest money for giving a lease of *wakf* property is not entitled to retain it unless he is willing to get the sanction of the kazi to validate the lease which he is bound to do under S. 8 of the Transfer of Property Act.

Where a certain amount was advanced by the lessee to the lessor not only as a mere part of the consideration for the granting of a lease but as a partial guarantee for the performance of the contract on the part of the lessee, the lessee could not seek to recover this sum unless there was some default on the part of the lessor in refusing to carry out the contract to the extent to which he is capable of carrying it out. *Golam Muhammad v. Akhoy Kumar Laha*, 32 Ind. Cas. 205.

HOLMWOOD and MULLICK, JJ.

References:—(a) 3 Ind. Cas. 353=11 C.L.J. 317=14 C.W.N. 535=37 C. 179, R.

(11) Dedication—What it involves—Proof thereof—Limited dedication—Possibility—Express or implied dedication—Presumption—Grave-yard—Land dedicated as grave-yard—Reservation of produce thereon—Legality.

Dedication involves original proprietorship. The proprietor of land may dedicate in one of two ways. He may do it by express grant. In such a case, the law requires a donee. If the property is transferred it must vest in some living agent, that is to say, either in a trustee or a body of trustees who represent the beneficial interest, hold the property for the user specified and execute the trust. The Civil Courts will in case of need administer or control the administration of the trust provided the trust is valid by the general law. But a man cannot, divest himself wholly of all interest and title in immoveable property without vesting it in some legal person. He may, however, and this is the second method, dedicate his land without any formal transfer or specific act of dedication. In such cases, the fact of dedication is proved by long user, while the date and often even the person of the actual dedicator are presumed. Inasmuch as the subsequent user constitutes the proof of the prior act of dedication to which such user is referable, it is only from the user that the extent of dedication can be presumed. Limited user is evidence of a limited dedication.

Mahomedan Law—(Continued).**—14.—Wakf—(Continued).**

There can be an implied dedication of a grave-yard with a reservation of the produce of the land in favour of the dedicator.

There is no difference between an express dedication limited to special uses for secular purposes and one limited for religious purposes. What may be limited by express grant may be equally limited under an implied grant.

Under Mahomedan Law, there may be limited dedications.

A grave yard once dedicated and adopted cannot be used for any secular purpose or any purposes inconsistent with the purpose for which it is dedicated.

There is nothing in the Mahomedan Law to prevent the reservation of natural products, the appropriation of which to other uses is not inconsistent with the use of the soil as a grave-yard(a).

The Civil Courts in administering the Mahomedan Law are not bound to hold as a matter of law that a man has dedicated something more than the evidence shows that he intended to dedicate. **Fakhruruddin v. Mohammad Rafiq**, 33 Ind. Cas. 91.

WALSH, J.

References:—(a) 9 C. 75=11 C.L.R. 502=7 Ind. Jur. 252; 3 A.L.J. 546=A.W.N. (1906) 159; 20 C. 334=20 I.A. 99, R.

(12) *Validity of Waqfnama wherein the word "mutwalli" not used*

Where the terms of a Waqfnama clearly appointed the dedicator as *mutwalli* and where from the terms of the said deed it was found that the intention of the dedicator was that the office of the *mutwalli* should be held by his successor, *held* that although the dedicator did not use the word "*mutwalli*" the said Waqfnama should be considered as valid. **Muhammad Hamid Ullah Khan v. Sita Ram**, 35 Ind. Cas. 732.

STUART, A.J.C.

(13) *Dedication to the services of Imams Hossein and Hassan and due observances of Muharram, is valid for the creation of wakf—Employment of trustees for carrying into effect the purposes of dedication, if invalidates wakf—Gift through the instrumentality of trustees if bad—Wakf, created by way of English form of conveyance Ram Charan Law v. Shaheb-zadee Fatima Begum*, 19 C.W.N. 1061=44 O. 933=30 Ind. Cas. 686. See Final Part, 1915, Col. 1002.

(14) *Wakf—Descendant of founder if becomes mutwalli by right of inheritance on death of mutwalli without appointing successor—Preferential right of descendant to mutwalliship—Appointment of mutwalli if must be made by Quadi—Judicial Officer in British India corresponding to Quadi—Jurisdiction of Subordinate Judge to exercise functions of a Quadi—Jurisdiction of District Judge—S. 92, Crim. Pro. Code (1908)—S. 539, Civ. Pro. Code (1882). Atiman-nessa Bibi v. Abdul Soban*, 20 C.W.N. 113=

Mahomedan Law—(Concluded).**—15.—Wakf—(Concluded).**

22 C.L.J. 577=43 O. 467=32 Ind. Cas. 21. See Final Part, 1915, Col. 1005.

(15) See MAHOMEDAN LAW (GIFT), No. 2, 32 Ind. Cas. 516.

—15.—Will.

(1) *Mahomedan Law—Devise by a Sunni Mahomedan, construction of—Disposition in order to be valid must be complete—Conditions imposed on a complete disposition treated as null and void.*

Where a testator devised certain landed property to his widow subject to the conditions that she was to have no power to transfer the property, that she was to hold it for life and that on her death the property instead of devolving on her heirs was to devolve on a certain Z, *held*, that the terms of the will could not be interpreted as meaning that the property was devised to Z with a usufruct for life to the widow.

Held further, that according to the law governing dispositions amongst Sunni Mahomedans the effect of a disposition such as the above is to confer complete proprietary title. Under the principles of the law such a disposition must be complete. If it is not complete it is not a disposition and it is well established law that where the testator endeavours to affix conditions on to the disposition it is treated as unconditional and the conditions are treated as null and void. **Baghtawar Khan v. Farooq Ahmad**, 19 O.C. 319.

STUART, J.C.

(2) *Mahomedan Law—Provisions thereof—How far affected by Probate and Administration Act, 1881. See ACT V OF 1881 (PROBATE AND ADMINISTRATION), No. 17, 34 Ind. Cas. 128.*

(3) *Mahomedan family governed by Marumakkatayam Law. See SUCCESSION CERTIFICATE ACT (VII OF 1889), No. 1, 31 Ind. Cas. 446.*

Mahomedans.

Mahomedans following Marumakkatayam Law—Custom of affiliation of strangers to tarwad.

The usage of affiliation to the tarwad prevailing among Hindus who followed the Marumakkatayam Law on the west coast has been accepted by the Mahomedan who follow the same law. **Mamu v. Muhammad Kutti**, 31 Ind. Cas. 385.

WALLIS, C.J. and SESHAGIRI AIYAR, J.

References:—35 B. 264, L'; 29 M.L.J. 481; 16 M. 201, R.

Maintenance.

(1) *Grant by way of maintenance—Presumption as to duration.*

Where it is shown that lands have been given by way of maintenance, the presumptions is that the grant has been made for the lifetime of the grantee. **Buniyad Husain v. Hazir-un-Nisa**, 35 Ind. Cas. 764.

LINDSAY, J.C.

Maintenance—(Concluded).

(2) 'Maintenance,' meaning of—Amount payable under order of District Court for education and maintenance of minor. See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 32-a, 32 Ind. Cas. 547.

(3) Decree for, of wife, not a debt provable in insolvency. See ACT VII OF 1907 (PROVINCIAL INSOLVENCY), Nos. 12, 10 S.L.R. 28.

(4) Suit for maintenance in Poona Court—Defendant residing in a Native State—Prayer that maintenance be made a charge on property within jurisdiction of Poona Court—Jurisdiction. See CIV. PRO. CODE (1909), No. 52, 18 Bom. L.R. 67.

(5) Right to future maintenance—Whether alienable or attachable—Receiver whether can be appointed in execution for realising such maintenance—S. 6 (d) and (h), Transfer of Property Act—Meaning of 'debt.' See CIV. PRO. CODE (1909), No. 137, 30 M.L.J. 361.

(6) Right of Hindu widow to claim—Facts to be taken into account in fixing the rate. See HINDU LAW (ADOPTION), No. 12, 123 P.R. 1916.

(7) Gift by husband to one who has been maintaining him during illness—Lien—Charge. See HINDU LAW (WIDOW), No. 31, 33 Ind. Cas. 566.

(8) Suit for—Pls of Hindu Widow having other means of support. See HINDU LAW (WIDOW), No. 24, 30 Ind. Cas. 897.

Malabar Law.

- 1.—GENERAL
- 2.—ALIENATION.
- 3.—GIFT.
- 4.—HUSBAND AND WIFE.
- 5.—JOINT FAMILY.
- 5 a.—LAND TENURES.
- 6.—MORTGAGE.
- 7.—PARTITION.
- 8.—TARWAD.

—1.—General.

- (1) *Landlord and Tenant—Malabar law—Kudima Jenmi referring to the land as his Jenman instead of as his Kudima Jenmam—Not a disclaimer of the title of Jenmi—What constitutes a disclaimer.*

The mere fact that Kudima jenmis, in a suit by them against their under-tenants for recovery of rent, refer to the land as their jenman instead of as their Kudima jenmam, is not sufficient evidence of a disclaimer of the paramount title of the jenmi to give a decree in eviction against them in favour of the jenmi. To constitute a disclaimer there must be a direct repudiation of the relation of landlord and tenant, or a distinct claim to hold possession of the estate upon a ground wholly inconsistent with the existence of the relation, which by necessary implication is a repudiation of it. *Keloth Chozhan Pydal Kurup v. Kiriathwa Tellath Narayanan*, (1916) M.W.N. 11=31 Ind. Cas. 220.

AYLING and TYABJI, JJ.

Malabar Law—(Continued).**—1.—General—(Concluded).**

- (2) *Malabar Law—Kanom subsisting—Melkanom, grant of—Whether void or voidable—Kanom term, expiry of—Tenant, whether can plead that he should hold on.*

A melkanom granted during the subsistence of a previous kanom is not altogether void, but is only voidable at the instance of the members of the tarwad who were not parties thereto.

A tenant whose kanom has expired is not entitled to plead that he should hold on even after such expiry. *Chettloton v. Moldin Kuttl*, 3 L.W. 467=(1916) 2 M.W.N. 350=34 Ind. Cas. 755.

SESHAGIRI AIYAR and BAKEWELL, JJ.

- (3) *Malabar law—Gift to wife and children or children alone—Incidents of tarwad property—Right of management—Maintenance of other members—Right to partition—Attachment of share in execution Chakhara Kannan v. Kunhi Pokker*, 18 M.L.T. 255=(1915) M.W.N. 740=29 M.L.J. 481(F.B.)=39 M. 317=30 Ind. Cas. 755. See Final Part, 1915, Col. 1012.

(4) *Malabar Law—Perpetual Kanom—Validity—Forfeiture—Mortgage before Transfer of Property Act—Clog on equity of redemption—Indian Law, whether same as that of the English Chancery Courts—Evidence Act, S. 32, cl. 2—Statement made by the writer of a letter to plaintiff's karyasthan that he wrote it at the request of 1st defendant—Writer dead—Statement not made in course of business—Admissibility in evidence—Landlord and tenant—Tenant having very substantial rights in land—Assertion of title as owner, if works forfeiture. Kolangorath Raman Nayar v. Kannothe alias Kandoth Yellarikya Kunhi Kolandan Musaliar*, 2 L.W. 941=(1915) M.W.N. 793=31 Ind. Cas. 184. See Final Part, 1915, Col. 1013.

(5) *Suit against Government by junior members of Tarwad—Agreement of service by third person—Contract by junior members to pay remuneration to the third person in the event of success in suit against Government—Suit compromised—Right of suit by the third person to claim compensation—Powers of Karnavan—Right of junior members to protect Tarwad property and reimburse expenses—Rights of persons lending monies to juniors for the purpose. Sultao Adi Raja Ahmad Ali Raja of Arakal v. Churla Kunhi Kannan*, 29 M.L.J. 632=31 Ind. Cas. 482. See Final Part, 1915, Col. 1015.

- (6) *Malabar Law—Karnavan—His powers—Family necessity or advantage.*

A Karnavan of a Malabar tarwad has not an uncontrolled discretion in the renewal of kanoms or grant of melcharths prior to the expiration of the term of the former but must justify his grants by family necessity or advantage. *Venkitammal v. Alangath Raman Nair*, 31 Ind. Cas. 931.

SADASIVA AIYAR and MOORE, JJ.

References:—27 M.L.J. 690=12 M.L.T. 600=16 Ind. Cas. 391, F.

Malabar Law—(Continued).**—2.—Alienation.**

- (1) *Malabar Law—Private Devaswom—Powers of Karnavan, Trustee—Alienations of temple properties, how far binding—Suit by junior members to set aside alienations—Suit, if maintainable—Subsequent agreement modifying mortgage, if a mortgage—S. 59, Transfer of Property Act.*

The junior members of a *tarwad* to which a private temple belonged, could bring a suit to protect the *Devaswom* against an alienation made by the *Karnavan* trustee (a).

Although the *Karnavan* is not a trustee, he is in a position of special responsibility to the other members of the *tarwad* (b).

In the case of alienation of trust property, viz., the properties belonging to the private *Devaswom* of a *tarwad* by a *Karnavan* without the consent of the other members of the *tarwad*, as much must be proved to uphold the transaction as is necessary to uphold any other alienation by the *Karnavan*. Both can be upheld only if they were effected in good faith and for necessity. The Court must inquire into the *bona fides* of the *Karnavan* and of the purchaser.

Sadasiva Iyer, J.—Courts in India must scrutinise alienations by compromise and awards out of Court made in reference to properties relating to religious and charitable trusts with very great care, before they are accepted as valid as against the trust.

A subsequent agreement, modifying the terms of the previous mortgage, is not a mortgage and need not comply with the provision of S. 59 of the Transfer of Property Act. *Ravi Varma Raja v. Ramasubramania Pattar*, (1916) 2 M.W.N. 312=31 M.L.J. 733=4 L.W. 576.

OLDFIELD and SADASIVA AİYAR, JJ.

References:—(a) 21 M.L.J. 568, F (b) 1 M. 153; 3 M. 328, R.

- (2) *Malabar Law—Marumakkattayam—Will—Devise to the senior male member of a tavazhi—Presumption—Manager owning equity of redemption remaining in possession as Kanomdar—Plea of discharge—Burden of proof—Duty to account.*

A devise to the senior male member of a *tavazhi*, that is to the natural representative of a family governed by the *Marumakkattayam* Law, is to be presumed to be a *putrayakalam* gift to the *tavazhi*, and not merely to the donee individually. But this presumption which is based on the principle of construing the terms of a Will in the light of the surrounding circumstances must not be used for the purpose of controlling and modifying the express words of a Will, but can only be used for the purpose of construing it. Though the fact of the donee being the manager of the *tavazhi* may lead to a presumption that the gift was intended for the benefit of the *tavazhi* of which he was the manager, no such presumption can be made in a case where the gift was only to a sub-*tavazhi*, and where absolute powers of alienation are expressly given to the donee (a).

Malabar Law—(Continued).**—2.—Alienation—(Concluded).**

Where the manager of a family is in possession of the suit properties and is himself the owner of the equity of redemption, when he pleads that he has discharged his liability to the family by payment to two of its members, there is a heavy burden on him to prove satisfactorily that he did, as a matter of fact, make the payment. The only person who ordinarily could give a discharge is the *de jure* manager of the family. He could discharge himself of his liability by investing the money in some security on behalf of the family or by payment to all the members of the family. He is not entitled to pay to two of the members of the family, constituting them managers for the mere purpose of receiving the money and giving him a discharge. In any event he is bound to account for the application of the money. *Paru Amma v. Itticheeri Amma*, 32 Ind. Cas. 459.

COUTTS-TROTTER and SRINIVASA AİYANGAR, JJ.

References:—(a) 16 M. 201=2 M.L.J. 226; 30 Ind. Cas. 755=29 M.L.J. 481=(1915) M.W.N. 740=18 M.L.T. 255 (F.B.); 18 Ind. Cas. 1=38 M. 79; 12 Ind. Cas. 492=35 M. 649=10 M.L.T. 399=22 M.L.J. 23=(1911) 2 M.W.N. 487; 22 Travancore Law Report 239; 6 M.I.A. 526; 2 I.A. 7=22 W.R. 409=14 B.L.R. 226; 31 Ind. Cas. 543=25 M.L.J. 637, D.

—3.—Gift.

Malabar Law—Gift by person following Marumakkattayam Law—Character of estate taken by donee—Deed of gift affording no clear indication of the estate conferred—Presumption—Relationship between donor and donee—Construction of deed of gift.

Per Kumaraswami Sastri, J.—Where a person following the *Marumakkattayam* Law gives properties to his wife and children or to his children alone following the same law, the presumption is that he intended the donees to take the properties with all the incidents of *tarwad* property. The mere fact that the donor states that he had a right to sell the property and that the donee should have all his rights, or the use of the words "with all my rights" or "as I was enjoying" will not take the case out of the general rule laid down in the Full Bench case in 22 M.L.J. 481. Express words indicating that the donees were to take the property as tenants-in-common and not under *Marumakkattayam* Law are necessary (a).

A Hindu ordinarily intends to confer on the donee such an estate as the donee would take under the personal law governing him. The degree of propinquity is, therefore, immaterial and affords no test. The case may be different where a donor not following *Marumakkattayam* Law gives properties to those who do (b).

Where the terms are clear and unambiguous and expressly confer an absolute heritable and alienable estate, there is nothing in the *Marumakkattayam* Law or usage to prevent the donee from taking an absolute estate like any

Malabar Law—(Continued).**—3.—Gift—(Concluded).**

other donee in the Madras Presidency and there is no reason to treat the clauses as repugnant and unenforceable simply because the gift is to the donee and his or her children or heirs.

In construing a deed of gift what Courts have to see is the intention of the donor as evidenced either by the deed or by the surrounding circumstances at the time of the gift. No amount of dealing by the donee could convert a limited into an absolute grant.

Where the gift was by an uncle following the Marumakkattayam Law to his nieces, children of the same mother, and there was nothing in the deed of gift to indicate that an absolute alienable estate was intended to be conferred on the donees.

Held that the property was intended to be given as *putrayakassam* property.

Per Coutts-Trotter, J. (dissenting).—As the donor assigned to his nieces “in full all the rights he possessed in respect of the lands” and the deed recited that he possessed “the right of holding with liberty to sell,” the donees took an absolute estate without the incidents of *tarwad* property.

The presumption in favour of a gift being subject to the incidents of *tarwad* holding is necessarily weaker when the objects of the gift are not the wife and children of the donor. **Kuyyattil Kundan Kutty v. Yayalpath Parkum**, 32 Ind. Cas. 107.

COUTTS-TROTTER and KUMARASAMI SASTRI, JJ.

References:—(a) 30 Ind. Cas. 755 = 18 M.L.T. 255 = (1915) M.W.N. 740 = 29 M.L.J. 481; 16 M. 201 = 2 M.L.J. 236, F.; 12 Ind. Cas. 492 = 35 M. 649 = 10 M.L.T. 399 = (1911) 2 M.W.N. 487 = 22 M.L.J. 23; 18 Ind. Cas. 1 = 38 M. 79, R. (b) 6 M.L.A. 526 = 4 W.R. 114 (P.C.); 2 I. A. 7 = 22 W.R. 409 = 14 B.L.R. 226, R.

—4.—Husband and Wife.

Malabar law — Husband and wife — Permanent lease to wife alone — Deed containing no words of conveyance to children — Makkalapaanpna.

Where a donee is a female *Makkalin* is the proper word to denote the course of devolution.

A husband gave a permanent lease of his properties to his wife. She in her turn executed a deed of gift in respect of the major portion of these properties in favour of her two daughters. One of the daughters sold some of the properties which fell to her share to a third party. In a suit by the daughter's children for a declaration that the alienation is not binding on them, *held* that the donor intended to give an absolute estate to his wife and that the gift by the wife to her daughters conferred an absolute right on them and the daughters' children had no right to contest the alienation. **Duja Bhandary v. Venku Dhandarl**, 31 Ind. Cas. 354.

AYLING and SESHAGIRI AIYAR, JJ.

References:—25 M.L.J. 637, F.; 16 M. 201; M.L.J. 81, Not F.

Malabar Law—(Continued).**—5.—Joint Family.**

(1) *Malabar Law—Power of tarwad to limit power of Karnavan — Family Karar — Abstention of one member, effect of—Revocation of Karar by a Karnavan who was a consenting party.*

Ordinarily a *Karnavan* has the right to grant a *melcharth* but it is in the power of the *tarwad* to limit the ordinary powers of a *Karnavan* and this limitation may be effected by a family *Karar* which the *Karnavan* is not entitled of his own authority to set aside (a).

The usual object of a family *Karar*, whereby a *Karnavan's* ordinary powers are restricted, is to settle family disputes or to provide against mismanagement by an incompetent or unscrupulous *Karnavan*, and is often a means of averting a suit to remove the *Karnavan* from his office. When, therefore, a *Karnavan* is a consenting party to such a *Karar*, he is bound by its terms, unless the other contracting parties are willing to release him from his obligations, or he can show that the *Karar* is no longer beneficial to the interests of the *tarwad*.

But the abstention for personal reasons of one member of the family cannot affect the binding character of the *Karar* on those who were parties to it (b).

Such a family *Karar* cannot be held to be a mere delegation of authority or a power of attorney which is capable of being revoked at any time by the *Karnavan*. Consequently so long as the *Karar* is in force, the *Karnavan* has no power to grant a *melcharth* of *tarwad* property without the consent of the other signatories to the *Karar*. **Pangl Achan v. Bheeman Achan**, 32 Ind. Cas. 501.

KUMARASAMI SASTRI and PHILLIPS, JJ.
References:—(a) 8 M. 381; 11 M. 124, F. (b) 9 M. 206, R.

(2) *Mubammadans following Marumakkattayam Law—Custom of affiliation of strangers to tarwad. See MAHOMEDANS, No. 1, 31 Ind. Cas. 385.*

—5-a.—Land Tenures.

Malabar Law—Anubhavam grant conferring permanent tenure.

The word “*anubhavam*” has been held to confer a permanent tenure when used with reference to a grant of land (a).

A deed of grant to the children of a certain man containing the words “as before you shall in future also hold” the properties on *anubhavam* right on a certain rent construed as a whole held to show that the parties intended the tenure to be permanent. The subsequent reference to a portion of rent as “*anubhavam*” held to mean a fixed allowance to be taken by the grantee in perpetuity out of the rent, notwithstanding that the gross rent may be varied from time to time upon a customary renewal of the tenure (b). **Krishna Iyer v. Murringa Malayil**, 32 Ind. Cas. 982.

BAKEWELL and NAPIER, JJ.
References:—(a) 27 M. 202, F. (b) 29 M. 501, D.

Malabar Law—(Continued).**—6.—Mortgage.**

Malabar Law — Contract Act, S. 69 — Melkanomdar — Agreement to pay the principal amount of prior kanom and redeem—Jenmi to pay for all repairs effected —Redemption suit by Melkanomdar and jenmi—Payment by Melkanomdar of the decree amount of principal and improvements —Separate suit for recovery from jenmi of amount for repairs and improvements, if maintainable—Transfer of Property Act, S. 74.

Suit for the recovery of the amount of repairs paid and of costs incurred on the ground that the defendant, the *jenmi*, had represented to the plaintiff, the Melkanomdar, that no repairs had been effected by the Melkanomdar, and that defendant was liable to pay, as he had undertaken to do so in the kanom deed itself.

Held, that the suit was premature. Although under S. 74 of the Transfer of Property Act, the Melkanomdar succeeded to all the rights of the Kanomdar, it was held on a construction of the Kanom deed that the *Jenmi* did not undertake to pay these sums, until he paid the mortgage money.

Under S. 63 of the Contract Act, although the *Jenmi* is bound by law to make the payments, the *Jenmi* is not bound by law to pay for improvements, till he himself redeems the property. *Arakkalakath Koyatti v. Paulgalatt Kunhammad*, (1916) 2 M.W.N. 358.

SPENCER and KRISHNAN, J.J.

—7.—Partition.

Malabar Law — Tarwad — Partition, right to—Karar—Family arrangement—Junior members, when bound by acts of Karnavan —Minor member, right of, to impeach Karar—Customary Law, how ascertained.

Per *Sankaran Nair, J.*—According to the constitution of a Malabar Tarwad, it is open to the members to enter into an arrangement for the management of the Tarwad affairs. It is open to them also to divide the Tarwad properties among themselves. Such a partition would ordinarily be binding on the minors, but if on attaining majority they are able to show that they have been prejudiced, that partition could be re-opened so far as they are concerned and they would be awarded the share which should have been set apart for them; but subject to this, the partition is final as between those who were parties to it.

Per *Sankaran Nair, J.*—According to Malabar Law "division cannot be enforced by a coparcener" and "the head of the family has entire control over the concerns and property of the family which he has to administer for the good of the whole (S. 397 Strange's Manual of Hindu Law). 'The unity of the family may not be broken up by any member claiming a share and forcing on a division.' The head of the family, holds the property to administer it for the good of the whole and it cannot be for the good of the family to allow strangers on behalf of minors to re-open family arrangements, if it

Malabar Law—(Continued).**—7.—Partition—(Concluded).**

can be prevented by securing to those minors their share without detriment to them or their Tarwad

Per *Seshagiri Iyer, J.*—The principle of the father of a joint Hindu family allotting the share of some of the members and keeping the rest of the properties of the family in tact is no doubt prevalent in the East Coast; and that is due to the development of the theory of partition mostly by the commentators on ancient Smriti texts. There has been no such development so far as Malabar is concerned.

Per *Coutts-Trotter, J.*—It is not open to minor members of a Malabar Tarwad to interfere with the family arrangement carried out by the *karar* of the members in so far as the persons who were parties to it and who were adults at the time are concerned; and all that they are entitled to is to come to the Court for relief for themselves on the footing that their own maintenance has to be provided for by the Court. The onus will be upon them to show that the *karar* was carried out in fraud of their rights. The onus will also be upon them to show that subsequent to the date of the *karar* there was mismanagement by the *karnavan*. If they can show that the *karar* was carried out in order to defeat their rights and can show that by fraudulent recitals of non-existent debts the property in the hands of the *karnavan* was misrepresented or understated in the *karar*, they will be entitled to relief in respect of those false debts and in respect of subsequent acts of mismanagement. What they are not entitled to is to have the whole *karar* set aside in a manner that would affect the position of the signatories to it. *Veluthakkal Chirudevi v. Veluthakkal Tarwad Karnavan*, 31 M.L.J. 879=(1917) M.W.N. 106=34 Ind. Cas. 818. *COUTTS-TROTTER and SESHAGIRI IYER, J.J.*

—8.—Tarwad.

(1) *Malabar Tarwad—Karnavan becoming a stani—Succeeding karnavan incapable of business management—Karar vesting management in stani—Renewal of an old deed by karnavan, validity of.*

Per *Seshagiri Ayyar, J.*—(Napier, J., *dubitante*):—An arrangement among the members of a Malabar tarwad by which a previous *karnavan* who had become a *stani* was given certain specific powers of management in respect of the tarwad, without any express power to obtain renewals of mortgages in favour of the tarwad, does not deprive the actual *karnavan* however incapable he may be, of the power of renewing usufructuary mortgages in favour of the tarwad. The renewal being binding on the members of the tarwad, they cannot set up adverse possession, but must submit to a redemption by the mortgagee.

Per *Seshagiri Iyer, J.*—The *karnavan* has two capacities—a temporal and a spiritual one. In the former he is the manager of the family properties, maintains the junior members, represents

Malabar Law—(Concluded).**—8.—Tarwad—(Concluded).**

the tarwad in transactions with strangers, etc. In his latter capacity he presides at the ceremonies and performs all the religious duties which are incumbent on him. A stranger cannot supplant him in this latter office; his duties as manager may sometimes be delegated to a stranger. If a receiver is appointed pending a suit for the removal of a karnavan, this officer will have all the rights of a karnavan so far as management is concerned. An agent who acts with the consent of all the members in managing the temporal affairs of a tarwad cannot be in a worse position (a). **Krishnan Kidavu v. Raman**, 39 M. 918.

SESHAGIRI IYER and NAPIER, JJ.

Reference:—(a) 12 M. 219, *doubled*.

Malice.

Evidence of—Burden of proof—Refusal to apologise whether evidence of. See **SLANDER**, No. 1, 8 Bur. L.T. 278.

Malicious Prosecution.

(1) **Malicious prosecution—Damages for—**
Suit for—Proof essential—Damages when awarded.

In an action for malicious prosecution, the plaintiff has to prove first that he was innocent and that his innocence was pronounced by the Tribunal before which the accusation was made.

A man is not to be mulcted in damages merely because he fails to prove another's guilt, and a man is not to receive compensation merely because there is a reasonable doubt about his guilt; if there is any doubt about his innocence, he fails to prove the absence of reasonable and probable cause.

A man is acquitted in a criminal case if there is a reasonable doubt as to his guilt but a Civil Court will not award him compensation in a subsequent suit for damages for malicious prosecution, unless it has not only itself no reasonable doubt as to his innocence, but considers that the prosecutor either had or should as a reasonable man have had none either. **Maung Tha Hla v. Mokhlis**, 9 Bur. L.T. 48=31 Ind. Cas. 324.

YOUNG, J.

(2) **Question of reasonable and probable cause and of malice—Question of law—S. 58, Bengal Tenancy Act—Omission to give rent receipt—Whether an 'offence'—Proceeding under that section upon tenant's complaint—Whether amounts to a criminal prosecution.**

In a suit for malicious prosecution, the question of reasonable and probable cause as well as that of malice is a question of law to be determined upon certain facts found (a).

The omission to grant rent receipts as required by S. 58, Bengal Tenancy Act, constitutes an offence within the meaning of the Penal Code (b).

A proceeding under S. 58 of that Act upon the complaint laid before the Collector by the tenant, is a criminal prosecution before the

Malicious Prosecution—(Concluded).

Collector. The designation of the officer before whom the complaint was laid cannot affect the question as to whether the proceeding can be called a prosecution. **Nalk Pandey v. Bldya Pandey**, 1 Pat. L.J. 149=34 Ind. Cas. 149.

MULLICK, J.

References:—(a) 28 C. 591. F.; 25 B. 332, D.; 12 C.L.J. 410; (1891) 2 Q.B. 719; (1870) 39 L.J. 177, R. (b) 9 C.W.N. 816, R.

(3) **Suit for damages for malicious prosecution Giving false information to police—'Prosecution' when begins—Quantum of damages whether can be considered in second appeal.** **Godha Ram v. Debi Das**, 1 P.R. 1915=28 Ind. Cas. 273=14 P.L.R. 1916. See Final Part, 1915, Col. 1016.

(4) **Malicious prosecution—Suit for—When defendant can be said to set the law in motion—Mere information though not correct will not do—Information need not be to an officer of the law—Difference between suits for defamation and suits for malicious prosecution.** **Manikam Mudaliar v. Munisami Naidu**, (1915) M.W.N. 911=18 M.L.T. 500=29 M.L.J. 694=31 Ind. Cas. 246 See Final Part, 1915, Col. 1019.

(5) **Abatement—Action for—Plaintiff dying pending his appeal—Action abates.** See **ABATEMENT OF APPEAL**, No. 1, (1916) 2 M. W.N. 280.

(6) **Charge of illegal distraint—Suit for damages—Maintainability.** See **ACT I OF 1871 (CATTLE TRESPASS)**, No. 1, 20 M.L.T. 308.

(7) **Suit for, against manager of joint Hindu family—Abatement—Cause of action—Survival.** See **CIV. PRO. CODE (1908)**, No. 549, 31 Ind. Cas. 4.

(8) **Burden of proving malice and absence of reasonable and probable cause—Suit for.** See **DAMAGES, SUIT FOR**, No. 1, 20 M.L.T. 303.

Manager.

(1) **Account, suit for—Principal and agent—Proprietor appointed by a co-proprietor as common manager for payment of debts on the estate, whether an agent of latter and, on his death, of his sons—Limitation.** See **ACCOUNTS**, No. 4, 20 M.L.T. 430.

(2) **Tender of patta, when valid, of joint Hindu family, if competent to tender patta.** See **MAD. ACT VIII OF 1865 (RENT RECOVERY)**, No. 2, 4 L.W. 654.

(3) **Court of wards—Manager's power to remit interest on arrears of rent.** See **MAD. ACT I OF 1902 (COURT OF WARDS)**, No. 1, 31 Ind. Cas. 468.

(4) **Alienation by woman of an estate—Effect of such alienation as waste—Right of reversioner to sue for recovery of possession or for appointment of.** See **HINDU LAW (ALIENATION)**, No. 21, 30 Ind. Cas. 578.

Mandamus.

(1) **Corporation or public body having statutory duty to perform—Power of Court to compel its performance.**

Mandamus—(Concluded).

Where a corporation or a public body has a statutory duty of a public nature towards another person, a mandamus will lie to compel its performance at the instance of any person aggrieved by the refusal to perform the duty unless there is another remedy equally convenient, speedy, beneficial and effectual as the mandamus; and by remedy is meant, not a remedy by act of the party but *remedium juris*.

The Court would not be justified in refusing a relief in a just case merely because it will encourage others to make frivolous applications in other cases. *In re G. A. Natesan*, 31 M. L.J. 634.

COUTTS-TROTTER and KUMARASWAMI SASTRI, JJ.

(2) Commissioner of Police—Refusal to issue license to conduct procession, though right established by Civil Court—Apprehension of breach of the peace. See MAD. ACT III OF 1888 (CITY POLICE), No. 1, 31 M.L.J. 426.

(3) Collector refusing to make reference—Order, if may be raised by the High Court—Civ. Pro. Code, S. 115. See LAND ACQUISITION ACT (1894), No. 9 (1916) 2 M.W.N. 348.

Mandapapadi.

Right to exclusively conduct a, if of a civil nature—Competency of temple trustees to grant such exclusive right. See CIV. PRO. CODE (1908), No. 11, (1916) 2 M.W.N. 327.

Map.

(1) Survey (of maps) as evidence of title, value of. See ACT XXIII OF 1863 (WASTE LANDS), No. 1, 14 A.L.J. 1205 (P.C.).

(2) Evidentiary value of Thak maps. See BEN. ACT XI OF 1859 (REVENUE SALE LAW), No. 6, 20 C.W.N. 1023.

(3) Entry in revenue map whether sufficient to establish title. See POSSESSION, No. 2, 9 L.B.R. 264.

Marine Insurance Policy.

Covering Note—Liability under—Nature of document—"Sling and craft risks," meaning of. See INSURANCE, No. 1, 9 S.L.R. 116.

Mark.

Will—Placing of, under direction of testator, if valid affixture of mark—Attestation. See ACT X OF 1865 (SUCCESSION), No. 6, 4 L.W. 255.

Market.

Established after the Act V of 1884 (Mad.)—License granted—Renewal after one year—If levy of fee for renewal, proper. See MAD. ACT V OF 1884 (LOCAL BOARDS), No. 3, (1916) 2 M.W.N. 253.

Market Rate.

Buyer failing to take delivery of goods and the seller exercising his powers of re-sale—Damages, claim for, at—Maintainability. See CONTRACT ACT, No. 108, 8 L.B.R. 367.

Marriage.

Money borrowed for, of daughter of a deceased member—Family necessity. See HINDU LAW (JOINT FAMILY), No. 9, 19 O.C. 113.

Marriage Expenses.

Directions by testator as to, if valid. See WILL, No. 18, 32 Ind. Cas. 267.

Marriage Fees.

(1) *Gramopadhyā*—Customary fees on marriages in Hindu form—Marriage performed in Panch Kalas Lingayat form—*Mangalsutra* and *Kankandhara* ceremonies common to both types of marriage—Marriage ceremonies to be taken as a whole to determine its form—Village Joshi cannot claim fees for common ceremonies. *Rangappa Ningappa Immadi v. Venkatbhat Linganbhat Joshi*, 17 Bom. L.R. 950=40 B. 112=31 Ind. Cas. 448. See Final Part, 1915, Col. 1020.

Marshalling.

(1) Marshalling of securities—Right when available. See MORTGAGE (GENERAL), No. 21, 81 P.W.R. 1916.

(2) Nature of right to—Right when exercisable. See TRANSFER OF PROPERTY ACT, No. 108, (1916) M.W.N. 265.

Marumakkatayam Law.

(1) Mahomedans following—Custom of affiliation of strangers to tarwad. See MAHOMEDANS, No. 1, 31 Ind. Cas. 385.

(2) Mahomedan family governed by. See SUCCESSION CERTIFICATE ACT (VII OF 1889), No. 1, 31 Ind. Cas. 446.

Master and Servant.

(1) Wrongful dismissal of servant—Damages—Month's pay—Reasonable damages—Reasonable notice.

When a servant is wrongfully dismissed, he can sue for damages and the amount of damages to be awarded for such a wrongful dismissal will depend on the nature of the hiring contract and the wages agreed upon.

In the case of a domestic or menial servant and also in the case of a clerk, a month's wages would be reasonable damages.

In the absence of any definite agreement or established custom, the contract of service is terminable by a reasonable notice. *M. E. Moola v. K. C. Bose*, 9 Bur. L.T. 63=8 L.B.R. 420=33 Ind. Cas. 931.

• TWOMEY, J.

(2) Newspaper—Co-editor—Contract of service—Power of managing director to vary duties and hours of attendance—Refusal to do duties assigned—Claim for salary. See CONTRACT, No. 4, 30 M.L.J. 207.

(3) Labourer—Rendering of services by *pamnal*—Whether amounts to payment of interest. See LIMITATION ACT (1908), No. 73, 33 Ind. Cas. 134.

Material Alteration.

(1) Document, execution of—One executant, non-signing of—Addition of that executant's name—No material alteration of document.

Material Alteration—(Concluded).

A material alteration of a document by a party to it after its execution without consent of the other party, renders it void.

But the mere addition of the name of one of the executants in a document who did not sign is no alteration.

It was originally proposed that two men should sign a hand-note; one signed it and the other did not. Subsequently the note was renewed by the man who signed it and yet again it was renewed by the same person.

Held that there was no question at all of any alteration having been made in the document; that as the man who did not sign the first note had nothing whatever to do with the transaction from first to last, could not be held responsible, and that a decree should be passed only against the man who did sign all the three notes. *Babu Lal Beladar v. Jadunath Jha*, 33 Ind. Cas. 417.

CHAMBER, C.J. and JWALA PERSAD, J.

References:—9 Rep. Ch. 266; 25 B. 616, R.

(2) Instrument, alteration in, for carrying out original intention. See ALTERATION OF DEED, No. 1, 35 Ind. Cas. 182.

Material Irregularities.

(1) Sale in execution—In proclamation of sale. See CIV. PRO. CODE (1908), No. 516, 33 Ind. Cas. 946.

(2) Execution sale, setting aside of. See CIV. PRO. CODE (1908), No. 514, 35 Ind. Cas. 411.

(3) See LIMITATION ACT (1908), No. 29, 101 P.R. 1916.

Maxims.

(1) A man shall not take advantage of his own fraud—Applicability of the maxim. See HINDU LAW (WIDOW), No. 19, 18 Bom. L.R. 954.

(2) "Bona fide purchaser for value without notice is a single defence." See LIMITATION ACT (1908), No. 182, 4 L.W. 200.

(3) *Generalia specialibus non derogant*. See MAD. ACT I OF 1908 (ESTATES LAND), No. 17, 39 M. 944.

(4) *In pari delicto potior est conditio possidentis*—Applicability of. See CONTRACT ACT, No. 12, 31 M.L.J. 264.

(5) "One who seeks equity must do equity." See PARTNERSHIP, No. 7, 113 P.W.R. 1916.

(6) Maxim '*qui facit per alium facit per se*'—Tying a bone to plaintiff's animal—Loss of cattle—Applicability of maxim. See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 31, 12 N.L.R. 7.

(7) *Secundum allegata et probata*. See MORTGAGE (REDEMPTION), No. 17, 9 Bur. L.T. 114.

(8) Where both ligants are parties to an invalid transaction, the position of one in possession is stronger and must prevail. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 12-b, 32 Ind. Cas. 593.

Medical Certificate.

Age—Certificate by a Medical man to private patient—Former judgment regarding age—Whether relevant—Value—Minority—Party pleading the same—Burden of proof. See EVIDENCE ACT, No. 7, 33 Ind. Cas. 142.

Meher.

Advancement—Conveyance of property in satisfaction of meher—Consideration not necessary. See CONSIDERATION, No. 1, 18 Bom. L.R. 810.

Melkanomdar.

(1) See MALABAR LAW (MORTGAGE), No. 1, (1916) 2 M.W.N. 358.

(2) Order for sale in suit by—Jenmi's title, whether extinguished, thereby—*Res judicata*—Prior suit by Melkanomdar, whether bars the jenmi's suit. See TRANSFER OF PROPERTY ACT, No. 123, 4 L.W. 184.

Memorandum of Appeal.

Redemption of mortgage—Appeal from decree of lower Court—Stamp duty payable on. See COURT-FEES, No. 4, 30 Ind. Cas. 322.

Memorandum of Objection.

Appellate Court's powers to add party exonerated. See CIV. PRO. CODE (1908), No. 676, 31 Ind. Cas. 978.

Mental Incapacity.

(1) Will—Execution by person suffering from plague. See HINDU LAW (ADOPTION), No. 12, 123 P.R. 1916.

Mercantile Contracts.

Construction of. See CONTRACT, No. 11, 23 C.L.J. 514.

Merger.

(1) Occupancy ryot subsequently acquiring *melvaram*—Rule of, whether applies. See MAD. ACT I OF 1908 (ESTATES LAND), No. 20, 4 L.W. 168.

(2) Ejectment, decree for—Appellate decree—Of original decree—Appeal dismissed for default—Decree, which, to be executed. See EXECUTION OF DECREE, No. 18, 24 C.L.J. 523.

(3) Mortgagee purchasing part of the mortgaged property—Intention. See LIMITATION ACT (1908), No. 214, 14 A.L.J. 1025.

(4) Mortgagee purchasing property in execution of his decree on simple mortgage. See MORTGAGE (USEFRUCTUARY), No. 3, 31 Ind. Cas. 891.

(5) Doctrine of merger whether applies to decrees for ejectment—Merger when applicable. See POSSESSION, No. 3, 14 A.L.J. 709.

(6) See REVIEW, No. 4, 24 C.L.J. 517.

(7) See TRANSFER OF PROPERTY ACT, No. 92, 35 Ind. Cas. 845.

Mesne Profits.

(1) *Mesne profits*—Decree for possession and *mesne profits*—Assignment of decree with

Mesne Profits—(Continued).

respect to mesne profits—Transfer of Property Act (IV of 1882), S. 6 (a)—Code of Civil Procedure (V of 1908), O. XXII, r. 10—Procedure.

Two persons obtained a decree (a) for possession of certain immoveable property and (b) directing an enquiry as to mesne profits. The decree-holders obtained possession of the immoveable property through the Court. They then sold to A and B their right to recover mesne profits under the decree which they had obtained. The two original decree-holders as well as A and B then applied to the Court of first instance to ascertain the amount of mesne profits due under the decree. In the petition it was stated that the original decree-holders had transferred their rights to A and B.

Held (i) that the right of the original decree-holders was not a mere right to sue within the meaning of cl. (a) of S. 6 of the Transfer of Property Act, but was a right to have the amount of mesne profits ascertained under the decree which had declared that they were entitled to mesne profits.

(ii) The decree for possession and mesne profits was passed under the present Code of Civil Procedure and it is quite clear that under the present Code proceedings taken to ascertain mesne profits are proceedings in the suit and not proceedings in execution.

(iii) That it was open to A and B to have made an application to the Court under O. XXII, r. 10, praying for permission to continue the suit, as assignees of the original plaintiffs decree-holders.

(iv) But although no such application was made but an application was made by all four persons as above explained, yet, as the first Court made an order in favour of A and B, the Court must be taken to have allowed them to continue the suit as assignees of the original decree-holders.

(v) The omission to make a formal application under O. XXII, r. 10 cannot be held to be fatal to the right of A and B to carry on the proceedings. **Harl Prasad Misser v. Kodo Marya**, 1 Pat. L.J. 427.

CHAMIER, C.J. and KINGSFORD, J.

(2) *Mesne profits, decree for—Notice of relinquishment given to plaintiff too late—Liability to pay mesne profits how affected—Interest on mesne profits beyond three years, awarding of, discretionary.* **Naina Pillai Maracayar v. Arumuga Mudali**, 2 L.W. 1129=31 Ind. Cas. 387. See Final Part, 1915, Col. 1024.

(3) *Mesne profits—Antecedent to suit and pendent lite—Jurisdiction of Court—Amount when exceeds Court's pecuniary jurisdiction—Course to follow Civ. Pro. Code (Act XIV of 1882), Ss. 211, 212—Bengal Civil Courts Act (XII of 1887), S. 18 et seq.* **Bhupendra Kumar v. Purna Chandra**, 8 Ind. Cas. 34=43 C. 650. See Final Part, 1910, Col. 915.

(4) Claim for, subsequent to suit for possession, if barred. See CIV. PRO. CODE (1908), No. 392, 9 Bur. L.T. 92.

Mesne Profits—(Concluded).

(5) See EXECUTION OF DECREE, No. 30, 33 Ind. Cas. 520.

(6) Decree for, and costs—Separate applications for execution of said reliefs—Continuation of proceedings. See EXECUTION OF DECREE, No. 24, 30 Ind. Cas. 213.

(7) Purchase, by decree-holder of unascertained share of profits—Suit for ascertainment and recovery of profits—Maintainability. See EXECUTION OF DECREE, Nos. 26 and 27, 33 Ind. Cas. 83.

(8) See HINDU LAW (ADOPTION), No. 11, 152 P.W.R. 1916.

(9) Sale by father and manager without necessity—Joint Hindu family—Sons repudiate sale, from date of repudiation. See HINDU LAW (ALIENATION), No. 18, 14 A.L.J. 1161.

(10) Sale of widow's right, title and interest in her husband's properties—Test to determine the interest sold—Decree for. See HINDU LAW (WIDOW), No. 33, 32 Ind. Cas. 587.

(11) Contract of lease—Suit for possession in the alternative for the return of premium. See LIMITATION ACT (1908), No. 192, 32 Ind. Cas. 245.

(12) Suit for possession and profits of property usufructually mortgaged. See LIMITATION ACT (1908), No. 177, 31 Ind. Cas. 804.

(13) See MORTGAGE (REDEMPTION), No. 19, 19 O.C. 161.

(13-a) See MORTGAGE (REDEMPTION), No. 25-a, 32 Ind. Cas. 729.

(14) Decree, execution of—Interest. See RES JUDICATA, No. 24, 14 A.L.J. 1171.

(15) If alienable. See TRANSFER OF PROPERTY ACT, No. 16, 31 Ind. Cas. 473.

(16) See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 11-a, 32 Ind. Cas. 732.

Mharki Vatan.

See JURISDICTION OF CIVIL COURTS, No. 4, 18 Bom. L.R. 779.

Mines and Minerals.

Suit for, if maintainable by a lessee of mining rights for a term against lessor's co-owners—Partition of underground mines and minerals, if possible. See PARTITION, No. 6, 20 C.W.N. 1306.

Mining Lease.

(1) Incidents of—Rights of lessee and lessor. See LEASE, No. 6, 20 C.W.N. 1135.

(2) Forfeiture—Penal provisions, strict construction of—Reflex against forfeiture—Covenants in a mining lease, exception to rule. See LEASE, No. 7, 39 M. 1049.

Minor.

See GUARDIAN.

See GUARDIANS AND WARDS ACT, 1890.

See HINDU LAW (GUARDIANSHIP).

See MAHOMEDAN LAW (GUARDIANSHIP).

Minor—(Continued).

- (1) *Contract of sale—Guardian purchasing property for minor—Suit for possession of property maintainable—Transfer of Property Act, Ss. 54, 55—Contract entered into with father of minor—Effect of.*

One S, a minor, purchased, "through his father and guardian" a house from certain persons. The price was not paid except a sum of Rs. 51, which was alleged to have been paid as earnest money. The sale-deed was compulsorily registered. The vendor, however, remained in possession of the house. Upon a suit by the minor to recover possession of the house from the vendor, she contended that the sale-deed was invalid having been executed in favour of a minor and that she was not bound by it.

Held, that the suit was not one for specific performance of a contract to sell but was founded on the title acquired by the plaintiff under the sale-deed executed in his favour, and consequently it was maintainable, there being nothing in the Transfer of Property Act which prevented a minor from purchasing property (a).

Held further that, the contract having been entered into with the father and guardian of the minor, no contractual obligations were undertaken by the minor, and any personal obligations arising as between the vendor and the vendee would have to be discharged by the party contracting with the vendor (b). **Narain. Das v. Musammat Dhania**, 14 A.L.J. 65=38 A. 154=35 Ind. Cas. 23.

BANERJI and WALSH, JJ.

References:—(a) 33 M. 312, Diss. (b) 24 M.L.J. 352, F.

- (2) *Minor, decree against—Minor properly represented in the suit—Suit to set aside decree—Not maintainable without proving fraud or collusion.*

A decree obtained against an infant properly made a party and properly represented in the case cannot be set aside by means of a separate suit, except upon proof of fraud or collusion on the part of the guardian **Beni Prasad v. Lajja Ram**, 14 A.L.J. 438=38 A. 452=35 Ind. Cas. 63.

RICHARDS, C.J. and RAUF, J.

- (3) *Contract by minor—Burden of proof as to minority—Ss. 103, 104, Evidence Act.*

It is for the party who comes into Court and pleads minority to make out his case, before the adverse party can be required to rebut it. **Sobhanmal Pothmal v. Bachal**, 9 S.L.R. 214=34 Ind. Cas. 890.

OROUGH and HAYWARD, A.J.Cs.

References:—26 B. 109 (116), F.; 4 S.L.R. 260, D.

- (4) *Decree against minor—Not properly represented in suit—Decree set aside and cause remanded—Revival of suit—Code of Civil Procedure (1908), O. IX, r. 13, S. 151.*

Under the Code of Civil Procedure a suit may be instituted against a minor by name. It is the duty of the Court to appoint a proper guardian *ad litem*. The institution of the suit is complete and saves limitation but its further

Minor—(Continued).

progress depends upon the appointment of a suitable guardian *ad litem*.

Where proceedings taken to appoint a guardian *ad litem* for a minor in a suit have been declared to be invalid, and the suit cannot proceed unless such proceedings are properly initiated and completed, the Court whose duty ultimately is to appoint such a guardian has inherent power under S. 151 of the Code of Civil Procedure to revive the suit under O. IX, r. 13 of the Code. **Bhagwan Dayal v. Param Sukh Das**, 14 A.L.J. 818=39 A. 8=36 Ind. Cas. 366.

WALSH and SUNDAR LAL, JJ.

- (5) *Mortgage in favour of minor, if enforceable by him or by others on his behalf.*

Held, on a reference to the Full Bench that "a mortgage executed in favour of a minor who has advanced the whole of the mortgage money is enforceable by him or by others on his behalf."

The full case-law on the subject reviewed (a). **Raghava Charlar v. Srinivasa Raghava Charlar**, 31 M.L.J. 575=20 M.L.T. 407=(1916) 2 M.W.N. 263=36 Ind. Cas. 921 (F.B.).

WALLIS, C.J., ARDUR RAHM and SRINIVASA AYYANGAR, JJ.

References:—33 M. 312=19 M.L.J. 752, Overruled.

- (6) *Minor—Decree against minor, grounds for setting aside of—Decree binding upon minor unless grounds exist for setting it aside—Ex parte decree against minor—Guardian of minor, gross negligence of.*

Held, that although a minor is entitled to impeach a decree passed against him during his minority for sufficient reasons such as fraud or collusion, yet if no such special reason exists the decree passed against the minor is just as good and conclusive a decree as a decree passed against an adult.

Held, that the mere fact that the guardian *ad litem* did not appear on the date of hearing and allowed an *ex parte* decree to be passed against the minor would not suffice of itself to justify a presumption of gross negligence against the guardian. **Raghuraj GIr v. Babu Rudra Pratab Singh**, 19 O.C. 119=36 Ind. Cas. 811.

KENDALL, A.J.C.

- (7) *Agreement to sell by him—Void—Contract Act, S. 11—Transfer of Property Act, 1882, S. 54.*

A minor cannot make any valid contract. An agreement to sell made by a minor would be void on account of his minority. **Maung Po Dauk v. Maung Ba Gyaw**, 33 Ind. Cas. 132.

MAUNG KIN, J.

- (8) *Mortgage in favour of minor, validity of.*

A mortgage-deed executed as security for a loan is not void by reason of the minority of the mortgagees, but is enforceable by them. There is no provision in the Transfer of Property Act which nullifies a transfer made by a

Minor—(Continued).

person of full age in favour of a minor. **Bhagabhor Mondal v. Mohini Mohan Banerjee**, 33 Ind. Cas. 994.

MOOKERJEE and TEJNON, JJ.

References:—39 C. 292=29 M.L.J. 1156=39 I.A. 1=16 C.W.N. 74=(1912) M.W.N. 22=9 A.L.J. 33=15 C.L.J. 69=14 Bom. L.R. 5=13 Ind. Cas. 331; 30 C. 539=5 Bom. L.R. 421=7 C.W.N. 441=30 I.A. 114, D.; 33 M. 312=19 M.L.J. 752=7 M.L.T. 233=4 Ind. Cas. 383; 33 A. 657=8 A.L.J. 670=11 Ind. Cas. 20, R.

(9) *Guardian appointed for litigation—Admission by minor effect—Will—Prima facie case—Revenue Court.*

Where a guardian is appointed to a minor for purposes of litigation in order to look after her interests, any admission made by the minor against her own interests is waste paper.

Where a person wills away his property and possession is doubtful and there is a *prima facie* case for the will, it is for the Civil Courts to set it aside if they think it and the Revenue Court will not interfere in third appeal. **Parbati v. Dharmaraji**, 32 Ind. Cas. 368.

HOLMS, J. M.

(10) *Competency of, to take property under a transfer of sale.* **Raghunath Bakhsh v. Haji Sheikh Mohammad Bakhsh**, 18 O.C. 115=30 Ind. Cas. 200. See Final Part, 1915, Col. 1026.

(11) *Attorney appointed by next friend—Attorney's costs—Charge on minor's property when may be made.* See ATTORNEY AND CLIENT, No. 3, 20 C.W.N. 537.

(12) *Suit against minor and another—Compromise without leave of Court—Bond executed by a person for himself and as guardian of minor—Liability of the minor—One of two joint promisors whether can plead minority of the other as a bar to the promisee's claim.* See CIV. PRO. CODE (1882), No. 29, 14 A.L.J. 534.

(13) *Compromise by next friend or guardian when binding on—Leave of Court.* See CIV. PRO. CODE (1908), No. 585, 35 Ind. Cas. 675.

(14) *Prior suit for partition—Minor parties—Reference to arbitration—Decree in accordance with award—Appeal from decree—Compromise in appeal—Leave of Court not obtained either to arbitration or to consent-decree—Effect—Minor's right of suit to avoid the decree—Prior partition suit re-opened with reference to all parties.* See CIV. PRO. CODE (1908), No. 587, 30 M.L.J. 465.

(15) *Purchase by manager of infant with infant's money—Plea of section to defraud said infant.* See CIV. PRO. CODE (1908), No. 147, 30 Ind. Cas. 212.

(16) *Irregular appointment of guardian ad litem—Question of prejudice to minor—Suit otherwise fully contested—Effect upon minor.* See CIV. PRO. CODE (1908), No. 581, 14 A.L.J. 589.

(17) *Minor defendant—Appellant—Death of guardian ad litem during pendency of appeal—*

Minor—(Continued).

Appeal disposed of without fresh guardian—Fresh guardian appointed in execution proceedings—Minor's property sold without objection—Minor whether can sue for declaration that decree and execution sale were invalid. See CIV. PRO. CODE (1908), No. 589, 31 M.L.J. 39.

(18) *Application by judgment-debtor to record satisfaction of decree—Enquiry into questions of fact—One of the judgment-debtors a minor—Validity of compromise—Court's duty—Compromise after decree—Applicability of O. XXXII, r. 7, Civ. Pro. Code* See CIV. PRO. CODE (1908), No. 429, 31 M.L.J. 207.

(19) *Contract for sale—Purchaser, a—Sale by de facto guardian, when valid.* See CONTRACT ACT, No. 8, 32 Ind. Cas. 638.

(20) *Principal debtors and surety—Former a minor at the time of the debt—Contract void—Liability of surety.* See CONTRACT ACT, No. 122, 54 P.R. 1916.

(21) *Appointment of guardian without notice—Decree not binding on minor.* See EVIDENCE, No. 6, 32 Ind. Cas. 380.

(22) *Major described as, in plaint, effect.* See EVIDENCE, No. 6, 32 Ind. Cas. 380.

(23) *Contract induced by representing that he was sui juris—Minor it may be estopped from repudiating the contract.* See EVIDENCE ACT, No. 98, 20 C.W.N. 418.

(24) *Agreement by guardian to pay rent at enhanced rate of rent whether binding on.* See GUARDIAN AND WARD, No. 4, 35 Ind. Cas. 582.

(25) *Alienation by guardian—Sanction of District Court—Agreement to pay interest not sanctioned—Right to reasonable interest—Suit by minors to avoid the alienation—Duty of minors.* See GUARDIANS AND WARDS ACT, No. 15, 24 P.R. 1916.

(26) *Whether can be Manager of Hindu family or guardian of person of property of his minor wife or children.* See GUARDIANS AND WARDS ACT, No. 12, 30 M.L.J. 21.

(27) *Presumption as to the religion of a minor—Duty of guardian.* See GUARDIANS AND WARDS ACT, No. 9, 46 P.W.R. 1916.

(28) See HINDU LAW (ALIENATION), No. 25 35 Ind. Cas. 673.

(29) *Debt contracted during minority—Ratification—Liability of minor.* See HINDU LAW (JOINT FAMILY), No. 13, 14 A.L.J. 521.

(30) *Manager, powers of—Transfer made order to acquire property on advantageous terms, whether binding on, members.* See HINDU LAW (JOINT FAMILY), No. 8, 19 O.C. 100.

(31) *Joint Hindu family—Minor member if can resist partition by adults—Rights of minors—Onus of proof that partition is unfair—Shifting of onus.* See HINDU LAW (PARTITION), No. 2, 30 M.L.J. 308.

(32) *Infant if can be adjudicated insolvent.* See INFANTS, No. 1, 20 C.W.N. 1065.

Minor—(Continued).

(33) Letters of administration—Grant, order of—Minor heir not made party—Revocation proceeding—Guardian *ad litem*, appointment of—Contentious suit—Minor not being cited not being properly represented, effect of. See LETTERS OF ADMINISTRATION, No. 1, 23 C.L.J. 79.

(34) Sale of minor's property by guardian—Fraud of minor—Suit to set aside sale barred—Right to recovery of possession of property sold—Extinction of right. See LIMITATION ACT (1908), No. 118, 34 Ind. Cas. 188.

(35) Suit against a minor—Attainment of majority during suit—Proceedings continued as if he was still a minor—Decree and sale in execution—Validity. See LIMITATION ACT (1908), No. 103, 19 M.L.J. 93.

(36) Cause of action—Death of minor within three years of his attaining majority—Minor's representative can sue within 3 years on the same cause of action. See LIMITATION ACT (1908), No. 30, 18 Bom. L.R. 579.

(37) Release by *de facto* guardian—Validity—Family settlement when not binding on minor—Tests—Powers of mother as *de facto* guardian. See MAHOMEDAN LAW (GUARDIANSHIP), No. 3, 3 L.W. 379.

(38) Malabar law—Tarwad—Partition, right to—*Karar*—Family arrangement—Junior members, when bound by acts of *Karnavan*—Right of, to impeach *karar*. See MALABAR LAW (PARTITION), No. 1, 31 M.L.J. 879.

(39) Manager of mortgagor's estate—Agreement entered by him on minor's behalf in excess of his authority—Invalidity. See MORTGAGE (GENERAL), No. 32, 1 Pat. L.J. 563.

(40) Promissory note by a young boy just emerged from minority with large expectations—Burden of proof *re* passing of consideration. See NEGOTIABLE INSTRUMENTS ACT, No. 23, 31 Ind. Cas. 739.

(41) Party—Admission by pleader—Whether binding on. See PLEADER AND CLIENT, No. 3, 86 P.L.R. 1916.

(42) Document—Presentation by, for registration—Minor claiming under the document—Registration—Validity. See REGISTRATION ACT (1908), No. 32, 33 Ind. Cas. 33.

(43) Fraud—Incorrect allegations in plaint—Setting aside decree—Suit against—Proper person to be appointed *guardian ad litem*—Gross negligence of guardian. See SETTING ASIDE DECREE, No. 2, 33 Ind. Cas. 481.

(44) Court-auction—Sale—Irregularity in the conduct of—*Bona fide* purchaser not protected—Major judgment-debtor—Treated as, vitiate sale—Notice—Execution. See SETTING ASIDE SALE, No. 1, 20 M.L.J. 479.

(45) Sale-deed in minor's favour—Contract Act, 1872, S. 11. See TRANSFER OF PROPERTY ACT, No. 25, 31 Ind. Cas. 792.

Minority.

(1) Party making the plea—Burden of proof. See EVIDENCE ACT, No. 7, 33 Ind. Cas. 142.

(2) See LIMITATION ACT (1908), No. 29, 101 P.R. 1916.

Misappropriation.

Liability of son to pay father's debt incurred by appropriating money due to another. See HINDU LAW (DEBTS), No. 7-a, 32 Ind. Cas. 969.

Misjoinder of Parties.

See PARTIES TO SUITS.

Second appeal—Grounds of. See CIV. PRO. CODE (1908), No. 189, 118 P.L.R. 1916.

Misrepresentation.

See FRAUD.

(1) Ability to discover truth. See CONTRACT ACT, No. 14, 112 P.L.R. 1916.

(2) Compromise decree—Right of party to prove that his consent was obtained by, and fraud—Necessity for suit to set aside decree. See EVIDENCE ACT, No. 25, 30 Ind. Cas. 639.

(3) See LANDLORD AND TENANT, No. 31, 31 M.L.J. 712.

(4) Specific performance—As to extent of property—Compensation—Principle—Court of equity. See VENDOR AND PURCHASER, No. 7, 32 Ind. Cas. 47.

Mistake.

(1) Any mistake or error in an execution petition will not necessarily render such an application a nullity. *Ramachandra Naidu v. Tripathi Naidu*, (1916) 2 M.W.N. 128=35 Ind. Cas. 614.

SPENCER and KRISHNAN, JJ.

(2) As to an essential matter of fact—Avoidance of contract. See CONTRACT ACT, No. 16, 18 Bom. L.R. 201.

(3) Description of land in mortgage document—Mutual mistake if can be proved by oral evidence. See EVIDENCE ACT, No. 72, 3 L.W. 551.

(4) Mutual, in description of land in registered mortgage deed—Oral evidence to prove—Construction of document. See EVIDENCE ACT, No. 73, 31 Ind. Cas. 671.

(5) Jurisdiction of Court to correct its own—Order passed without hearing parties—Fresh order after hearing setting aside the same—If *ultra vires*. See JURISDICTION OF CIVIL COURTS, No. 3, 31 M.L.J. 319.

(6) Presentation of appeal to wrong Court—*Bona fide*—Delay in filing appeal—Saving of limitation. See LIMITATION ACT (1908), No. 12, 30 Ind. Cas. 211.

(7) Suit against wrong defendant—Name corrected after period of limitation—Clerical mistake—Amendment. See LIMITATION ACT (1908), No. 83-a, 32 Ind. Cas. 872.

(8) Order passed under—Inherent power of Court. See REVIEW, No. 5, 32 Ind. Cas. 627.

Mistake of Court.

Tender of money on the last day of payment in the Court, application made for permission to make payment—Money tendered though not deposited on that date through, or its officers—Next day holiday—Payment made on the next first opening day of the Court, whether such a payment within time and sufficient compliance with the terms of the decree. See PRE-EMP-TION, No. 12, 123 P.W.R. 1916.

Mixed Question of Law and Fact.

(1) Raising—Second appeal. See APPEAL (SECOND APPEAL), No. 7, 10 S.L.R. 38.

(2) See PROPRIETARY RIGHT, No. 1, 35 Ind. Cas. 262.

"Mogul" Rent.

Meaning of. See LEASE, No. 6, 20 C.W.N. 1135.

Mokurari Lease.

(1) Provision for enhanced rent for collection charges—Construction of contract. See ABWAR, No. 1, 36 Ind. Cas. 404.

(2) High rate of interest and damages in, if penalty—Contract Act (IX of 1872), S. 74, See BEN. ACT VIII OF 1885 (TENANCY), No. 37, 21 C.W.N. 108.

(3) Permanent. See BEN. ACT VIII OF 1885 (TENANCY), No. 36, 21 C.W.N. 112.

(4) See CIV. PRO. CODE (1908), No. 507, 36 Ind. Cas. 769.

Money Decree.

Against different defendants at different times. See LIMITATION ACT (1908), No. 49, 31 Ind. Cas. 917.

Money had and received.

Second suit to recover mortgage-money—Failure of consideration—Suit for—Limitation. See RES JUDICATA, No. 17, 18 Bom. L.R. 773.

Mortgage.

- 1.—GENERAL.
- 2.—ANAMALOUS.
- 3.—BY CONDITIONAL SALE.
- 4.—CONTRIBUTION.
- 5.—EQUITABLE.
- 6.—FORECLOSURE.
- 6-A.—MARSHALLING.
- 7.—REDEMPTION.
- 8.—SALE OF MORTGAGED PROPERTY.
- 9.—SIMPLE.
- 10.—SUBROGATION.
- 11.—USUFRUCTUARY.

—1.—General.

(1) *Contribution—One mortgagor relieving his co mortgagors of a burden—Compulsion or possession not necessary—Minor—De facto guardian—Mahomedan Law—Mortgage by such guardian for minor's benefit.*

A mortgagor who relieves his co-mortgagors of a burden, whether under compulsion of law or as a private transaction, is entitled to claim that his co-mortgagors should pay him what he

Mortgage—(Continued).**—1.—General—(Continued).**

has paid for their benefit, and it is not necessary that he should be put in possession of the property of the co-mortgagors.

Under the Muhammadan Law a mortgage made for the benefit of the minor and for necessity by a *de facto* guardian is binding on the minor. *Abid Ali v. Imam Ali*, 14 A.L.J. 18=38 A. 92=32 Ind. Cas. 177.

BAJERJI and WALSH, JJ.

References:—26 A. 22; 1 A. 533, F.

(2) *Mortgage—Suit for sale—Parties—Person alleged as benamidar impleaded as defendant—No defence by such person—Whether suit maintainable.*

One N made a simple mortgage of a house in favour of one S. S brought a suit for sale on foot of the mortgage against M, alleged to be representative of N and she got a decree. The house was sold and purchased by K. Upon K suing to recover possession it was found that M was not N's representative. In the meantime the purchase-money deposited by K was attached by a creditor of D, the husband of S on the allegation that D was the real mortgagee. D objected that the money belonged to his wife S. The creditor succeeded. D now brought the suit upon foot of the mortgage made by N. He impleaded S as a *pro forma* defendant on the allegation that she was a *benamidar* for him. S did not enter appearance. The Lower Appellate Court held that D had failed to prove that he was the real mortgagee and dismissed the suit. In second appeal the finding was accepted and the decree was affirmed. *Held* in appeal under S. 10 of the Letters Patent (reversing *Chamier, J.*) that D was competent to maintain the suit, the *benamidar* being a defendant to the suit, and she having omitted to deny the allegation made by D. *Dujal v. Shyam Lal*, 14 A.L.J. 30=38 A. 122=33 Ind. Cas. 954.

RICHARDS, C.J. and RAFIQ, J.

(3) *Co-mortgages—Payment to one if discharges the debt.*

Payment of a mortgage debt to one of several co-mortgages is a good discharge of the debt. *Ponnusami Pillai v. Thyagaraja Pillai*, 3 L. W. 22=32 Ind. Cas. 173.

COUTTS-TROTTER and SRINIVASA AIYANGAR, JJ.

References:—36 M. 544, F.; 22 Q.B.D. 537; 2 Ch. 160, Not F.; 38 C. 342, R.

(4) *Mortgage—Period fixed for redemption—Liability to pay interest from the expiry of such period up to payment.*

In the absence of a covenant that interest should cease to run after the expiry of the stipulated period, the creditor is entitled to interest at the rate specified in the mortgage-deed for the entire period during which the mortgage money remains unpaid. *Mota Singh v. Bishen Singh*, 5 P.R. 1916=23 P.W.R. 1916=32 Ind. Cas. 821.

RATTIGAN and SADI LAL, JJ.

References:—77 P.R. 1898, F.; 114 P.R. 1901, D.; 20 A. 171 (P.C.); 19 A. 39 (P.C.), R.

Mortgage—(Continued).**—1.—General—(Continued).**

(5) *Mortgage when deemed to be extinguished—Mortgage transferred—Rights of transferee—Effect on right of redemption—S. 91, Transfer of Property Act.*

When a mortgage is redeemed by the mortgagor or by some one 'having' a right under S. 91, Transfer of Property Act, to redeem, the original contract is completed and all the mortgagee's rights created under it cease. The contract of mortgage is no longer in existence and the mortgage is said to be extinguished.

The same thing happens when the mortgagor's rights are invaded and some one having no right to redeem redeems in opposition to the mortgagor. The mortgage is then extinguished because the mortgagee recognizes the title of the person redeeming and allows redemption in view of the terms of the original contract, he does not give up his rights of his own free will, but because he thinks that by the terms of his contract he is legally bound to do so. The contract is therefore at an end and the rights created by it cease.

But a mortgagee may either sell or mortgage his rights under the contract. When he mortgages them, the transaction is a sub-mortgage and the mortgagee may redeem his right so long as the mortgagor does not exercise his paramount right of redemption. When the mortgagee sells his rights, those rights do not cease to exist; they become the rights of the purchaser; the original contract is still in force just as in the case of the negotiation of a negotiable instrument. The mortgage is then said to be transferred. This is what happens when a person having no right to insist on redemption redeems either with the permission of the mortgagor or without such permission but recognizing the mortgagor's title. He merely purchases the mortgagee's rights. *Mi Hla Yin v. Mi Hman*, U.B.R. (1915), 3rd Qr., 89 = 32 Ind. Cas 506.

MCCOLL, J.C.

References:—U.B.R. (1897—1901), II, 473; U.B.R. (1904—1906), II, Limitation, 9, R.

(6) *Hypothec—Oral charge on moveable property—Validity—Subsequent written unregistered mortgage—Priority—S. 48, Registration Act.*

In this case the plaintiff Bank sued to enforce its claim on an unregistered mortgage of the machines, good-will, furniture, appurtenances, etc.; belonging to a printing press. Defendant contended that she had a previous oral charge or hypothec of the same properties as security for the advances made by her.

Held, that the hypothec created in favour of defendant over the property in suit gave her as much right to that property as the unregistered deed of mortgage subsequently executed gave to the plaintiff Bank, and that, quite irrespectively of all questions of notice, her rights being prior in time must prevail over the rights of the latter Bank.

There is no provision of law in force in the Punjab which requires a charge of this kind in

Mortgage—(Continued).**—1.—General—(Continued).**

respect of moveable property to be by deed in writing; nor is there any authority for the proposition that, if made orally, it is not as effectual for all purposes (except, of course, in the cases provided for by S. 48, Registration Act) as if it were effected by an instrument in writing, provided always that its existence can be proved. *Mrs. Stewart v. Bank of Upper India, Ltd.*, 32 P.R. 1916 = 34 Ind. Cas. 932.

RATTIGAN and LE-ROSSIGNOL, J.J.

Reference:—11 Ind. Cas. 869, R.

(7) *Mortgagor and mortgagee—Rights of first and second mortgages to bring the property to sale—Rights of purchasers.*

Coutts-Trotter, J.—What passes to a mortgagee is a right to sell the mortgagor's interest as it stood at the date of his mortgage, subject only to this, that in his suit he must make all subsequent mortgagees parties, if he wishes the sale to be free of their encumbrances.

Of any number of mortgagees the latter can always redeem the earlier but cannot be compelled to do so, and the earlier cannot redeem the later except by consent.

The decisions in 22 M.L.J. 129, 2 M. 108 and 24 M. 171, are in conflict with the Full Bench decision in 21 M.L.J. 213.

Srinivasa Iyengar, J.—A puisne mortgagee who is not made a party to a suit for sale by a prior encumbrancer is entitled to insist on a decree for sale subject to the previous mortgage.

Rights of prior and subsequent mortgagees to bring the properties to sale and the rights of the purchasers elaborately discussed.

Taking two single mortgagees, their rights and liabilities will be as follows:

(1) If the 2nd mortgagee sues first, he can, without making the first mortgagee a party, sell the property subject to the first mortgage; the purchaser will become the owner of the equity of redemption instead of the mortgagor, but subject only to the first mortgage, as the second mortgage is extinguished by the sale. The first mortgagee can sue to recover his mortgage money by sale without making the 2nd mortgagee or the mortgagor a party but only the purchaser. If he wants a personal decree against the mortgagor, he can also be joined in the same suit.

(2) If the 2nd mortgagee sues first, he can join the first mortgagee and redeem him and sell the property and realise the amount due on both the mortgages.

(3) If the 2nd mortgagee sues first, he can join the first mortgagee, and with his consent ask for a sale of the property free of all encumbrances. The proceeds will be distributed according to priority.

(4) If the 2nd mortgagee sues first without making the 1st mortgagee a party, the 1st mortgagee may in execution of the first decree require the property to be sold free of his mortgage, and if the amount due to him is admitted, the Court can order a sale free of all encumbrances.

Mortgage—(Continued).**—1.—General—(Continued).**

(5) If the 2nd mortgagee sues first without making the 1st mortgagee a party, the 1st mortgagee can, while the first suit is pending, sue for sale making the 2nd mortgagee and the mortgagor parties, in which case there can be no sale in the 1st suit, and, if there had been a sale pending the 1st mortgagee's suit, the purchaser will be affected by *lis pendens*. He can redeem the 1st mortgagee in which case there will be no sale in the 1st mortgagee's suit or, if there is a sale, can claim the balance of the sale-proceeds after payment to the 1st mortgagee, as both 2nd mortgagee and mortgagor must be presumed to have obtained the value of their interests in the property out of the sale proceeds in the first sale. In this case the purchaser under the second sale gets the property and is entitled to possession against the 1st purchaser.

(6) If the 1st mortgagee sues first, making the 2nd mortgagee a party as he ought, there cannot be a trial of a further action.

(7) If the first mortgagee sues first without making the 2nd mortgagee a party, the 2nd mortgagee is not affected and can bring his own action for sale making the mortgagor a party if there had been no sale in the 1st mortgagee's suit, or, if there had been a sale, making the purchaser a party in his capacity of the ultimate owner of the equity of redemption, and the purchaser in the 2nd mortgagee's execution sale gets a good title to the property. He is not affected by any *lis pendens* while any purchaser in the first mortgagee's sale would be. **Chinnu Pillai v. Yenkatawami Chettiar**, 30 M.L.J. 347=(1916) M.W.N. 245=19 M.L.T. 217=40 M. 77=34 Ind. Cas. 507.

COUTTS-TROTTER and SRINIVASA
ATYANGAR, J.J.

(8) *Mortgage by two out of three brothers, members of joint Hindu family—Death of one executant—Suit against other executant and the non-executing brother only as representing the deceased executant—Ex parte decree and sale in execution and purchase by mortgagee—Non-executing brother's original share if passed by the sale—Decree for joint possession if can be made—Transfer of Property Act, S. 44.*

Delivery of symbolical possession is operative against the judgment-debtor who from that date becomes a trespasser, and the remedy of the decree-holder who has failed to get actual possession is by suit.

Where A and B, two out of three brothers, A, B and C, members of a joint *Mitakshara* family, executed a mortgage of their whole property, and the mortgagee on the death of A sued to enforce the mortgage against B as mortgagor and also as the legal representative of A, and against C, describing him only as A's legal representative:

Held—that the decree and the sale could not affect C's original one-third share in the mortgaged property, since the question of the validity of the mortgage as against C who was not

Mortgage—(Continued).**—1.—General—(Continued).**

a party thereto could not be raised and decided in the mortgage suit.

That, in a suit by the purchaser to recover the property, C was not barred from raising the question by the doctrine of constructive *res judicata*.

That the plaintiff, as purchaser of an undivided two-thirds share in huts used as residence by a joint Hindu family, could not be given a decree for joint possession, regard being had to S. 44 of the Transfer of Property Act.

That the proper course to follow is either to direct delivery of possession by partition in execution proceedings or to leave the purchaser to his remedy by a separate suit for partition. **Girja Kanta Chakrabarty v. Mohim Chandra Acharjya**, 20 C.W.N. 575=23 C.L.J. 587=35 Ind. Cas. 294.

MOOKERJEE and ROY, J.J.

(9) *Mortgagee not entitled to sale at the time of suit—Right of sale accrued pending suit—Decree for sale, whether can be given—Powers of the appellate Court to take cognizance of matters happening subsequent to the institution of the suit—Practice—'Place of suing' meaning of—Civ. Pro. Code, Ss. 15 to 20 and 21.*

Where a mortgagee, when he brought the suit to enforce his security, had a right to recover the principal amount due under the mortgage only by taking possession of the mortgaged property, but acquired the right to bring the property to sale subsequently, a decree could be passed for the sale of the properties.

Where it is necessary to prevent injustice or avoid multiplicity of proceedings, the appellate Court can take cognizance of matters which happened after the institution of the suit, for the purpose of moulding the relief which the plaintiff was entitled to.

Quare.—Whether Court has power to allow a plaintiff to claim reliefs, to which he was not entitled at the time of the action, on a new title which accrued later.

An objection that the Court taking cognizance of the suit is not entitled to adjudicate upon the claim, whether in whole or in part, for want of jurisdiction for any of the grounds given in Ss. 15 to 20 of the Civ. Pro. Code, is an objection to 'the place of suing' within the meaning of S. 21 of that Code.

Therefore an objection that the Court could not give any relief in a mortgage suit with respect to property comprised in the mortgage bond, on the ground that it is situate in the Agency tracts, is an objection to the place of suing. **Sri Raja Satrucherla Ramabhadra Razu v. Sri Sri Sri Vikrama Deo Maharajulanguaru**, 19 M.L.J. 360=(1916) M.W.N. 354=34 Ind. Cas. 411.

ABDUR RAHIM and SRINIVASA IYENGAR, J.J.

(10) *Execution of a decree on a simple mortgage—Auction-purchaser at a Court-sale, position of, against a puisne mortgagee—*

Mortgage—(Continued).**—1.—General—(Continued).**

Puisne mortgagee in possession under usufructuary mortgage — Puisne mortgagee, effect of decree on, to which he was not a party—Auction-purchaser, rights obtained by.

Held, that an auction-purchaser who has purchased property at a Court sale in execution of a decree on a simple mortgage obtained by a prior mortgagee cannot obtain possession against a puisne mortgagee who was not a party to the suit in which that decree was obtained, and who is in possession under the terms of a usufructuary mortgage of a later date.

Held further, that the rights of a puisne mortgagee cannot be affected by the provisions of a decree to which he was not a party.

Held also, that such a purchaser cannot obtain a right greater than the right possessed by the prior mortgagee. He can do exactly what the holder of the prior mortgage or the mortgagor could do—no less and no more. **Sheo Indar Bahadur Singh Kunwar v. Ghazludda**, 18 O.C. 347=33 Ind.Cas. 243.

STUART and PANDIT KANHAIYA LAL, A.J. CS.

- (11) *Mortgage — Prior usufructuary mortgage's rights—Rights of purchaser of equity of redemption in decree of 1st mortgagee's suit to which puisne mortgagee was not made party—Declaratory suit by puisne mortgagee without asking for further relief, maintainability of—Transfer of Property Act, S. 67—Civ. Pro. Code (1908), O. XXXIV, r. 1.*

A second mortgagee in possession under a mortgage under which he was entitled to possession, cannot be lawfully ousted from possession by his mortgagor or by the 1st mortgagee or by a purchaser at a sale under a decree in a suit on the 1st mortgage to which he was not a party. The purchaser in such a suit, whether he is a first mortgagee or a stranger, does not acquire the rights of the mortgagor as at the date of the first mortgage but only those that subsist in him at the date of the suit.

Therefore a puisne mortgagee's suit for declaration that the decree and sale in the first mortgagee's suit were inoperative against him and that the purchaser was not entitled to disturb his possession, without asking for further relief is maintainable. **Maung San Bwin v. A.N.K. Nagamutu**, 8 Bur. L.T. 261=30 Ind. Cas. 710=8 L.B.R. 266.

FOX, C.J.

References:—9 Ind. Cas. 513=1 M.W.N. 165=21 M.L.J. 213=9 M.L.T. 431; 26 M. 537, R.

- (12) *Suit by prior mortgagee—Puisne mortgagee a party—Mortgage amount not proved—Duty of executing Court.*

Where a suit was brought by the first mortgagee impleading the mortgagor and the second mortgagee and a decree was passed for the sale of the property and the sale proceeds were brought into Court and the first mortgagee was

Mortgage—(Continued).**—1.—General—(Continued).**

paid and the puisne mortgagee was *ex parte* and did not prove the amount due to him under the mortgage. *Held* that the executing Court cannot inquire into the amount due to the second mortgagee and direct the same to be paid out of the sale proceeds.

Whether a second suit by the puisne mortgagee will lie?

When a decree is to be executed, the executing Court has only the power to carry out the specific orders contained in the decree. **Sesha Iyer v. Arimuttu Yathyar**, (1916) M.W.N. 323=34 Ind. Cas. 362.

SESHAGIRI AIYAR, J.

- (13) *Mortgagor and mortgagee—Assignment of mortgage—Equities—Decree debt against assignor—Subsequent to date of assignment—Equitable set-off—Extent.*

In a mortgage suit by an assignee of the mortgage a decree debt subsequent to the date of the assignment against the assignor cannot be allowed to be set-off.

The doctrine that there is a right of equitable set-off is well founded but has always been confined to unascertained sums arising out of the same transaction. To give the words "equitable set-off" a wider meaning than this appears to be very dangerous.

Assignment of a mortgage is not an actionable claim within the meaning of S. 132 of the Transfer of Property Act.

It is well settled that, where a mortgage is transferred without the privity of the mortgagor, the transferee takes subject to the state of account between the mortgagor and the mortgagee at the date of the transfer.

An assignment of a mortgage is not covered by the same rules that govern assignments of other choses-in-action. **Subramania Iyer v. Subramania Patter**, (1916) M.W.N. 351=30 M.L.J. 615=34 Ind. Cas. 859.

AYLING and NAPIER, J.J.

- (14) *Execution of decree—Preliminary decree for sale—Decree absolute—Code of Civil Procedure (1908), O. XXXIV, rr. 4 and 5 —"Mortgaged property," meaning of.*

A puisne mortgagee brought a suit for sale on foot of his mortgage. He impleaded the mortgagor and also a prior mortgagee who held a mortgage over the property mortgaged to him and also over other properties belonging to the mortgagor. A decree for sale of the mortgaged property was passed in his favour upon his redeeming the prior mortgage. The prior mortgage was redeemed by him, and then he applied for a decree absolute for the sale of the property common to both the mortgages and also of such properties as were mortgaged to the first mortgagee but not to him. The Courts below disallowed his application.

Held, that the puisne mortgagee had been subrogated to the rights of the first mortgagee upon his redeeming the latter, and the Courts below ought to have made the decree absolute in his favour allowing him to sell the properties

Mortgage—(Continued).**—1.—General—(Continued).**

in the first mortgage over and above the property common to both the mortgages.

Per *Piggott, J.*—So far as the terms of O. XXXIV, r. 5 are concerned, these merely lay down that, in a certain event, the Court shall pass a decree that "the mortgaged property or a sufficient part thereof" be sold. The meaning clearly is that the mortgaged property which the plaintiffs are under the peculiar circumstances of the case entitled to bring to sale shall be ordered to be sold. Neither r. 4 nor r. 5 of O. XXXIV says anything about the specification of the mortgaged property.

Per *Walsh, J.*—Observations made on the Court's inherent powers to amend its decrees in order to promote the ends of justice. *Udhishter Singh v. Kausilla*, 14 A.L.J. 502 = 38 A. 398 = 34 Ind. Cas. 79.

PIGGOTT and WALSH, JJ.

- (15) *Definitions of mortgage and sale—Redemption—Partly paid mortgage—Transfer of Property Act, Ss. 54, 58—Transfer of interest in property—Presumption arising from execution of mortgage-deed—Consideration of mortgage—Mortgagor's competency of objecting to the mortgage—Completion of mortgage—Evidence Act, S. 92 (4).*

Held, that the definitions of "sale and mortgage" as given respectively in Ss. 54 and 58 of the Transfer of Property Act should be unreservedly adopted in the Punjab and given their full logical effect, and that a mortgage is a "transfer of interests" in property, which is a contract completed at the time of execution and not liable to rescission at the option of either party, in the absence of express or implied stipulation to that effect.

Held, also, that, in the absence of a covenant or stipulation to the contrary, a mortgage is complete and the "transfer of interest" in property is effected, not when the consideration for it is paid or made good, but when the mortgage contract is entered into, regardless of whether and when the consideration is paid or made good.

Held, further, that the presumption being in favour of immediate transfer of interest when the deed of mortgage is executed, it could be rebutted by proof of an express stipulation to the contrary or by proof of facts and circumstances from which such a contrary intention might reasonably be inferred. *Allah Ditta v. Nazar Din*, 51 P.W.R. 1916 = 53 P.R. 1916 (F.B.).

JOHNSTONE, C. J., CHEVIS, SCOTT-SMITH, SHADI LAL and LE ROSSIGNOL, JJ.

References:—153 P.R. 1882; 100 P.R. 1889; 1900 P.L.R. p. 401; 59 P.R. 1907 = 95 P.W.R. 1907 (F.B.), *overruled*; 103 P.R. 1906 = 86 P.W.R. 1906, *doubted*; 34 A. 273; 29 R. 46; 31 B. 552; 10 O.W.N. 1032; 32 M. 201, F; 19 Ind. Cas. 676, D.; 132 P.R. 1879; 16 P.R. 1884; C. Revision 355 of 1906 (unpublished); 26 P.W.R. 1908; 31 P.R. 1911 = 236 P.W.R. 1911; 55 P.R. 1911 = 41 P.W.R. 1911; 66 P.R.

Mortgage—(Continued).**—1.—General—(Continued).**

1912 = 82 P.W.R. 1912; 67 P.R. 1914 = 207 P.W.R. 1914; 10 Ind. Cas. 268; 35 M. 114; 18 Ind. Cas. 610; 35 C. 1051, R. and *Expl.*

- (16) *Purchaser of equity of redemption—Payment to mortgagor of money by a mortgagee left with him for payment to prior mortgagee after the sale of equity of redemption, effect of, on purchaser's rights—Purchaser, whether bound to give notice of his purchase to mortgagee.*

A mortgagor left a portion of the mortgage-money with the mortgagee to pay off a prior mortgage but the money was not paid to the prior mortgagee. Thereafter the mortgagor sold his equity of redemption to the plaintiff. After the sale the mortgagee paid to the mortgagor the portion of the mortgage-money which had been left with him for payment to the prior mortgagee.

Held, that any dealings between the mortgagor and the mortgagee made after the plaintiff's purchase could not affect his rights and therefore the plaintiff could not be liable to pay the money paid to the mortgagor after his purchase.

Held further, that the law does not require the purchaser of a property which has been mortgaged to give notice of his purchase to the mortgagee. *Sheo Prasad v. Bisheshar Nath*, 19 O.C. 12 = 34 Ind. Cas. 266.

LINDSAY, J. C.

- (17) *Decree on prior mortgage without making puisne mortgagees a party—Suit by puisne mortgagee—Accounts contained in previous decree whether binding on puisne mortgagee.*

Where a prior mortgagee obtained a decree for sale on the basis of his mortgage without impleading the puisne mortgagee, and the puisne mortgagee subsequently brought a suit for redemption of the prior mortgage and impugned therein the correctness of the account contained in the previous decree, *held*, that the proper course in such a case is to proceed on the basis of the mortgage to find out whether the amount declared in the previous decree to be due to the mortgagee was excessive and, if it was, to readjust the account as if no such decree had been obtained. The puisne mortgagee in such a case is entitled to repudiate his liability for anything beyond what is actually due on the mortgage. *Gouri Shanker Singh (Thakur) v. Rai Rajnar Bahadur Singh*, 19 O.C. 39 = 35 Ind. Cas. 434.

PANDIT KANHAIYA LAL, A. J. C.

- (18) *Construction of mortgage-deed—Described as bond at the end—Effect of—Interest—Costs.*

Held, that a document given by the mortgagor to the mortgagee for the additional advance made to the former by the latter is practically a mortgage deed, although at its end it is described as a bond in which it is stated that the debt shall be secured on the immoveable property already mortgaged and that the earlier mortgage shall be irredeemable except upon discharge of the debt secured by the said document,

Mortgage—(Continued).**—1.—General—(Continued).**

and that the mortgagor is not at liberty to claim redemption without paying the principal and interest at the agreed rate due thereon.

In this case interest at the agreed rate of Rs. 2-2-0 per cent. per mensem for nearly 15 years amounting to Rs. 453-12-0 was allowed on the principal of Rs. 99 and all costs. **Lalla Hukam Chand v. Kadar Buksh**, 100 P.W.R. 1916.

SHADI LAL and LE-ROSSIGNOL, JJ.

References:—14 C. 687, Diss.; 11 Ind. Cas. 629, R.

(19) *Mortgage-decree—Execution sale—Purchase by decree holder—Application by judgment-debtor to set aside sale—Limitation Act (1908), Sch. I, Art. 166, or S. 231, Chota Nagpur Tenancy Act (VI, B.C. of 1908), applicable.*

In execution of a mortgage-decree, the mortgaged property was sold on 21st December 1912 and was purchased by the decree-holder and the sale was confirmed on the 15th February 1913. On 24th August 1914, the judgment-debtor applied to set aside the sale on the ground that, under S. 47 of the Chota Nagpur Tenancy Act, the sale was null and void.

Held—That the application was barred by limitation, if not under Art. 166 of the Limitation Act, at any rate under S. 231 of the Chota Nagpur Tenancy Act. **Nilmoni Goswami v. Roban Majhi**, 20 C.W.N. 1243=1 Pat. L.J. 483.

SHARFUDDIN and ROE, JJ.

(20) *Decree for road-cess—Purchase in execution—Title of purchaser whether paramount to that of mortgagee over same property—S. 65, Act VIII of 1885 (Bengal Tenancy)—Ss. 47, 64 (A), 64 (B), Act IX of 1880 (Bengal Road-cess).*

The definition of rent in the Bengal Tenancy Act includes road cess, and therefore, under S. 65 of that Act, a decree for road cess is a first charge upon the tenure. The provisions of Ss. 47, 64 (A) and 64 (B) of the Road-cess Act also support this view (a).

The purchase in execution of a decree for road-cess gives the purchaser a title paramount to a mortgage over the same property, even though the mortgage was prior to the decree. **Cheoditti v. Quadress**, 1 Pat. L.J. 161.

MULLICK, J.

Reference:—(a) 21 C. 722, R.

(21) *Marshalling of securities—Right, when available—Suit by prior mortgagee—Subsequent mortgagee, a necessary party—Prior mortgagee, right of, to enforce his securities—Puisne mortgagee, when can redeem prior mortgage.*

The doctrine of marshalling which finds expression in S. 81 of the Transfer of Property Act cannot be availed of by a subsequent mortgagee who has notice of the prior mortgage.

A subsequent mortgagee is interested in the equity of redemption and is a necessary party to a suit brought by the prior mortgagee on the footing of his mortgage.

Mortgage—(Continued).**—1.—General—(Continued).**

Where, therefore, a decree is passed behind his back, he is entitled to treat it as a nullity and his rights remain unaffected by the decree and by proceedings in execution thereof.

There is no provision of law preventing a prior mortgagee from bringing a suit with the object of getting the full benefit of the security which he holds (a).

A puisne mortgagee, who has not been joined as a party to the suit of the prior mortgagee, is entitled to redeem the prior mortgage with a view to enforcing his own mortgage upon payment of such sum as may be found due (b). **Kishen Chand v. Ramsukh Das**, 81 P.W.R. 1916=86 P.R. 1916=33 Ind. Cas. 815.

SHADI LAL and LESLIE-JONES, JJ.

References:—(a) 23 A. 1=A.W.N. (1900) 178, F. (b) 26 M. 537, 28 B. 53=5 Bom. L.R. 892, F.

(22) *Mortgage decree—Sale in execution and purchase by mortgagee—Mortgaged property sold for arrears of revenue—Purchase subject to mortgage—Mortgagee purchaser whether can bring a suit for possession against purchaser in revenue sale—Remedy of former.*

A mortgagee sued the mortgagors on the mortgage and obtained a decree, in execution of which he purchased the mortgaged property and obtained formal delivery of possession, but in the meantime the mortgaged property had been sold for arrears of revenue and purchased by strangers. The purchase at the revenue sale was subject to the plaintiff's mortgage.

The mortgagee purchaser now brought a suit for possession against the purchasers at the revenue sale. *Held* that the plaintiff was not entitled to a decree for possession, but he was entitled to the ordinary remedy of a mortgagee, namely, to have the mortgaged property put up for sale, if the defendants failed to redeem. **Balli Singh v. Bindeswari Tewari**, 1 Pat. L.J. 133=35 Ind. Cas. 532.

CHAMIER, C.J. and JWALA PRASAD, J.

(23) *Stipulation to pay by instalments—Provision to call up whole amount 90 days after demand—Failure to pay instalments—No final demand—No right to sue for whole amount—Construction of the bond—Proper relief.*

On the 14th November 1912, the defendant mortgaged certain immovable properties to the Alliance Bank of Simla (plaintiff), in lieu of a sum of Rs. 15,000 bearing interest at 7 per cent per annum with six-monthly rests. According to the terms of the bond, the principal was to be repaid in five annual instalments of Rs. 3,000 each beginning on the 1st January 1914. The bond also contained a provision that the mortgagor will, 90 days after demand, pay to the Bank or its assigns the amount for the time being owing by the mortgagor to the Bank on account current to be made up with interest and other charges.

The defendant failed to pay the first instalment, and the Bank, after some correspondence,

Mortgage—(Continued).**—1.—General—(Continued).**

sued for the recovery of the whole amount due. It was contended by the defendant that according to this provision the Bank was not entitled to claim even the amount of the first instalment until 90 days after demand and that the Bank having failed to make a demand 90 days before filing the suit, the suit was not maintainable.

Held that the Bank was fully entitled to sue for the amount of each unpaid instalment as soon as it fell due, and that the provision in question is one which confers on the Bank the further right to call up the whole amount of the debt whenever it thought fit and whether or no there had been any default on the part of the mortgagor, 90 days after demand.

Held, also, that, although the defendant has failed to carry out the terms of the mortgage contract, the Bank was not entitled to put an end to the contract and to call up the whole amount although the remaining instalments have not fallen due (a).

Held further that, as there was no final demand for the payment of the whole debt 90 days before the institution of the suit, the Bank was only entitled to claim the amount of the first instalment plus the interest due on the whole debt up to the date of institution of the suit. **Kanhaya Lal v. Alliance Bank of Simla**, 62 P.R. 1916=161 P.W.R. 1916=6 P.L.R. 1917=35 Ind. Cas. 561.

SHADI LAL and LESLIE-JONES, JJ.

Reference:—(a) 26 B. 211, D.

(24) *Mortgage—Decree for sale with provision for recovery of balance of decree amount from the other properties of the mortgagor if sale-proceeds are insufficient—Execution—Starting point of limitation.*

Held on a reference to the Full Bench that "where a mortgage decree for sale also includes a provisional decree for recovery of any balance from the other properties of the mortgagor in case the sale-proceeds of the mortgaged property are found insufficient to satisfy the entire decree amount, the period of twelve years limited by S. 48 of the Code of Civil Procedure, for execution of the decree against the other properties of the mortgagor begins to run, not from the date of the decree, but only from the date when the mortgaged properties are sold and the sale-proceeds are found insufficient to satisfy the decree" (a).

Properly speaking, there should be first a decree for sale of the mortgaged properties, and if the mortgaged properties were found insufficient, a separate decree or order should then be made for realization of the balance from the person and other properties of the judgment-debtor. But as there was a very prevalent practice in the mofussil Courts to draw up one decree providing for the sale of the mortgaged property and if the sale-proceeds were insufficient to satisfy the decree, for recovery of the balance from the other properties of the mortgagor, it was held that a combined decree like this, though irregular, would be within the competency of the Court and binding on the

Mortgage—(Continued).**—1.—General—(Continued).**

parties. **Alyasamler v. Yenkatachela Mudali**, 31 M.L.J. 513=(1916) 2 M.W.N. 296=4 L.W. 507=20 M.L.T. 391.

ABDUR RAHIM, O.C.J., and SESHAGIRI AIYER and PHILLIPS, JJ.

References:—(a) 29 Ind. Cas. 556; 26 M.L.J. 83; 16 M.L.T. 399; 30 M. 461; 18 M.L.J. 548; 16 C.L.J. 318; 38 M. 677; 29 M. 46; 36 M. 104=21 M.L.J. 546; 29 A. 12; 33 A. 264 (P.C.); 18 C.W.N. 492; 20 M. 107=7 M.L.J. 66; 27 A. 619; 7 M. 80; 7 M. 83; 23 M. 60, R.

(25) *Mortgage—Suit by a first mortgagee without making a subsequent usufructuary mortgagee a party—Decree and sale thereunder—Properties purchased by the mortgagee—Subsequent mortgagee renewing his mortgage after decree—Whether the previous usufructuary mortgage kept alive—Suit for possession by the decree holder auction-purchaser—Maintainability.*

Where a mortgagee, who had purchased mortgaged properties in execution of the decree in the suit on his mortgage, to which a second usufructuary mortgagee, whose mortgage was before the decree and who had taken a new usufructuary mortgage after the date of the decree from the owner, was not a party, brought a suit for possession under O XX1, r. 103, Civ. Pro. Code, against the owner and the second usufructuary mortgagee.

Held, that in the absence of proof of any intention on the part of the usufructuary mortgagee to give up his security under the first deed he must be presumed to have intended to keep it alive and he was entitled to rely on it against the plaintiff's decree and sale under it.

Held also, that, the defendant being in the position of a puisne mortgagee with possession and the plaintiff, in that of first mortgagee who had purchased the property in execution of the decree on his mortgage to which the puisne mortgagee was not a party, the plaintiff's suit for possession must fail.

The question whether previous incumbrances paid off or renewed were to be treated as still kept alive or as extinguished against mesne incumbrances is one of intention of the parties to the transaction and, where there is no clear evidence of that intention from express declarations or attendant circumstances, parties must be presumed to have intended what is for their benefit; the mere fact that the incumbrance has been paid off or renewed does not decide the question.

Where a subsequent incumbrancer alleges that a prior incumbrance has been extinguished by payment or renewal it must be clearly established by cogent evidence, whether direct or inferential that the person making the payment or taking the renewed deed, deliberately and with the knowledge that it was to his benefit to keep the prior incumbrance alive elected to extinguish it for all purposes; otherwise the presumption that a man intends what is to his benefit should be allowed to prevail.

Mortgage—(Continued).

—1.—General—(Continued).

The principle under which protection is granted to persons renewing prior incumbrances against intervening incumbrances applies also to cases of intervening decrees under which property has been sold.

In a usufructuary mortgage possession is an essential part of the security and what is kept alive is not merely the security but the rights of the mortgagee on the property under the deed. *Sree Mahant Prayag Dass Jee Yaru v. Ravur Chengama Naidu*, 20 M.L.T. 295 = (1916) 2 M.W.N. 288 = 4 L.W. 477.

AIDUR RAHIM, O.C.J. and KRISHNAN, J.

(26) *Sub-mortgage — Mortgagor paying off mortgage amount without notice of the sub-mortgage—Good faith of mortgagor—Sub-mortgage, if extinguished—Right of sub-mortgagee to enforce mortgage security—Question of notice decided without an issue thereon — Objection, if can be raised in appeal—Practice.*

A sub-mortgage is extinguished by the bona fide payment of the mortgage-debt by the mortgagor without notice or knowledge of the sub-mortgage and it is for the sub-mortgagee to allege and prove that the mortgagor had notice of his sub-mortgage before redemption took place (a).

Where the lower Court found against the fact of notice though there was no issue on the point.

Held that an objection as to want of issue cannot be raised in Second Appeal since the defect, if any, was due only to the person raising the objection in the present case. *Chinnaswamy v. Venkata Ramakrishnaaya*, 4 L.W. 502 = (1917) M.W.N. 111.

SPENCER and PHILLIPS, JJ.

References:—(a) 18 M.L.J. 462; 29 B. 199, R.

(27) *Suit on mortgage—Want of necessary parties.*

A mortgage is indivisible, and, if upon the record, there be not found all parties entitled to a share of the money due under the mortgage, the suit must be dismissed in its entirety (a). *Girwar Narain Mahton v. Mussammat Makbunessa*, 1 Pat. L.J. 468 = 36 Ind. Cas. 542.

ROE and JWALA PRASAD, JJ.

Reference:—(a) 6 C. 515, F.

(28) *Mortgage by certificated guardian—Sanction to raise loan granted by District Judge but subsequently revoked—Money lent without notice of revocation and applied by guardian for minor's benefit—Effect of the revocation of sanction on the mortgage—Rate of interest.*

The certificated guardian of a minor obtained the leave of the District Judge to raise a loan for a certain amount from the plaintiff. Subsequently the District Judge called upon the guardian to state whether the mortgage had been executed or not and on the guardian's failure to do so the Judge revoked the order. No notice of revocation was given either to the

Mortgage—(Continued).

—1.—General—(Continued).

plaintiff or the guardian and the plaintiff advanced the money on the mortgage which was executed by the guardian and the entire amount was applied to the benefit of the minor's estate. The rate of interest was not placed before the District Judge and was not sanctioned by him but that stipulated in the mortgage bond was Rs. 1-8-0 with annual rests:

Held—That even assuming that the order of the District Judge, revoking the lease was effective as against the plaintiff the transaction stood in the same position as if there was no sanction by the Judge to the certificated guardian. The order was merely a voidable one under S. 30 of the Guardians and Wards Act at the instance of the minor on coming of age after restoration of the benefit received by him under the order and the plaintiff was entitled to a decree for the amount advanced by him on the mortgage bond but only to interest at the rate of 12 per cent. simple interest. *Manasharam Das v. Ahmad Hussain Prodhan*, 21 C.W.N. 63.

CHATTERJEE and RICHARDSON, JJ.

(29) *Mortgage—Gross and culpable negligence of vendor (first mortgagee) in leaving title deeds with vendee (mortgagor)—Whether prior mortgage postponed thereby in favour of subsequent mortgage by deposit of title deeds—Search in Registration office—Constructive notice—Priority—Transfer of Property Act (IV of 1882), Ss. 3, 78.*

There are three ingredients in S. 78 of the Transfer of Property Act—fraud, misrepresentation, or gross negligence. The section makes these ingredients disjunctive and one cannot be defined in terms of the other or others. They are three different kinds of conduct and are in no way co-extensive (a).

Per Holmwood, J.—The mere omission on the part of the mortgagee to take and keep the title deeds is not of itself gross negligence and the existence of gross negligence must be determined according to the circumstances of each case—and one of the circumstances to be taken into consideration is the fact that in this country a universal system of registration exists (b).

Per Holmwood, J.—What constitutes gross negligence is always excessively difficult either to define or by way of anticipation to illustrate.

Per Holmwood, J.—Neglect to recover the title deeds by a vendor from a vendee who has secured the greater part of the purchase-money to the vendor by giving him a mortgage on the property itself, when the vendor has full notice that the vendee is impecunious and a bad paymaster and thereby the vendee is enabled to obtain a second mortgage on the property by deposit of the title deeds, is gross and culpable negligence, and is rendered more so by a deliberate suppression of the existence of the mortgage in the sale deed and a suggestion that the purchase-money was required in cash and

Mortgage—(Continued).**—1.—General—(Continued).**

paid accordingly. Such negligence postpones the rights of the prior mortgagee.

Registration not being in itself notice a search made by the clerk of the solicitor to the vendee who has an interest to conceal the encumbrance from the second mortgagee cannot saddle the latter with notice of the encumbrance. **Nanda Lal Roy v. Abdul Aziz**, 43 C. 1054=34 Ind. Cas. 115.

HOLMWOOD and IMAM, JJ.

References:—(a) 2 C.W.N. 750; (1860) 2 De G.F. & J. 578; (1907) 2 Ch. 104, R. (b) 2 C.W.N. 750; (1860) 2 De G. F. & J. 578, R.

(30) *Difference between English and Indian law as to the conception of mortgage—Transfer of Property Act, Ss. 58 and 66—Lease by mortgagor in possession.*

Under the Transfer of Property Act, 1882, a mortgage is a transfer of an interest in specific immoveable property for the purpose of securing (1) the payment of money advanced or to be advanced by way of loan, (2) an existing or future debt, or (3) the performance of an engagement which may give rise to a pecuniary liability. In whatever terms the document may be expressed nothing more than what is stated in S. 58 (a) is effected. Consequently although in the case of an English mortgage the mortgagor transfers the property absolutely to the mortgagee the Indian law does not recognize that he does so in fact, and the mortgagor remains in Indian law owner of the property subject of course to the mortgage.

The fictions of English law in regard to the legal and equitable estate have not been continued in India.

A mortgagor in possession can *prima facie* exercise the ordinary rights of an owner in possession.

The only restriction imposed on him is that contained in S. 66 of the Transfer of Property Act, that is to say, he must not commit any act which is destructive or permanently injurious to the property if the security is insufficient or will be rendered insufficient by such act. **Tana Peena Cheena Pitchay Meera Rowther v. Mammakantakath Pathumakutty Uma**, 8 L.B.R. 413=9 Bur. L.T. 243=34 Ind. Cas. 24.

FOX, C.J., and TWOMEY, J.

(31) *Mortgage—Simple mortgage—deed and lease executed simultaneously, effect of—Agreement putting mortgagee in possession to appropriate profits in payment of principal money, admissibility of—Evidence Act, S. 92—Transfer of Property Act, S. 76, cl. (h).*

Where a simple mortgage-deed provided that the principal money carried no interest and simultaneously with the execution of the mortgage-deed the mortgagor executed a lease in favour of the mortgagee for a period of six years which was the term fixed for payment in the mortgage-deed, held, that the lease and mortgage could not be treated as constituting

Mortgage—(Continued).**—1.—General—(Continued).**

one transaction, namely, that of a usufructuary mortgage.

In this case the mortgagee was ejected from the property on the expiration of the lease, but was subsequently restored to possession of a portion of the property. It was alleged that the arrangement between the parties was that the mortgagee was to enjoy the profits, crediting them to the repayment of the principal money.

Held, that the alleged arrangement, which was not one for satisfaction of the terms of the deed of mortgage, but in direct contradiction of the terms of the deed of mortgage, could not be proved under S. 92 of the Evidence Act.

Held further, that S. 76, cl. (h) of the Transfer of Property Act has no application to a case where the mortgagee has not been shown to be in possession *qua* mortgagee. **Muhammad Husain (Mlr) v. Muhammad Ashgar (Sayed)**, 19 O.C. 328.

STUART, J.C.

(32) *Mortgage—Simple mortgage—Mortgagor and mortgagee—Recitals in mortgage bond—Effect—Deed containing no words conveying interest in immoveable property—Effect—Validity as simple mortgage—Mortgagor in possession—Scope and extent of his powers—Acts done by him when binding on mortgagee—Manager of minor mortgagor's estate—Agreement entered by him on minor's behalf in excess of his authority—Invalidity—Entry in record of rights on the strength of such agreement—Power of High Court to enquire into basis of entry—Transfer of Property Act, 1882, S. 58 (a) and (b)—Guardians and Wards Act (VIII of 1890), Ss. 27 and 29.*

When a mortgagor is allowed to remain in apparent possession and ownership of the mortgaged properties, the recitals in the mortgage-deed are very important in considering the nature and the scope of the implied authority which arises as between the mortgagors and mortgagees.

A deed which is expressly called a mortgage-deed and expressly mortgages and hypothecates the property charged as security for the mortgage debt, is according to the law of India, a valid simple mortgage. The deed need not contain any words involving a transfer of any specific interest in immoveable property (a).

Where a mortgage bond is executed on behalf of certain minors by the manager appointed by the Court and in pursuance of a statute, *viz.*, the Guardian and Wards Act VIII of 1890, the fact that the Manager was the person who executed the mortgage and is declared to be the Manager of the estate, rather limits than extends the ordinary rights of a mortgagor in possession (b).

While a mortgagor remains in possession after the date of a mortgage he can deal with the property in the usual and customary way so as to bind the mortgagee; but he must not

Mortgage—(Continued).**—1.—General—(Continued).**

do anything prejudicially affecting the mortgaged property as security for the mortgage-debt.

Where a person gets a contractual benefit from a mortgagor in possession after the date of the mortgage, the *onus* is upon such person to prove that it was a benefit which he might derive and retain in the usual course of the management of the property.

Where the status of the defendants as recorded in the Record-of-rights was made on foot of an agreement not legally binding upon the mortgagees, the High Court is entitled in law to inquire and examine into the grounds and basis upon which the entry in the Record-of-rights was made. **Anand Kam Marwarl v. Dhanpat Singh**, 1 Pat. L.J. 563.

ATKINSON and KINGSFORD, JJ.

References:—(a) 34 A. 446; 35 C. 837, F. (b) 17 C.L.J. 389, P.

- (33) *Mortgage—Mortgagee in possession—Duty to keep mortgaged property in repair—Reasonable expenditure on irrigation—Impossibility to ascertain sums spent—Right to amount spent therefor—No right to sums paid for cesses—Road cess—Transfer of Property Act, Ss. 72, 76 (3).*

A mortgagee in possession is required to keep the property in repair, and reasonable expenditure upon irrigation comes under the heading of keeping the property in repair. But where it is impossible for the Court to say from the mortgagee's accounts what sums were actually expended for the bare keeping of the property in repair, and what sums were spent on improvements of the property, the Court will not assess any figure under this head.

A mortgagee is not entitled to add the expenses he incurred for payment as cesses (e.g., road-cess) to his mortgage security.

The payment of a public charge for which the property may not be summarily sold cannot be constituted a charge upon the property (a).

S. 72 of the Transfer of Property Act does not cover a case in which the right, title and interest only of the mortgagor is to be put up for sale. It covers only the case of a payment made to save the security itself. **Rajendra Prasad v. Bahuria Ratan Jote Kuer**, 1 Pat. L.J. 589.

ROE and JWALA PRASAD, JJ.

Reference:—(a) 30 C. 794, Ref to.

- (34) *Mortgage—Non-transferable occupancy holding—Landlord taking mortgage from tenant—Prior mortgages—Landlord suing on his mortgage—No right to question validity of prior mortgages.*

Where the landlord who takes a subsequent mortgage from his tenant sues the latter on the mortgage, he cannot claim to set aside all previous mortgages on the ground that the property which was mortgaged was non-transferable and that the mortgages were effected

Mortgage—(Continued).**—1.—General—(Continued).**

without his consent (a). **Natabar Sarkar v. Natabar Mandal**, 33 Ind. Cas. 112.

WOODROFFE and CHAUDHARI, JJ.

References:—(a) 27 Ind. Cas. 61=18 C.W.N. 971=20 C.L.J. 52=42 C. 172 (F.B.), R.

- (35) *Evidence—Mortgage deed—Execution proved—Denial of payment of consideration—Onus of proof.*

A mortgage deed the execution of which is proved is presumed to have been executed for consideration, and if the mortgagor pleads non-receipt of consideration, the *onus* of proving the plea lies on him.

Where a mortgage-deed purports to have been executed in consideration of a debt due under a prior mortgage-deed and the execution of both deeds is proved, the evidence afforded by the execution of the prior deed read with further admission of the existence of the debt evidenced by it, in the subsequent deed, is sufficient proof of the existence of the antecedent debt in satisfaction of which the second deed was executed. **Narain Singh v. Rustom Singh**, 33 Ind. Cas. 777.

KANHAIYA LAL, A.J.C.

- (36) *Unregistered mortgage-deed—Personal liability—Covenant for payment of money on certain contingency—Absence of such contingency.*

The question of the personal liability of a mortgagor depends upon the construction of the document in each case. The test is what is the remedy provided for the satisfaction of the mortgage debt in each case.

Suit on an unregistered mortgage bond. The principal issue for decision in the case was whether the defendant was personally liable. The mortgage-deed had provided that in case of there being any dispute as to the title to the mortgaged property or in case any defect in title to come to light the mortgagor was to be personally liable. It also contained a promise to pay the money within a fixed period. The remedy provided in the bond for the satisfaction of the mortgage-debt was the transfer by way of sale to the mortgagee. *Held* that the contingency mentioned in the bond did not arise and as the personal covenant is entered into in every form of mortgage, the remedy provided for non-payment also showed that there was no personal liability on the part of the mortgagor to pay. Consequently the present suit to enforce the personal liability was not maintainable. **Nazim Husain v. Mahabir Prasad**, 30 Ind. Cas. 224.

LINDSAY, J.C.

References:—3 Ind. Cas. 871=12 O.C. 275; 22 I.A. 68=22 C. 434, R.

- (37) *Mortgagor's power of alienation after mortgage—Right of assignee—Effect of sale or foreclosure proceedings.*

A mortgagor cannot by any dealings with the mortgaged property subsequent to the date of the mortgage affect the rights of the mortgagee under the contract, subject to the condition that the mortgagor's power of alienation is not

Mortgage—(Continued).**—1.—General—(Continued).**

restricted. The assignee of mortgaged property can take only subject to the encumbrance, and if the property is sold or foreclosed by the mortgagee in proceedings properly taken for the purpose, the interests which the mortgagor may have created subsequent to the mortgage may be destroyed. **Syed Hussain v. Bank of Upper India, Ltd.**, 30 Ind. Cas. 289.

LINDSAY, J.C., and KANHAIYA LAL, A.J.C.

(36) Prior unregistered mortgage—Subsequent registered mortgage—Priority.

As between a prior unregistered mortgage and a subsequent registered mortgage the former cannot claim priority over the latter. **Gajadhar Lal v. Gulaba**, 30 Ind. Cas. 388.

KANHAIYA LAL, A.J.C.

(39) Right of mortgagee to value of improvements—Proof of claim.

A mortgagee who claims the value of improvements effected by him will be allowed a moderate amount on proof of his claim by satisfactory evidence and he cannot succeed if the claim is extravagant and not supported by documentary evidence. **Sham Sundar v. Harbans Singh**, 30 Ind. Cas. 517.

JOHNSTONE and SHAH DIN, J.J.

(40) Mortgage not proved to be duly executed—Simple money-decree cannot be given.

A simple money-decree cannot be given, in a suit on a mortgage if the mortgage is not proved to have been duly executed according to the provisions of the Transfer of Property Act, as it would entirely change the cause of action. **Munshi Lal v. Maugat Rai**, 31 Ind. Cas. 706.

RICHARDS, C.J. and RAFIQUE, J.

(41) Mortgage—Suit thereon—No prayer for simple money decree—Grant of such decree discretionary with Court—Limitation Act, 1908, Sch. I, Art. 116—Period of limitation—Starting point.

The Court is not bound to give a simple money-decree where the plaintiff sues to realise his debts on the foot of a mortgage. No doubt a simple money-decree is frequently given by the Court but this is a matter of grace. When it does so it should, strictly speaking, amend the plaint by adding a claim for a simple money decree against the individual and the decree ought to be against that individual.

The contention that limitation under Art. 116, Limitation Act, 1908, runs from the date of the registration of the bond is extremely doubtful. **Mohan Lal v. Lekhraj Singh**, 33 Ind. Cas. 111.

RICHARDS, C.J. and RAFIQUE, J.

(42) Mortgagees—Under proprietary rights, if entitled to claim—Oudh Rent Act (XXII of 1886), S. 107-II.

A mortgagee cannot claim under-proprietary rights under S. 107-II of the Oudh Rent Act (XXII of 1886), as he cannot be considered a

Mortgage—(Continued).**—1.—General—(Continued).**

successor by transfer, to the original grantee. **Kishan Dayal v. Thakur Prasad**, 33 Ind. Cas. 203.

CAMPBELL, J.M.

(43) Mortgage—Mortgage of zamindari and sir lands—Loss by mortgagor of zamindari rights—Mortgage to be effective against mortgagor's ex-proprietary rights—Suit to establish ex-proprietary rights—Adverse possession.

When a zamindar having mortgaged his zamindari rights together with his sir land loses his zamindari rights and becomes an ex-proprietary tenant of the sir, the mortgage does not become ineffectual as regards the sir but takes effect as a mortgage of the ex-proprietary rights.

By three deeds the plaintiff mortgaged to each of three persons A, B and C, 1/3 of his share of the lands together with the sir area annexed to it, and subsequently executed a simple mortgage of the entire share in favour of C. Under this mortgage the entire share was in 1893 brought to sale and purchased by D. D sold the share in 1896 to E the successor in interest of C. More than 12 years after this the plaintiff sued to establish his ex-proprietary rights in the sir which accrued to him in 1893.

Held (i) that the claim as regards the 1/3 share in E's possession was barred, for in 1916 the plaintiff was against E entitled to claim 1/3 share of the ex-proprietary tenancy which had been mortgaged to C, without any payment whatever under the mortgage deed, and E's possession was therefore from that time forward, as regards that share, adverse to the plaintiff; (ii) that as to the two-thirds mortgaged to A and B as the plaintiff was not entitled to possession of his ex-proprietary rights till the mortgages were redeemed, his rights might be recorded as existing subject to the mortgage rights of A and B. **Ram Dhari Singh v. Jugul Singh**, 33 Ind. Cas. 483.

BAILLIE, S.M. and TWEEDY, J.M.

References:—(a) 24 A. 533 = A.W.N. (1902), 155, F.

(44) Mortgage—Sale of mortgaged property—Subsequent suit on mortgage by mortgagee—Non-joinder of purchaser, effect of—Civ. Pro. Code (Act V of 1908), O. XXXIV, r. 1.

A mortgagee who brings a suit on the mortgage should under O. XXXIV, r. 1, Civ. Pro. Code, join a prior purchaser of the mortgaged property as party. If failing to join him, he obtains a decree for sale and brings the property to sale, neither the decree nor sale would be binding on such purchaser. **Maung Pe v. Y.P. Farmayam Pillay**, 33 Ind. Cas. 760.

PARLETT, J.

References:—17 A. 434 = A.W.N. (1895) 83, D.; 8 B. 168; 26 M. 484 = 13 M.L.J. 131; 21 C. 216, F.

(45) Prior and puisne mortgage—Decree in favour of prior mortgagee—Sale of mortgaged property—Receipt of small sum of money by

Mortgage—(Continued).**—1.—General—(Continued).**

puisne mortgagee—Decree by puisne mortgagee, application for—Civ. Pro. Code (Act V of 1908), O. XXXIV, r. 6—Person and other property of judgment-debtor liable to balance of money due.

A decree-holder obtained a decree for a sale of the property mortgaged against the judgment-debtor in August 1912. That decree was made absolute in May 1913. The property mortgaged was meanwhile sold in execution of a prior mortgage decree obtained by a third party to which the decree-holder was a party. The decree-holder did not pay the money due on the prior mortgage and allowed the mortgaged property to be sold, contending himself with a small sum of money received by him out of the surplus sale-proceeds in part satisfaction of puisne encumbrance. In October 1913 he applied for a decree under O. XXXIV, r. 6 of the Civ. Pro. Code (Act V of 1908) for the balance of the money due to him against the person and other property of the judgment-debtor.

Held that the decree-holder was entitled to obtain a decree for the balance due on his mortgage against the person and other property of the judgment-debtor; that because he was a party to decree in execution of which the mortgaged property was sold he was bound by the sale and could not bring the mortgaged property to sale again in execution of his decree; and that it was not obligatory on him to redeem the prior mortgage and if the property could not be sold again it was open to him to give up his lien and seek a decree for the balance due to him under O. XXXIV, r. 6 of the Civ. Pro. Code (Act V of 1908). **Wasil Ali v. Jang Bahadur Singh**, 34 Ind. Cas. 48.

STUART and KANHAIYA LAL, A.J. CS.

References:—25 A. 79; 28 A. 19; 29 A. 369; 34 A. 606; 14 O.C. 62; 22 A. 404; 31 A. 373; 33 C. 890; 11 C.L.J. 639; 18 C.L.J. 133, R.

(46) *Mortgage—Entries in Khewat—Defendants shown as mortgagees in possession—Attestation of the entry by them—Effect—Admission—Onus of proof—Inference to be drawn.*

Where it was alleged that at some time or other in 1859, the plaintiff mortgaged his property to the defendants and where there were certain entries in the *Khewat* of 1877, the verification of which was attested by the predecessors of the defendants and apparently by one of the defendants himself.

Held also that the *onus* must be thrown on the defendants who have been shown to be in possession as mortgagees in 1877 and still in possession in 1913, that the defendants having failed to show any change in the circumstances between the two *termini*, the defendants are in possession as mortgagees and that they have not discharged the *onus* of showing that the plaintiff's equity of redemption has been extinguished. **Pakaria v. Ramjita**, 34 Ind. Cas. 165.

WALSH, J.

Mortgage—(Continued).**—1.—General—(Continued).**

(47) *Mortgage—Money left in deposit with the mortgagee to be taken from time to time when needed—Suit for the money—Right of suit—Suit not one to enforce a contract to lend.*

Where part of the mortgage money was left in deposit with the mortgagee and was to be taken from time to time by the mortgagor on receipts to be furnished by him, the mortgagor is entitled to sue for such amount. It is not a suit to enforce a contract to lend money. The transaction is to be regarded as a deposit of money with a banker or agent repayable on demand without interest and a suit is maintainable to get such money from the mortgagee. **Ranjita v. Rukmin**, 34 Ind. Cas. 387.

LINDSAY, J.C.

References:—2 N.W.P.H.C.R. 409, F.; 8 O. O. 5; 11 O.C. 217; 30 A. 252, D.

(48) *Mortgagor and mortgagee—Mortgage document, construction of—Accounts.*

Where a usufructuary mortgage bond provided that the mortgage amount would be paid to the mortgagees in a lump sum after expiry of the term fixed therein and that the mortgagees in possession should pay the mortgagors a certain sum annually and the mortgagees withheld payment of the amounts annually payable by them.

Held that the amounts withheld by the mortgagees should be taken in discharge of the principal amounts then due to them and the accounts between the parties taken on that basis. **Brij Kumar Lal v. Majlis Sahal**, 34 Ind. Cas. 899.

WOODBROFFE and CHAUDHURI, JJ.

(49) *Mortgage—Consideration, plea regarding—Onus—Mahomedan Law—Alienation by mother as de facto guardian of minor's son—Minor's benefit—Onus—Registrar—Admission re-signing of blank sheets only—Registration Act (XVI of 1908), S. 35 (3).*

Where a document is in the hands of the mortgagee, the presumption is that consideration passed. The *onus* is on the mortgagor pleading want of consideration. The first step in throwing the burden on the other side, is a statement of fact which might render it probable that the mortgagor executed the mortgage without consideration.

Where a Mahomedan mother, as *de facto* guardian of her minor son, undertakes to alienate or encumber her minor son's property, the burden of proof is on the alienor or mortgagee to prove that the transaction was for the benefit of the minor (a). The paying of the debt of the brother of the minor having no interest in the property of the minor, though a fine act, is a quixotic act. Such a transaction cannot be entered into by the mother, and is void against the minor unless accepted by him on his attaining his majority.

If there has been no admission of execution of a document the Registrar has no jurisdiction to register the document (b).

Mortgage—(Continued).**—1.—General—(Continued).**

Execution consists in signing a document written out and read over, and understood, and does not consist of merely signing a name upon a blank sheet of paper. To be executed, a document must be in existence; where there is no document in existence, there cannot be execution. Where an executant clearly says that he signed on blank paper and that the document which he contemplated, the statement is a denial, not an admission of execution (c). **Ebadut Ali v. Muhammad Fareed**, 35 Ind. Cas. 56.

ROE and JWALA PRASAD, JJ.

References:—(a) 34 C. 36; 34 C. 65, F. (b) & (c) 6 C.W.N. 329, D.

(50) *Mortgages, property subject to two — Second mortgagee obtaining possession under his mortgage decree—Subsequent suit by prior mortgagee and symbolical delivery in execution—Second mortgagee if willing to redeem cannot be ejected—Limitation Act, 1908, Arts. 137, 138, 144.*

There were two mortgages to two persons, the first being usufructuary and the second simple. The second mortgagee got a decree and purchased in execution in January 1898. The prior mortgagee then brought the property to sale in execution of his decree obtained subsequently in 1898 and got symbolical possession on the 2nd August 1901.

The sale was confirmed on the 31st August 1901. In a suit on 20-2-1911 to eject by the first mortgagee, the second mortgagee held that the 1st mortgagee could not eject the second mortgagee if the latter desired to redeem (a). Art. 144 and not Art. 137 or 138, Limitation Act, applied to the suit. Arts. 137 and 138 do not apply where possession has already been delivered by Court. **Blawambhar Lal v. Jhulan Ram Tewari**, 35 Ind. Cas. 87.

MULLICK, J.

Reference:—(a) 32 C. 891, R.

(51) *Mortgage of occupancy holding providing for personal covenant.*

A covenant in a mortgage-deed relating to an occupancy holding, that in the event of non-payment the mortgagee is entitled to recover possession of a certain cultivatory holding in which the mortgagors have a right of occupancy is void in law. The document in so far as it involves a mortgage of an occupancy holding is invalid, but in so far as it contains a personal covenant on the part of the debtors to pay the amount it is enforceable at law. **Muhammad Shakir v. Gopi**, 35 Ind. Cas. 202.

SUNDER LAL, J.

Reference:—(a) 6 A.L.J. 88, D.

(52) *Mortgage—Denial of execution by stranger—Want of consideration—Suit by puisne mortgagee—Contest by stranger—Evidence Act, 1872, S. 106.*

When a suit upon a mortgage is contested by a stranger who denies that the bond was executed and also asserts that the mortgage was devoid of consideration, the onus is on the plaintiff to prove his case (a).

Mortgage—(Continued).**—1.—General—(Continued).**

Spencer, J.—A mortgage without consideration is a nullity and so inoperative and it creates no charge on the property as against a subsequent purchaser (b).

Kumaraswami Sastri, J.—It is well established that in cases of sales and assignments, mere non-payment of purchase money would not vitiate the transaction, and in such cases, so long as the deed stands, it is no concern of a person, who was no party to the transaction, to call in question, the non-payment of consideration.

Where the transfer itself is impeached on the ground of its being a colourable transaction, or of its being otherwise invalid in law, different considerations will prevail (c).

A mortgage is *prima facie* security for a debt, and, where the debt does not exist, it is difficult to see how the security can be enforced. Where, therefore, a puisne incumbrancer or a person in possession of mortgaged property and claiming title thereto, succeeds in showing that there was no debt, it is difficult to see how the property can be ordered to be sold (d). **Kumarappan Chettiar v. Narayanan Chettiar**, 35 Ind. Cas. 455.

SPENCER and KUMARASWAMI SASTRI, JJ.

References:—(a) 3 M.L.T. 38, F.; 36 A. 478; 23 B. 745; 36 C. 773 (P.C.), R.; 25 A. 159; 10 A.L.J. 108; 35 C. 420; 27 A. 271 (P.C.); 27 M.L.J. 621, D. (b) 23 Ind. Cas. 805, F.; 15 M. 54, D. (c) 22 Ind. Cas. 615, R. (d) 23 Ind. Cas. 805, R.

(53) *Mortgage — Parties — Person claiming title paramount unpleaded—Objection raised first in second appeal—Costs.*

Where in a suit on a mortgage a defendant claims to have a title paramount to that of both the mortgagor and mortgagee and he did not pray in the Courts below that the suit should be dismissed as against him but invited the decision of the Court upon the question of his title to the mortgaged property, it is not open to him to ask the High Court in second appeal to set aside the order directing him to pay the costs of the litigation which he invited (a). **Basdeo Narala v. Bachan Chowdhurani**, 32 Ind. Cas. 358.

STARBUDDIN and CHAPMAN, JJ.

References:—(a) 33 C. 325 = 3 C.L.J. 205, R.

(54) *Mortgage—Mortgage to 5 brothers—Suit by one—Decree—Sale—Purchase by plaintiff in his own name—Right of other brothers to property purchased—Limitation—Civ. Pro. Code (Act V of 1908), S. 66.*

A mortgage was made in favour of five brothers one of whom was B. B alone brought a suit on the mortgage making the other brothers *pro forma* defendants to the suit, alleging that they had declined to join with him. Subsequent to the mortgage and prior to the suit, B and his brothers had separated. B got a decree in his own name for the sale of the property and he made an application to the Court for leave to bid which was granted and

Mortgage—(Continued).**—1.—General—(Continued).**

the property was purchased by him and he was allowed to set off the decree *pro tanto*. More than seven years after the issue of the sale certificate to B, his brothers, brought a suit for declaration of their title to a $\frac{2}{3}$ share in the property purchased by B and for joint possession over the same together with mesne profits. It was not alleged by the plaintiffs that B was *benamadar* for them and it was clear that B purchased the property for himself.

Held (i) that the plaintiffs' equity (if any) attached to the purchase money and not to the property purchased, and (ii) that their right to the purchase money was barred by time, (iii) that S. 66 of the Code of Civil Procedure, 1908, was not applicable to the case. **Ganesh Lal v. Jogam Nath**, 32 Ind. Cas. 171.

RICHARDS, C J. and RAFIQUE, J.

(55) *Sale in execution of mortgage decree—Purchase of lands and crops standing thereon—Mortgagor in possession—Lease by mortgagor for one year prior to sale—Validity—Purchaser's right to rent reserved under the lease—Substitution of properties and securities—Ss. 2 (d), 8, 36, 44, 52, 73, Transfer of Property Act. Penumetea Subbaraya v. Yeeglesena Satharama-raza, 17 M.L.T. 57=(1915) M.W.N. 174=28 Ind. Cas. 232=39 M. 283. See Final Part, 1915, Col. 1033.*

(56) *Consideration for mortgage—Amount taken back by mortgagee from mortgagor on mortgagee executing a pro-note to mortgagor for that amount—Effect—Suit upon mortgage against representatives of deceased mortgagor—Form of decree—O. XXXIV, rr. 4, 5, 6, Civ. Pro. Code (1908). Sukh Dial v. Mani Ram, 29 P.R. 1915=27 Ind. Cas. 489=29 P.L.R. 1916. See Final Part, 1915, Col. 1037.*

(57) *Preliminary decree whether executable—Steps for obtaining order absolute—Limitation—Arts. 182, 183, Limitation Act (1908)—S. 48 and O. XXXIV, Civ. Pro. Code (1908)—Fresh starting point after final decree—Limitation—Ss. 88, 89, Transfer of Property Act. Mahomed Husain Saib v. Abdul Kareem Saib, 17 M.L.T. 424=29 Ind. Cas. 237=39 M. 544. See Final Part, 1915, Col. 1038.*

(58) *Mortgage suit—Personal remedy not barred at the date of institution of suit—Application for personal decree not made within 3 years of the date of confirmation of the mortgage-sale—Personal remedy whether barred—Art. 181, Limitation Act (1908)—O. XXXIV, rr. 3, 6, Civ. Pro. Code (1908)—S. 90, Transfer of Property Act. Bishwambhar Shaha v. Ram Sundar Kaibarta, 42 C. 294=30 Ind. Cas. 719. See Final Part, 1915, Col. 1039.*

(59) *Mortgage money, balance of, suit for—Suit, if maintainable in Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), Sch. II, cls. (15) and (16)—Mortgagor's remedy. Shaik Galim v. Sadarjam Bihl, 21 C.L.J. 532=19 C.W.N. 1334=29 Ind. Cas. 621=43 C. 59. See Final Part, 1915, Col. 1040.*

Mortgage—(Continued).**—1.—General—(Continued).**

(60) *Mortgage—Relinquishment of ex-proprietary rights in favour of second mortgagee—Effect of. Dhani Shahu v. Raj Mahal Kunwar*, 13 A.L.J. 651=30 Ind. Cas. 393. See Final Part, 1915, Col. 1042.

(61) *Transfer of Property Act, Ss. 59, 90—Mortgage executed by purdanashin lady behind screen—Attestation by witnesses who knew her voice and saw her sign through screen, if valid—Erroneous decree, not appealed from—Effect—Sale under S. 90, effect of. Padarath Halwal v. Pandit Ram Nain Upadhyay, 19 C.W.N. 991=13 A.L.J. 809=17 Bom. L.R. 617=18 M.L.T. 85=29 M.L.J. 159=2 L.W. 639=22 C.L.J. 165=(1915) M.W.N. 709=37 A. 474 (P.C.)=30 Ind. Cas. 365. See Final Part, 1915, Col. 1044.*

(62) *Mortgage—Clog on equity of redemption—Transfer of Property Act—Principles of, applicability in Punjab. Safdar Ali v. Ghulam Mohi-ud Din, 158 P.L.R. 1915=145 P.W.R. 1915=103 P.R. 1915=30 Ind. Cas. 526. See Final Part, 1915, Col. 1045.*

(63) *Mortgage—Legal representative—Decree against assets of deceased mortgagors—Necessity—Second appeal—Liability of land mortgaged. Arura v. Balak Ram, 157 P.L.R. 1915=147 P.W.R. 1915=30 Ind. Cas. 528. See Final Part, 1915, Col. 1045.*

(64) *Limitation—Mortgage—Rights of mortgagee sold at auction; purchaser from auction-purchaser—Limitation Act (1908), Art. 134, Sch. I. Ghasi Ram v. Musammat Kishna, 13 A.L.J. 877=30 Ind. Cas. 564. See Final Part, 1915, Col. 1046.*

(65) *Decree—Construction—Suit for sale on mortgage—No direction for sale in decree—Decree in terms giving only a charge—Civ. Pro. Code (1908), O. XXXIV, r. 6, applicability of. Muhammad Hussain v. Muthu Chettiar, 2 L.W. 689=30 Ind. Cas. 280. See Final Part, 1915, Col. 1046.*

(66) *Mortgagee holding two mortgages—Suit upon puisne mortgage—Reservation of right under prior mortgage—Maintainability of suit—Civ. Pro. Code, O. XXXIV, r. 1—Transfer of Property Act, Ss. 61, 99. Subramania Aiyar v. Balasubramania Aiyar, 29 M.L.J. 195=38 M. 927=30 Ind. Cas. 317 (F.B.). See Final Part, 1915, Col. 1046.*

(67) *Mortgage—Joint Hindu family—Partition subsequent to mortgage—Suit for mortgage-money—Mortgagee, whether can claim lien on the property. Prem Shah v. Khan Chand, 128 P.W.R. 1915=30 Ind. Cas. 31=48 P.L.R. 1916. See Final Part, 1915, Col. 1046.*

(68) *Mortgage—Suit for redemption—Mortgagee, whether can question mortgagor's title—Equity of redemption, vesting of—Attornment of mortgagee to superior landlord, effect of. Abhuram Sil v. Hara Chand Das, 29 Ind. Cas. 746=20 C.W.N. 1231. See Final Part, 1915, Col. 1048.*

Mortgage—(Continued).**—1.—General—(Continued).**

(69) *Release by one of several heirs of deceased mortgagees—Payment of entire mortgage money to one of several heirs of mortgagees, effect of.* **Rudra Singh v. Jangl Singh**, 18 O.C. 154 = 30 Ind. Cas. 371. See Final Part, 1915, Col. 1049.

(70) *Mortgagees having a claim against the mortgagor unconnected with the mortgage—Right to have mortgaged property sold in satisfaction of such claim—O. 34, r. 14, Civ. Pro. Code (1908)—S. 99, Transfer of Property Act.* **Tarak Nath Adhikari v. Bhubaneswar Mitra**, 42 C. 780 = 30 Ind. Cas. 988. See Final Part, 1915, Col. 1049.

(71) *Mortgage—Application for decree absolute—Execution application—Dismissed for statistical purposes—Revival of application.* **Singara-valu Pillai v. Santhanakrishna Mudaliar**. (1915) M.W.N. 643 = 31 Ind. Cas. 9. See Final Part, 1915, Col. 1050.

(72) *Mortgagor and mortgagee—Adverse possession against mortgagor, if bars simple mortgagee.* **Vyapuri v. Sonamma Bai Ammani**, 2 L.W. 1080 = 18 M.L.J. 436 = 29 M.L.J. 645 = (1915) M.W.N. 947 = 39 M. 811 = 31 Ind. Cas. 412 (F.B.). See Final Part, 1915, Col. 1051.

(73) *Document—Construction—Sale-deed or mortgage-deed—Price treated as continuing debt—Property made security for repayment of debt.* **Kastur Chand Lakhamji v. Jakhea Padia Patel**, 17 Bom. L.R. 928 = 40 B. 74 = 31 Ind. Cas. 388. See Final Part, 1915, Col. 1051.

(74) *Mortgagor and mortgagee—Time fixed for payment by a decree nisi—Extension of time—Circumstances giving jurisdiction—Revision—Civ. Pro. Code, S. 115, O. XXXIV, rr. 3 and 8.* **Murugesu Mudaliar v. Ramaswami Chetty**, 18 M.L.J. 495 = (1916) M.W.N. 126 = 39 M. 882 = 31 Ind. Cas. 200. See Final Part, 1915, Col. 1051.

(75) *Transfer of Property Act, S. 53—Mortgage executed in order to defeat creditors, if void—Consideration paid in part—Suit to enforce mortgage security—Lien.* **Krishna Kumar Nandy v. Joy Krishna Nandy**, 29 Ind. Cas. 690 = 23 O.L.J. 570 = 21 C.W.N. 401. See Final Part, 1915, Col. 1052.

(76) *Decree under first mortgage—Sale in execution thereof—Interest sold—Second mortgagee's right to pay mortgage amount—Failure to exercise the right—No remedy against land—O. XXI, r. 89, Civ. Pro. Code, 1908.* **Kanayaram v. Tiruthalingh**, 9 S.L.R. 86 = 31 Ind. Cas. 37. See Final Part, 1915, Col. 1053.

(77) *Mortgage by insolvent within 2 years of insolvency—Petition to set aside—Report by Official Receiver—Inquiry not by Court—No power to delegate functions to Official Receiver.* See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 47, (1916) 2 M.W.N. 182.

(78) *Mortgage by insolvent within two years of his adjudication—Burden of proving good faith and consideration—Mortgage invalid*

Mortgage—(Continued).**—1.—General—(Continued).**

under S. 59, Transfer of Property Act, if operates as a charge under S. 100 of that Act. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 42, 31 M.L.J. 133.

(79) *Of land in favour of agriculturist who undertakes to pay debt due from an agriculturist to a non-agriculturist—Consideration—Transfer of Property Act, S. 58.* See PUNJAB ACT XIII OF 1900 (ALIENATION OF LAND), No. 1, 114 P.W.R. 1916.

(80) *See U.P. ACT II OF 1901 (AGRA TENANCY), No. 12-b, 32 Ind. Cas. 593.*

(81) *See U.P. ACT II OF 1901 (AGRA TENANCY), No. 31, 34 Ind. Cas. 84.*

(82) *Occupancy holding mortgaged prior to Agra Tenancy Act—Rent suit—Parties—Civ. Pro. Code (1908), O. I, r. 9.* See U.P. ACT II OF 1901 (AGRA TENANCY), No. 20, 31 Ind. Cas. 456.

(83) *To non-occupancy tenant—Rights of occupancy, acquisition of.* See U.P. ACT II OF 1901 (AGRA TENANCY), No. 7-b, 32 Ind. Cas. 387.

(84) *Purchaser of part of mortgaged property—Right to raise plea of adverse possession against mortgagee.* See ADVERSE POSSESSION, No. 2, 18 O.C. 369.

(85) *Construction of deed whether a document is deed of, or sale—Whether it is a ground of second appeal.* See APPEAL—SECOND APPEAL, No. 6, 115 P.W.R. 1916.

(86) *See CIV. PRO. CODE (1882), No. 12, 39 M. 1026.*

(87) *In suit on, wherein accounts if adjusted once for all in preliminary decree—Subsequent payment by mortgagee, if can be added.* See CIV. PRO. CODE (1908), No. 617, 35 Ind. Cas. 95.

(88) *Meaning of the term "mortgagee" in O. XXXIV, r. 14, Civ. Pro. Code.* See CIV. PRO. CODE (1908), No. 618, 14 A.L.J. 902.

(89) *Non-transferable occupancy holding, sale of, under rent decree—Right of mortgagee to set aside.* See CIV. PRO. CODE (1908), No. 342, 31 Ind. Cas. 859.

(90) *Sale of property subject to—Right of purchaser to question validity of mortgage.* See CIV. PRO. CODE (1908), No. 482, 30 Ind. Cas. 238.

(91) *Applicability of O. XXI, r. 58, Civ. Pro. Code, to claims founded on mortgage—Order refusing to recognize mortgage—Suit to set aside the order—Limitation—Art. 11, Limitation Act (1908)—Applicability.* See CIV. PRO. CODE (1908), No. 476, 31 M.L.J. 247.

(92) *Mortgagee becoming entitled to equity of redemption—Merger.* See CIV. PRO. CODE (1908), No. 122, 30 M.L.J. 391.

(93) *Mortgage decree on consent—Preliminary decree—Final decree—Running of time—S. 48, Civ. Pro. Code (1908)—Personal decree.* See CIV. PRO. CODE (1908), No. 121, 23 O.L.J. 573.

Mortgage—(Continued).**—1.—General—(Continued).**

(94) Mortgage decrees passed when the Civ. Pro. Code of 1882 was in force—S. 48 of the Civ. Pro. Code of 1908 if would govern applications for execution of such decrees. See CIV. PRO. CODE (1908), No. 118, 20 O.W.N. 952.

(95) Equitable mortgage, effect of—Recovery of balance due on. See CIV. PRO. CODE (1908), No. 612, 8 L.B.R. 450.

(95-a) See CIV. PRO. CODE (1908), No. 626-a, 32 Ind. Cas., 944.

(95-b) Suit—Preliminary decree for sale—Application for execution by transferee. See CIV. PRO. CODE (1908), No. 440-a, 32 Ind. Cas. 981.

(96) Entered into deliberately and voluntarily—Liability of mortgagor to pay commission. See COMMISSION, No. 2, 30 Ind. Cas. 323.

(97) Or charge—Covenant to pay whether can be implied. See CONSTRUCTION OF DEED, No. 1, (1916) 2 M.W.N. 263.

(98) Transaction whether sale or—Surrounding circumstances. See CONSTRUCTION OF DEED, No. 7, 32 Ind. Cas. 192.

(99) See CONTRACT, No. 18, 30 Ind. Cas. 323.

(100) Executory contract to convey land—Right thereunder if can be mortgaged—Document recognising the ownership of a person other than mortgagor if can be treated as mortgage. See CONTRACT, No. 9, 3 L.W. 435.

(101) A person executing mortgage in the owner's name—Deed of transfer by mortgagee to a third party signed by the same person—Transferee suing to recover money on discovering that the owner did not sign the transfer—Failure of consideration. See CONTRACT ACT, No. 16, 18 Bom. L.R. 201.

(102) Agreement opposed to public policy—Assignment of, taken by patwari benami—Not void. See CONTRACT ACT, No. 19, 14 A.L.J. 962.

(103) Mortgagee leasing property to mortgagors—Division among mortgagors—Failure by one mortgagor to pay his share of revenue—Payment by mortgagee—Liability of other mortgagors. See CONTRACT ACT, No. 70, 14 A.L.J. 605.

(104) Penalty—Interest at 75 per cent. in a, by poor and ignorant men—Reasonable compensation. See CONTRACT ACT, No. 99, 34 Ind. Cas. 609.

(105) Landlord and tenant—Non-transferable holding, usufructuary mortgage of, by the tenant—Acceptance of rent from the mortgagee—Validity of mortgage if can be questioned by the land-lord. See ESTOPPEL, No. 7, 34 Ind. Cas. 764.

(106) Document, extrinsic evidence to construe. See EVIDENCE ACT, No. 69, 35 Ind. Cas. 111.

(107) Evidence of conduct as to whether a, was really a *Kubala*. See EVIDENCE ACT, No. 60, 35 Ind. Cas. 102.

Mortgage—(Continued).**—1.—General—(Continued).**

(108) Mutual mistake in description of land in registered, deed, oral evidence to prove—Construction of document. See EVIDENCE ACT, No. 73, 31 Ind. Cas. 671.

(109) Registered sale-deed—Oral evidence to prove the same to be a, inadmissibility. See EVIDENCE ACT, No. 35, 34 Ind. Cas. 153.

(110) Secondary evidence—Admission of, in prior proceedings. See EVIDENCE ACT, No. 37, 36 Ind. Cas. 696.

(111) See EVIDENCE ACT, No. 80, U.B.R. 1916, 2nd Qr., p. 110.

(112) Suit on mortgage bond—Admission of mortgagor if sufficient to make mortgage admissible against other parties not admitting execution, without proof by attesting witnesses. See EVIDENCE ACT, No. 42, 20 C.W.N. 1044.

(113) Suit on mortgage—Original deed in possession of defendant—Admissibility of certified copy—Proof of. See EVIDENCE ACT, No. 31, 36 Ind. Cas. 673.

(114) O. XXXIV, r. 4, Civ. Pro. Code—Decree passed in terms that the rights of prior mortgagees might not be prejudiced—Decree whether capable of execution. See EXECUTION OF DECREE, No. 2, 14 A.L.J. 324.

(115) Decree awarding personal remedy in case sale-proceeds of mortgaged property do not suffice—Interpretation of decree—Duty of executing Court. See EXECUTION OF DECREE, No. 8, 75 P.W.R. 1916.

(116) Grant of *dasabandham* rights—Of such rights by grantee—Rights of mortgagee. See GRANT, No. 4, 31 Ind. Cas. 565.

(117) See HINDU LAW—JOINT FAMILY, No. 26, 34 Ind. Cas. 757.

(118) By one member—Liability of survivors on death of that member. See HINDU LAW (JOINT FAMILY), No. 17, 30 Ind. Cas. 382.

(119) Joint Hindu family—By a member at a high rate of interest, power of Court to vary the rate—Creditor's duty to establish family necessity justifying the high rate—Second appeal. See HINDU LAW (JOINT FAMILY), No. 10, 19 O.C. 159.

(120) Partition of joint family properties—Mortgage-debt left out of account in partition suit as being valueless—Subsequent suit by father to enforce the mortgage—Son whether necessary party—Suit whether bad for non-joinder. See HINDU LAW (PARTITION), No. 1, 19 M.L.T. 43.

(121) Attestation by heir—By widow—Estoppel. See HINDU LAW (WIDOW), No. 23, 30 Ind. Cas. 388.

(122) Right of reversioner to, property in possession of widow—Suit by widow for declaration that mortgage was of no effect against her interest. See HINDU LAW (WIDOW) No. 21, 30 Ind. Cas. 198.

(123) Mortgage of moveables—Rights of mortgagees. See HYPOTHECATION, No. 1, 18 Bom. L.R. 587.

*Mortgage—(Continued).***—1.—General—(Continued).**

(124) Transaction whether mortgage or lease—Construction. See LEASE, No. 2, 1 Pat. L. J. 1.

(125) Right of mortgagor in possession to grant perpetual lease. See LEASE, No. 8, 30 Ind. Cas. 258.

(126) Assignment by mortgagee. See LIMITATION ACT (1908), No. 234, 32 Ind. Cas. 314.

(127) Award of compensation for breach of penal clause—Amount awarded a charge on mortgaged property. See LIMITATION, No. 4, 30 Ind. Cas. 328.

(128) Execution—Attachment—Sale proceeding—Application by a mortgagee for holding the sale subject to his—Dismissal of the application—Suit to establish lien—Limitation. See LIMITATION ACT (1877), No. 3, 18 Bom. L.R. 782.

(129) Hypothecation bond—Principal payable after 11 years—Interest every year—Condition that principal and interest shall both become due immediately in default of payment of interest—Cause of action if arises on date of first default. See LIMITATION ACT (1908), No. 152, 4 L.W. 77.

(130) See LIMITATION ACT (1908), No. 239, 35 Ind. Cas. 753.

(131) See LIMITATION ACT (1908), No. 203, 35 Ind. Cas. 241.

(131-a) See LIMITATION ACT (1908), No. 238-a, 32 Ind. Cas. 353.

(132) Instalment; bond—Suit for whole amount on default as to an instalment—Acceptance by creditor of part of over-due instalment—Starting point of limitation. See LIMITATION ACT (1908), No. 153, 33 Ind. Cas. 606.

(133) Code of Civil Procedure (V of 1908), O. XXXIV, rr. 3 and 5—Application to make final conditional decree for sale of mortgaged properties. See LIMITATION ACT (1908), No. 280, 1 Pat. L.J. 364.

(134) Loan of paddy—Limitation for suit. See LIMITATION ACT (1908), No. 196, 24 C.L. J. 348.

(135) Mortgagee purchasing part of the mortgaged property—Merger—Intention. See LIMITATION ACT (1908), No. 211, 14 A.L.J. 1025.

(136) Mortgagor receiving rents—Suit by mortgagee for amounts improperly collected by mortgagor—Breach of contract. See LIMITATION ACT (1908), No. 142, 34 Ind. Cas. 173.

(137) Mortgage with possession—Suit for refund of money advanced by mortgagee—Fraud. See LIMITATION ACT (1908), No. 168, 106 P.L.R. 1916.

(138) Absolute occupancy holding—Foreclosure by subsequent mortgagee—Purchase of the holding by malguzar under S. 38, Central Provinces Tenancy Act (1883)—Suit by prior mortgagee for payment of his mortgage money

*Mortgage—(Continued).***—1.—General—(Continued).**

from the sale-proceeds—Limitation. See LIMITATION ACT (1908), No. 232, 12 N.L.R. 90.

(139) Hypothecation of land with trees—Trees sold by mortgagor to third parties and cut and carried away by purchasers—Remedy against purchasers—Limitation. See LIMITATION ACT (1908), No. 115, 3 L.W. 341.

(140) Mortgage decree—Execution—Prayer for decree absolute absent in the application—Prayer for sale if implies prayer for making decree absolute. See LIMITATION ACT (1908), No. 285, 3 L.W. 468.

(141) Suit on—Mortgage deed giving option to mortgagee to sue or not to sue. See LIMITATION ACT (1908), No. 226-a, 32 Ind. Cas. 551.

(142) See MALABAR LAW (ALIENATION), No. 1, (1916) 2 M.W.N. 312.

(143) In favour of minor if enforceable by him or by others on his behalf. See MINOR, No. 5, 31 M.L.J. 575.

(144) In favour of minor, validity of. See MINOR, No. 8, 33 Ind. Cas. 994.

(145) See PARTITION, No. 10, 30 Ind. Cas. 316.

(146) Winding up—Power to one partner to mortgage firm's assets—Acknowledgment. See PARTNERSHIP, No. 8, 8 L.B.R. 363.

(147) Mortgage of property prior to Transfer of Property Act—Mortgagor liable to pay revenue—Mortgagee paying the same—Pre-emptor liable to pay the amount of revenue as part of consideration. See PRE-EMPTION, No. 8, 14 A.L.J. 717.

(148) Suit by mortgagee—Receiver when to be appointed. See RECEIVER, No. 3, 23 C.L. J. 440.

(149) Deed, when comes into operation—Attachment before registration—Effect. See REGISTRATION ACT (1909), No. 36, 32 Ind. Cas. 431.

(150) Second suit to recover money—Failure of consideration—Suit for money had and received—Limitation. See RES JUDICATA, No. 17, 18 Bom. L.R. 773.

(151) Provision in mortgage deed restraining mortgagee's right to sue—Independent clauses regulating the right—Construction of document. See RIGHT OF SUIT, No. 3, 30 Ind. Cas. 323.

(152) Money left with vendee to pay off mortgagee—Money not paid—Suit against vendee—Vendee whether a trustee. See SALE, No. 3, 14 A.L.J. 151.

(153) Adverse possession by mortgagee—Effect. See SALE, No. 1, 50 P.W.R. 1916.

(154) Stipulation for re-purchase—No date fixed for re-payment—Transaction amounting to—Intention of parties. See SALE, No. 14, 36 Ind. Cas. 991.

Mortgage—(Continued).**—1.—General—(Continued).**

(155) Salvage lien—Subrogation—Prior and subsequent. See SALVAGE LIEN, No. 1, 14 A.L.J. 953.

(156) Lease by mortgagor after mortgage-decree but before sale, whether binds the auction purchaser—Nature of decree—*Lis pendens*. See SMALL CAUSE COURT, JURISDICTION OF, No. 1, 20 M.L.T. 512.

(157) See SPECIFIC RELIEF ACT, No. 18, 34 Ind. Cas. 396.

(158) In India before the Transfer of Property Act (IV of 1882)—No writing required. See STAMP, No. 1, 18 Bom. L.R. 904.

(159) Improvement by mortgagees—Intention to add costs to mortgage money. See TRANSFER OF PROPERTY ACT, No. 100, 30 Ind. Cas. 234.

(160) Mortgage invalid—Whether can be treated as a charge. See TRANSFER OF PROPERTY ACT, No. 128, 9 Bur. L.T. 64.

(161) Mortgage not validly executed if creates a charge—Personal liability to repay if to be implied from fact that document mentioned advance of money. See TRANSFER OF PROPERTY ACT, No. 89, 20 C.W.N. 989.

(162) Pre-emption decree obtained by prior mortgagees against subsequent mortgagees on ground of subsequent, being sale—Prior mortgagee's suit against mortgagor personally for recovery of mortgage money not maintainable. See TRANSFER OF PROPERTY ACT, No. 92, 35 Ind. Cas. 845.

(163) Suit by mortgagees for interest—Principal not becoming due—Maintainability. See TRANSFER OF PROPERTY ACT, No. 95, 3 L.W. 587.

(164) Rent—Assignment—Debt—Simple, and subsequent lease of the hypotheca to mortgagee—Mesne profits. See TRANSFER OF PROPERTY ACT, No. 16, 31 Ind. Cas. 473.

(165) Transfer of immoveable property of less than Rs. 100 in value to mortgagee with possession on failure to pay off mortgage—Oral transfer accompanied by formal delivery of possession—Validity of sale—Effect as against subsequent vendee under registered sale-deed. See TRANSFER OF PROPERTY ACT, No. 54, 20 O.W.N. 195.

(166) Preliminary decree—Decree absolute for sale—First decree not appealed from—First decree cannot be attacked in appeal against the second—Second decree is in the nature of an application for execution. See TRANSFER OF PROPERTY ACT, No. 119, 18 Bom. L.R. 38.

(167) Equity of redemption—Acquisition by prescription—Duty to pay taxes—Revenue sale—Property acquired by fraud—Suit for recovery when lies. See TRANSFER OF PROPERTY ACT, No. 93, 19 M.L.T. 210.

(168) Assignment of mortgagor's rights—Assignment between date of preliminary decree and that of final decree—Assignee, position of.

Mortgage—(Continued).**—1.—General—(Concluded).**

See TRANSFER OF PROPERTY ACT, No. 122, 12 N.L.R. 60.

(169) Attestation—Witnesses not present at actual execution—Admission of Execution by mortgagor—Effect. See TRANSFER OF PROPERTY ACT, No. 84, 14 A.L.J. 361

(170) Person subscribing a scribe if attesting witness. See TRANSFER OF PROPERTY ACT, No. 93, 20 C.W.N. 699.

(171) Document bearing the signature of one attesting witness—Scribe writing the name of another person as a marginal witness—No proof of authority to sign—Validity of mortgage or charge. See TRANSFER OF PROPERTY ACT, No. 85, 14 A.L.J. 673.

(172) Mortgagee in possession—Non-payment of Tagavi claims—Sale of property owing to mortgagee's default—Purchase by him *benami*—Effect—Rights of mortgagor. See TRUSTS ACT, No. 13, 18 Bom. L.R. 438.

(173) No tender of amount—Right to interest. See TRUSTS ACT, No. 6, 32 Ind. Cas. 97.

(174) See VENDOR AND PURCHASER, No. 4, 34 Ind. Cas. 47.

(175) Surrender of right by vendee—To vendor. See VENDOR AND VENDEE, No. 1, 30 Ind. Cas. 234.

(176) Trust—Investment of trust money on first—Accumulation of debt in excess of value of mortgaged property—Breach of trust. See WILL, No. 20, 33 Ind. Cas. 604.

—2.—Anomalous.

Mortgage deed termed 'Swadina tanaka meddatu sharatu Pattiram'—Stipulation by mortgagor to pay within a fixed period—Transaction to be treated as a sale in default—Construction of document—Suit for redemption—Limitation—Ss. 58, 60, 98, Transfer of Property Act—Clog on redemption. Hakeem Patte Muhammed v. Sheikh Davood, 18 M.L.T. 269 = 29 M.L.J. 525 = (1915) M.W.N. 852 = 30 Ind. Cas. 569 = 39 M. 1010. See Final Part, 1915, Col. 1065.

—3.—By Conditional Sale.

(1) *Oral agreement putting mortgagee in possession in lieu of interest—Evidence of such agreement, admissibility of—Evidence Act, S. 92.*

When after executing a mortgage by conditional sale the mortgagor put the mortgagee in possession of the property mortgaged under an oral agreement, authorising the mortgagee to enjoy the profits and devote the amount realized towards satisfaction of the interest; held, that there was nothing illegal in the agreement, and evidence to prove it was admissible. There is nothing in such an agreement which varies, contradicts or adds to the terms of the original deed. On the other hand, it merely provides for the satisfaction of one of the conditions of the deed. *Jagatpal Singh v. Harnam Singh*, 19 O.C. 166 = 34 Ind. Cas. 745.

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Mortgage—(Continued).**—3.—By Conditional Sale—(Concluded).**

(2) Surrender of condition as to conditional sale—Mutation of names. See PUN. ACT XIII OF 1900 (ALIENATION OF LAND), No. 10, 79 P.L.R. 1916.

(3) Or sale with covenant to purchase—Test. See CONSTRUCTION OF DEED, No. 2, 31 M.L.J. 750.

(4) Sale-deed—Construction of—Sale with agreement to reconvey—Distinction between—Intention of parties. See SALE, No. 11, 31 M.L.J. 375.

(5) Mortgage executed before the Transfer of Property Act—Document not purporting to sell the property but containing covenant to relinquish all rights therein—Construction—Document whether mortgage by conditional sale—Law applicable—Remedies under the Transfer of Property Act if available—Scope of S. 2 (c) of that Act—Suit for foreclosure—Limitation. See TRANSFER OF PROPERTY ACT, No. 9, 30 M.L.J. 338.

(6) Option to purchase—Registration. See TRANSFER OF PROPERTY ACT, No. 79, 9 Bur. L.T. 177.

—4.—Contribution.

(1) *Transfer of Property Act, S. 82—Contribution—Properties of two owners mortgaged to secure one debt—One owner and his property, release of, on payment of one-half of the debt—Property released from the major portion—Liability of the other mortgagor and the remaining portion of the mortgaged property, whether extends to the whole balance or whether only rateable.* *Thuvooor Venkatasubba Reddy v. Bagiammal*, 2 L.W. 469=17 M.L.T. 411= (1915) M.W.N. 339=29 M.L.J. 319=29 Ind. Cas. 113=39 M. 419. See Final Part, 1915, Col. 1068.

(2) Sale of portion of mortgaged property subsequent to mortgage—Liability of purchaser to contribute to mortgage debt. See TRANSFER OF PROPERTY ACT, No. 110, 1 Pat. L.J. 228.

(3) Parties and valuation for ascertaining liability to contribution. See TRANSFER OF PROPERTY ACT, No. 111, 14 A.L.J. 713.

—5.—Equitable.

(1) *Validity of equitable mortgage in places where Transfer of Property Act does not obtain—Priority of such mortgage over subsequent registered mortgage with or without notice—S. 49, Registration Act (1977)—Applicability—Title-deeds whether include copies where originals are lost—Intention to keep alive prior mortgage—Presumption—Merger.*

In the Punjab and in other places where the Transfer of Property Act does not obtain, a mortgage by deposit of title-deeds is a valid legal mortgage and has the same legal effect as a mortgage created by any other means recognized by law; the English doctrine of the legal estate prevailing over the equitable estate does not obtain in a country where there is no distinction between legal and equitable estates;

Mortgage—(Continued).**—5.—Equitable—(Concluded).**

and consequently a mortgagee, who holds a registered deed of mortgage, cannot claim priority over an earlier mortgage created by deposit of title-deeds (a).

The mortgage by deposit of deeds is a complete act and not an executory agreement, and therefore S. 48 of the Registration Act, which gives priority to registered instruments as against oral agreements not followed by delivery of possession of the property concerned, does not apply (b); and the question of notice, actual or constructive, of the previous equitable mortgage does not arise.

Title-deeds include copies of the deeds when the originals are not forthcoming (c).

Held on the facts that the title-deeds were deposited with the mortgagee with the intention of creating a mortgage charge in her favour over the property in suit.

Held also that the equitable mortgagee, when she accepted a later mortgage-deed, intended to keep the first mortgage alive for all purposes beneficial to herself. *Mrs. Stewart v. Bank of Upper India, Ltd., Simla*, 31 P.R. 1916=34 Ind. Cas. 937.

RATTIGAN and LE-ROSSIGNOL, JJ.

References:—(a) 9 M.I.A. 307; 17 A. 252; 14 B. 269, R. (b) 31 C. 57 (73); 11 C. 158; 33 C. 410; 14 Bur. L.R. 211, R. (c) 1 M. & A. 635, R.

(2) *Equitable mortgage—Deposit of title-deeds by way of security when accompanied by an actual written charge—Scope of the security—Not necessarily the same as scope of the title-deeds.*

(1) Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (2) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (3) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and extent of the security. *P.J. Mehta v. Chan Mah Phee*, 14 A.L.J. 638=20 C.W.N. 925=43 C. 895=9 Bur. L.T. 125=31 M.L.J. 155=4 L.W. 69=(1916) M.W.N. 443=18 Rom. L.R. 664=20 M.L.T. 242=24 C.L.J. 314=8 L.B.R. 458=35 Ind. Cas. 190 (P.G.).

LORD SHAW, SIR JOHN EDGE and SIR LAWRENCE JENKINS.

(3) Letter setting out terms of equitable mortgage and authorising the receiving of title-deeds from another—Necessity for registration. See REGISTRATION ACT (1908), No. 23, 3 L.W. 585.

—6.—Foreclosure.

(1) *Mortgage by conditional sale—Money repayable in instalments—Default in payment of instalment with interest—Right to sue for foreclosure—Mortgagee's right to enforce the security before expiry of term for repayment of whole of the principal—Intention of the parties—Right to sue for sale on simple mortgage for interest only.* *Karnidan v. Meghraj*, 11 N.L.R. 153=30 Ind. Cas. 981. See Final Part, 1915, Col. 1069.

Mortgage—(Continued).**—6.—Foreclosure—(Concluded).**

(2) See O.P. ACT XI OF 1898 (TENANCY), No. 7, 1 Pat. L.J. 525.

(3) Suit for foreclosure—Money paid to the mortgagee in the foreclosure suit—Suit for contribution against defendants on the ground that they held portions of the mortgaged property—Defendants not parties to the foreclosure suit—No liability to contribute. See CONTRIBUTION, No. 5, 34 Ind. Cas. 367.

(4) Assignment of mortgage rights by heirs of mortgagee—Suit for foreclosure by assignees—Maintainability. See HINDU LAW—JOINT FAMILY, No. 24, 34 Ind. Cas. 3.

(5) Suit for foreclosure—Limitation. See LIMITATION ACT (1908), No. 92, 14 A.L.J. 1.

(6) See PRE-EMPTION, No. 16, 19 O.C. 183.

(7) Decree for foreclosure, pre-emption in respect of—Decree for pre-emption obtained, by one co-sharer without impleading others equally entitled, effect of—Transfer of property made by decree-holder during pendency of appeal. See PRE-EMPTION, No. 15, 19 O.C. 153.

(8) Demand—Duty of mortgagees. See REG. XVII OF 1806 (BENGAL LAND REDEMPTION AND FORECLOSURE), No. 3, 2 P.W.R. 1916.

(9) Foreclosure only remedy mentioned in the deed—No personal remedy. See TRANSFER OF PROPERTY ACT, No. 98, 12 N.L.R. 19.

(10) Transfers of preliminary and final decree for foreclosure to different persons—Substitution of names. See TRANSFER OF PROPERTY, No. 1, 9 Bur. L.T. 121.

—6-a.—Marshalling.

Mortgage suit—Question as to marshalling not raised and decided—Execution proceedings—Joinder of parties.

In a mortgage suit the question as to marshalling of securities was not raised and decided. So the representatives of the party who could have raised such a question and got a decision could not urge their joinder as parties to execution-proceedings arising thereon, if they are not so joined for raising that question and getting it decided at that stage. *Raza Husain v. Ameerchand Pal*, 32 Ind. Cas. 715.

LINDSAY, J.C. and STUART, A.J.C.

—7.—Redemption.

(1) *Integrity of mortgage broken up—Proportionate amount payable—Evidence Act S. 94—Misdescription—Oral evidence admissible.*

He executed three mortgage-deeds dated respectively March 27, 1864, April 3, 1864 and February 6, 1873. In the first he mortgaged 9½ biswas of a village called Paniyala along with other property, and in the second he mortgaged five more biswas of the same village. The third mortgage was for Rs. 15,000 and out of the consideration he declared Rs. 3,500 to be a further charge on the villages mortgaged in the

Mortgage—(Continued).**—7—Redemption—(Continued).**

deed of March 27, 1864. In the list of properties mentioned, Hala Nagla was entered instead of Paniyala. The plaintiffs acquired the rights of the mortgagors in Paniyala, and the defendants, representatives of the mortgagees, purchased portions of the mortgaged property: *Held* that the plaintiffs were entitled to redeem Paniyala on payment of the proportionate liability for the mortgages existing thereon, and that evidence was admissible for the purpose of showing that Paniyala was liable for the proportionate part of the further charge of Rs. 3,500, the entry in the mortgage-deed of 1873 of Hala Nagla being a case of misdescription and mutual mistake. *Mahabir Prasad v. Muhammad Maslyatullah*, 14 A.L.J. 15 = 38 A. 103 = 32 Ind. Cas. 174.

BANERJI and WALSH, JJ.

(2) *Redemption by one co-owner—Charge—Transfer of Property Act, S. 95—Sale by redeeming co-owner of such property—Suit for redemption by another co-owner—Limitation—Limitation Act (1877), Sch. II, Arts. 144, 148, 134.*

A had four sons K, Y, N and F. The plaintiff is the son of Y. On August 13, 1860, A made a usufructuary mortgage of some family property in favour of D and then died. F made a mortgage of the property to the father of B in order to raise money to pay off the mortgage in favour of D. The mortgage of 1860 was thus paid off. F's mortgagee remained in possession as such for nearly twenty years until May 26, 1898, when F sold the property to B and the vendee remained in possession since then till 1912, the date of the suit. The plaintiff brought this suit to redeem the mortgage of 1860. In the mortgage of 1877, F stated that the property was his *maurusi* (ancestral) village and that he owned the share. It was assumed that F was separate but that the property belonging to the family had not been divided:

Held that when, in 1877, F redeemed the mortgage of 1860, he acquired a charge on the plaintiff's share and inasmuch as he asserted a title in himself adversely to the true owners and dealt with the property by way of sale, the suit was barred by Art. 144, Sch. II of the Limitation Act, 1877, and neither Art. 148, nor Art. 134 applied to it. *Jai Kishen Joshi v. Budhan and Joshi*, 14 A.L.J. 41 = 38 A. 138 = 34 Ind. Cas. 244.

TUDBALL and PIGGOTT, JJ.

Reference:—14 A. 1 (F.B.), D.

(3) *Usufructuary mortgage—Stipulation as to time of redemption—Time essence of the contract—Redemption—No offer before suit—Cause of action.*

A usufructuary mortgage of agricultural land was made and it was provided that it could be redeemed in *Jeth* of any year. The mortgagor sued to redeem but it was proved that he had at no time offered to pay the mortgage-debt prior to the institution of the suit:

Mortgage—(Continued).**—7.—Redemption—(Continued).**

Held that the mortgagor had no right to institute the suit unless and until he had tendered the mortgage debt or such amount as he considered due to the latter. **Muhammad Ali v. Baldeo Pando**, 14 A.L.J. 55=38 A. 148=34 Ind. Cas. 183.

TUDBALL and WALSH, JJ.

Reference:—A.W.N. (1894) 149, F.

(4) *Mortgagor and mortgagee—Money-decree—Execution—Sale of the equity of redemption—Purchase by mortgagee—No objection by mortgagor for sale—Loss of right to redeem—Transfer of Property Act, S. 99.*

When the mortgagee purchased the equity of redemption of the mortgagor in execution of a money-decree obtained by the former against the latter in a suit not arising out of the mortgage and the mortgagor did not object to the confirmation of the sale:

Held, the mortgagor lost the right of redemption, notwithstanding that the sale of the equity of redemption was in contravention of S. 99 of the Transfer of Property Act. **Arjuna Reddy v. Venkatachela Asari**, 19 M.L.T. 121=32 Ind. Cas. 611=5 L.W. 242=32 M.L. J. 525.

AYLING and NAPIER, JJ.

(5) *Declaratory suit—Payment to recorded co-mortgagee—Good faith—Hindu widow's right—Receipt not mentioning details, nor supported by reliable evidence—Effect of neither getting back mortgage-deed nor possession after alleged payment of mortgage money.*

A brought a declaratory suit to the effect that a certain land had not been redeemed. The defendant alleged payment to C (a Hindu widow) who was recorded in Revenue papers as mortgagee of 2/3 share, but not in actual possession. He made some payments to D, and E which ought to have been made to C, had he thought C had any right as one of the mortgagees. He also in certain previous suits did not implead C as a party which he should have done had he thought C had any right.

Held, that payment in good faith to C was not proved.

Held, also, that a receipt giving no details and not supported by reliable evidence as to the actual amount paid was of very little value, even though there was evidence to the effect that a substantial sum had actually been paid. **Muhammad Khan v. Lala Kishore Chand**, 33 P.L.R. 1916.

RATTIGAN and SCOTT-SMITH, JJ.

(6) *Suit for redemption—First suit for redemption withdrawn—Second suit for redemption of mortgage of another date—Mortgage found invalid—Principle of saving defendant from multiplicity of suits—Defendant's admission of a mortgage—Decree for redemption.*

When both parties appeared on the date fixed for the trial of the suit and at their request the suit was struck off as settled, the suit must be held to have been withdrawn by the plaintiff and cannot be held to have been dismissed for default of the appearance of both parties. Such

Mortgage—(Continued).**—7.—Redemption—(Continued).**

abandonment is done at the risk of the plaintiff's losing all right to litigate the subject-matter of the claim or claims so abandoned or withdrawn from the adjudication of the Court, unless he got the permission of the Court to re-litigate the same.

Where, plaintiffs brought a first suit to redeem a mortgage of 1893 which was withdrawn and then brought another suit to redeem a later mortgage of 1897 which was found to be an invalid transaction, the plaintiff cannot be allowed to treat the latter suit as a suit for the redemption of the earlier mortgage as it would be barred by O. XXIII, r. 1, cl. 3 of the Civ. Pro. Code.

The plaintiff's cause of action, into whatever *prolean* forms it may be moulded by the ingenuity of pleaders, is to be regarded as the same, if it rests on facts which are integrally connected with those upon which a right and infringement of the right have already been once asserted as a ground for the Court's interference.

The decision in 28 M. 406 must be deemed to have been overruled by the Full Bench decision in 37 M. 70 (a).

Where, in a suit for redemption, the plaintiff fails to prove the mortgage set up by him, the Court may allow the plaintiff to redeem on the basis of a different mortgage under which the defendant claims to hold. **Damodaran Numbudripad v. Theyyanakkann**, (1916) M. W.N. 171=32 Ind. Cas. 624.

SADASIVA Aiyer and NAPIER, JJ.

References:—(a) 25 M. 406; 37 M. 70, R.

(7) *Equity of redemption—Mortgagee with possession purchasing the same in execution of money decree—Mortgagor's right of redemption—Extinguishment—Validity of purchase—Transfer of Property Act, S. 99—Civ. Pro. Code, 1908, O. XXXIV, r. 14—Change in the law—Applicability of S. 99, Transfer of Property Act, to the Punjab.*

S mortgaged his house with possession to M, but S, remained in possession of the house as M's tenant on the strength of a deed of rent executed by S in favour of M. M sued S for arrears of rent and obtained a money decree in execution of which M purchased in Court auction, with the permission of the Court, the equity of redemption of the house. The auction sale was confirmed despite S's objections. S brought a regular suit to set aside the auction sale which was also dismissed. S then brought the present suit against M for redemption of the mortgage on the ground that M's purchase of the equity of redemption could not affect his right to redeem.

Held that, according to the principle embodied in r. 14, O. XXXIV, Civ. Pro. Code, the auction sale of the equity of redemption in favour of the present defendant was a perfectly good one, and since it was duly confirmed by a competent Court, it had the effect of extinguishing plaintiff's proprietary rights in the mortgaged house and his right of redemption was therefore lost.

Mortgage—(Continued).**—7.—Redemption—(Continued).**

In view of the change of law effected by the Code of Civil Procedure, 1908, the Courts of the Punjab, to which the Transfer of Property Act has never been extended, cannot recognize and act upon the technical rule embodied in S. 99, Transfer of Property Act.

R. 14, O. XXXIV, Civ. Pro. Code (1908), which has repealed S. 99, Transfer of Property Act, is restricted to claims arising only under the mortgage, and it is now competent to the mortgagee to have the equity of redemption sold in satisfaction of any debt which he might have against the mortgagor unconnected with the mortgage. *Behr Baksh v. Sanjhe Khan*, 18 P.R. 1916=33 Ind. Cas. 802.

SHAH DIN and LE ROSSIGNOL, JJ.

References:—(a) 35 C. 61 (F.B.) and 37 A. 165 (F.B.), F.; 2 P.R. 1907; 15 P.R. 1911, *Not Appl.*; 29 M. 421; 30 M. 362; 32 C. 296 (F.C.); 22 M. 347; 22 B. 624; 6 Ind. Cas. 47=14 C. W.N. 579, R.

(8) *Suit by puisne mortgagee—Prior mortgagee purchasing property in execution of decree on his mortgage—Puisne mortgagee no party—Basis of account.*

A puisne mortgagee seeking to redeem property purchased by a prior mortgagee in execution of a decree passed in a suit on the prior mortgagee's mortgage to which the former was no party can do so only upon the basis of accounts being taken on foot of that mortgage, taking into consideration the rate of interest stipulated for in the prior mortgage-deed. *Phul Chand v. Roshan Lal*, 14 A.L.J. 337=36 Ind. Cas. 703.

BANERJI and TUDBALL, JJ.

Reference—19 A. 527, *Appl.*

(9) *Custom—Succession—Village proprietary body, rights of—Village, nature of—Mortgage—Redemption*

A mortgagor who was a member of a village proprietary body died leaving no direct heir of his own. The plaintiff, who were of the same tribe and got as the mortgagor, sued, as members of the village proprietary body, to redeem lands belonging to the mortgagor. The village was, however, found to be homogeneous and did not consist of a number of proprietors of different tribes, religions and castes. The mortgagees though distantly related to the mortgagor were not proprietors in the village.

Held, that the mortgagees had no right to succeed and that the plaintiffs were entitled to redeem. *Budhi Singh v. Mohan Singh*, 40 P. W.R. 1916=32 Ind. Cas. 768.

RATTIGAN and LESLIE JONES, JJ.

References:—2 P.R. 1911=3 P.W.R. 1911 (Rev.)=10 Ind. Cas. 294, R.

(10) *Burden of proof.*

Where a plaintiff comes into Court setting up a particular mortgage which he seeks to redeem, he must adduce *prima facie* evidence of his right to redeem that mortgage, and he is not entitled in that suit to a decree for redemption of other mortgages which may be found to be subsisting between the parties but which form

Mortgage—(Continued).**—7.—Redemption—(Continued).**

no part of the cause of action on which he has come into Court.

What is sufficient *prima facie* evidence would depend on the circumstances of each case. *Shadeo Ojha v. Lachmina Kuar*, 14 A.L.J. 615=34 Ind. Cas. 207.

KNOX and LINDEAY, JJ.

(11) *Suit by prior mortgagee and purchase by him in execution—Right of puisne mortgagee to redeem whether can be exercised after confirmation of sale—Suit for possession—Defendant whether can plead right to redeem when that right is barred—Omission of puisne mortgagee's name in execution proceedings—Irregularity—Effect.*

A prior mortgagee got a decree upon his mortgage bond in 1897 and purchased the property in execution and obtained delivery in 1900. In 1902, a puisne mortgagee obtained a mortgage decree on the same property, executed the decree, bought the property in auction and obtained registration of his name in the Collectorate. The prior mortgagee now sued for declaration of title and confirmation of possession or in the alternative for recovery of possession.

The Court of first instance decreed the suit, but permitted the puisne mortgagee (defendant) to redeem. The lower appellate Court also decreed the suit, but *held* that the defendant was not entitled to redeem, as he failed to do so before the order absolute in the plaintiff's mortgage suit.

Held, on second appeal, that the right of redemption continued till the confirmation of sale (a). But as his right to redeem was barred, he ought not to be allowed to exercise that right as a defendant in the present suit for recovery of possession.

The puisne mortgagee also contended that the sale was not binding as his name was omitted in the execution proceedings in connection with the decree on which plaintiff based his title.

Held that such omission was merely an irregularity, and the sale, even though the mortgagee creditor was himself the purchaser, could not be considered a nullity (b). *Syed Muhammad Rafi v. Syed Muhammad Askarf*, 1 Pat. L.J. 261.

MULLICK, J.

References:—(a) 31 C. 863, R. (b) 25 B. 337, F.; 32 C. 296, D.

(12) *Redemption decree—Deposit of redemption money more than three years after decree, validity of—Limitation for exercise of right of redemption after decree.*

On 30th May, 1901, a decree for redemption was passed in favour of several plaintiffs. On 6th September, 1913, one of the plaintiffs put in an application depositing the amount made payable by the decree and praying that notice should issue to the mortgagees to withdraw the money.

* *Held*, that the right to redeem could be exercised at any time before order absolute for

Mortgage—(Continued).**—7.—Redemption—(Continued).**

sale had been passed, and therefore the deposit was valid even though made long after the expiry of three years from the date of decree. **Bhushar Singh v. Bikramajit Singh**, 19 O.C. 30=34 Ind. Cas. 349.

LINDSAY, J.C.

(13) Redemption, suit for—Burden of proof—Court's duty in such cases.

In a suit for redemption, the plaintiff, when he is put to strict proof and is out of possession, must stand or fall by the strength of his evidence and cannot depend upon the weakness of his adversary's case. In such cases, it is absolutely wrong to deal with the case of the defendant first and prove it to be worthless and then turn to that of the plaintiff. The Court should see whether the plaintiff has discharged the burden lying upon him; his case cannot be held to be true because the defendant has failed to prove his defence. **La Aung v. Maung So**, 9 Bur. L.T. 57=31 Ind. Cas. 885.

MAUNG KIN, J.

Reference:—S.J. 482; S.J. 404, R.

(14) Onus probandi—One mortgagor redeeming the entire mortgage—Acknowledgment—Limitation Act (1908), S. 19, Sch. I, Art. 148.

In a suit by the representatives of some co-mortgagors for the redemption of their shares in certain property against the representatives of a co-mortgagor, the plaintiffs alleged that the mortgage had been made by one Sukhjit in favour of one Muhammad Husain in the year 1913, Sambit. The plaintiffs also relied on certain acknowledgments made by the defendant's predecessor-in-title. One of these was a *dakhalnama* executed by Ramlal in 1890 which contained a description of the property and was signed by Ramlal. The defendant contended that there was no mortgage, that he was absolute owner, that the acknowledgments had not been proved and that the suit was time-barred. It was held by the Court of appeal that the date of the mortgage had not been proved, but the acknowledgments were in respect of some mortgage and that the plaintiffs were entitled to redeem:—

Held, that the rule of limitation governing a suit of this kind was that laid down in *Ashfuq Ahmed v. Wasir Ali* (a), that Art. 148 of Sch. I to the Limitation Act applied, that is, the limitation extended for a period of 60 years from the date of execution of the mortgage or from the date when the mortgage money became due, and the burden was upon the plaintiffs of proving the mortgage that they had set up, and that it was for them to prove that the acknowledgment relied upon by them as contained in the *dakhalnama* had been made at a date within the period of limitation.

Held also that the acknowledgment contained in the *dakhalnama* amounted to nothing more than a description of the property purchased and was not an acknowledgment of a liability within the meaning of S. 19 of the

Mortgage—(Continued).**—7.—Redemption—(Continued).**

Limitation Act. **Khilal Ram v. Talk Ram**, 14 A.L.J. 334=38 A. 540=36 Ind. Cas. 452.

PIGGOTT and LINDSAY, JJ.

Reference:—(a) 11 A. 423 (F.B.), R.

(15) Failure of mortgagee in possession to keep accounts—Effect—Failure to deposit redemption money within fixed time—No bar to hearing of second appeal.

It is the duty of a mortgagee in possession to keep accounts of all expenditure, and, if he does not, all the presumptions will be made in favour of the mortgagor, but failure to keep accounts does not *ipso facto* defeat a claim for compensation which is proved in other ways.

Where in a redemption suit, possession was decreed by the lower appellate Court to the mortgagor's vendee on payment of a specified sum, the fact that such sum was not deposited within the time fixed in the lower appellate Court's decree does not necessarily bar the hearing of a second appeal in the Chief Court (a).

Because the appellant has not deposited the redemption money in Court within the time ordered it cannot be said that there is no decree for redemption subsisting in his favour. **Thakur Das v. Rada Kishen**, 99 P.R. 1916.

SHADI LAL and LE-ROSSIGNOL, JJ.

References:—(a) 161 P.R. 1890, R.; 23 A. 88; 31 A. 328; 23 M. 521, D.

(16) Transfer of Property Act (IV of 1882), Ss. 76 (i) and 84—Tender of amount due on the mortgage—What constitutes tender—Cessation of interest—Account for gross receipts.

Actual production of money is not necessary to constitute legal tender of the money due on a mortgage, especially when the mortgagee by words or conduct shows his determination not to accept it.

A suit for redemption is an offer to redeem, and if the defendant contests the suit and it is found that his case is not true, he must, under S. 76 (i) of the Transfer of Property Act, account for his gross receipts from the mortgaged property from the date of institution of the suit, and also forfeit all claim to interest from that date under S. 84. **Maung Po Tun v. Ma E Kha**, 9 Bur. L.T. 117=33 Ind. Cas. 735.

U KIN, J.

(17) Suit for redemption—Sale set up by defendant—Neither mortgage nor sale proved—Effect—Transfer of Property Act (IV of 1882), S. 55 (6) (b).

In a suit for redemption, in which the defendant denies the mortgage alleged by the plaintiff and sets up a sale to him, the plaintiff cannot recover possession, when, by reason of the provisions of the Transfer of Property Act, the plaintiff cannot prove the mortgage sued on, and the defendant cannot prove the sale relied upon by him.

It is in accordance with the principles of sound commonsense and justice that a man who brings a case and fails to prove it should not get a decree on a different cause of action from that alleged by him.

Mortgage—(Continued).**—7.—Redemption—(Continued).**

The plaintiff can succeed only according to his allegations and proofs, *secundum allegata et probata*.

S. 55 (6) (b) of the Transfer of Property Act applies only to the case of a buyer who has paid the purchase money in anticipation of delivery of possession, not to a buyer who has accepted delivery without a registered sale deed (a). *In re Ma Htwo v. Maung Lun*, 9 Bur. L.T. 114 = 8 L.B.R. 334 = 33 Ind. Cas. 163 (F.B.).

FOX, C.J., ROBINSON and PARLETT, J.J. *Reference*—(a) 8 B.L.T. 70, *overruled*.

(4) See SPECIFIC RELIEF ACT (1877), No. 2, 115 P.L.R. 1916.

(18) *Successive mortgages—Sale in execution of decree on second mortgage before sale in execution of decree on first mortgage—Right to possession—Form of suit*

Certain property was mortgaged to A, and then it was mortgaged to B. A brought a suit on his mortgage without impleading B. He obtained a decree and in execution thereof he purchased the property. B also brought a suit on his mortgage without impleading A. He obtained a decree and the property was purchased by C who went into possession. A obtained formal possession but failed to dispossess C. A suit was brought by A against B and C for an order that the money due under the prior mortgage might be paid to A or, in default, the plaintiff might be put into possession :

Held that the suit was maintainable, and that all the parties being before the Court the equities between them might be worked out and, C was entitled to nothing more than an opportunity of paying off the prior mortgage. *Babu Lal v. Jalakia*, 14 A.L.J. 1146.

PIGGOTT and LINDSAY, J.J.

(19) *Redemption decree—Deposit of mortgage money by mortgagor—Title to get possession from date of deposit—Suit for profits by mortgagor—Period for which profits could be recovered.*

The plaintiff obtained a preliminary decree for redemption against the defendant who was also the lambardar. The decree directed the mortgage money to be deposited in or before September. As a matter of fact the money was paid into Court in August, but actual possession over the share was not delivered to the plaintiff until a date in November which fell after the date when profits for *kharif* became payable. It was admitted that there was no accounting for *kharif* profits in the redemption suit :

Held, that a plaintiff in a redemption suit being entitled to possession as soon as he had deposited the money, the plaintiff's title to the profit in the present case arose from the date on which the mortgage money was put into Court. *Ram Karan v. Achal Singh*, 19 O.C. 161 = 35 Ind. Cas. 799.

LINDSAY, J.C.

(20) *Ejectment suit by mortgagor prior to obtaining decree in redemption suit.*

An ejectment suit by the mortgagor of a zamindari, prior to his obtaining decree in

Mortgage—(Continued).**—7.—Redemption—(Continued).**

redemption suit is premature and should be dismissed. *All Bux v. Parkash Nand*, 31 Ind. Cas. 464.

CAMPBELL, J.M.

(21) *Possession taken by mortgagee as agreed in mortgage deed—Right of mortgagor to sue for redemption—Plea of adverse possession by mortgagee.*

Where in pursuance of a stipulation in a mortgage deed the mortgagee got possession of the mortgaged property as owner because of the omission of the mortgagor to pay the mortgage amount within the stipulated time, the mortgagor lost his right of redemption in cases not governed by the provisions of the Transfer of Property Act, and in this respect there is no difference in principle between a simple and a usufructuary mortgage (a)

Where a mortgage is subsisting the mortgagee cannot set up an adverse title against his mortgagor so as to acquire a title by adverse possession after 12 years. *Abdul Hamid v. Durrah Bibi*, 36 Ind. Cas. 959.

FOX, C.J. and ORMOND, J.

References :—1 L.B.R. 192 ; 16 Ind. Cas. 694 = 37 M. 545 = (1912) M.W.N. 995 = 12 M.L.T. 330 = 23 M.L.J. 360 ; 7 B.L.R. 136 = 13 M.I.A. 660 = 15 W.R. 35 = 2 Subh. P.C.J. 410 = 2 Sar. P.C.J. 623 = 20 E.R. 660, R.

(22) *Lease by mortgagee—Redemption of mortgage—Sub-letting of land by lessee—Suit by lessee to recover occupancy—Oudh Rent Act (XXII of 1886), S. 108 (10).*

"On the redemption of a mortgage the mortgagee is bound to retransfer the property free not only from the mortgage but also from all incumbrances created by him." As the ruling in 3 A.L.J. 517 recognises the creation of occupancy rights, a mortgagee in possession is entitled to create a statutory tenancy (in Oudh) which can remain effective even after the mortgage is redeemed (a).

Held also that a tenant who sublets his land can be deemed to be a tenant in occupancy of that land so that he can recover occupancy under S. 108 (10) of the Oudh Rent Act (XXII of 1886) (b). *Jagra v. Kalpi*, 33 Ind. Cas. 270.

HOLMS, S.M.

References :—(a) 3 A.L.J. 517, R. (b) 16 O.C. 105, R.

(23) *Mortgage, decree absolute for sale on, against father—Sons suing for possession—Sons' right of redemption—Limitation Act, 1877, Sch. II, Arts. 12, 95—Civ. Pro. Code, 1882, S. 578—Guardian ad litem—Notice.*

If, in pursuance of a decree absolute for sale on a mortgage obtained against a deceased mortgagor without substituting or mentioning his sons as his heirs, the sale is effected, the sons cannot challenge the sale (a).

The status of Mitakshara sons would confer no right to redeem the self-acquired property of their father sold in execution of a mortgage decree obtained against the father (b).

On property being sold in execution of a decree if a suit for possession is brought on the

Mortgage—(Continued).**—7.—Redemption—(Continued).**

ground that the sale was a nullity, the sale need not be set aside (c).

* After a mortgagor's equity of redemption has been sold away in execution of a decree obtained by a second mortgagee, it is not open to the mortgagor to bring a suit for redemption against the first mortgagee (d).

Arts. 12 and 95 of Sch II of the Limitation Act, 1877, does not apply to a redemption suit.

If in fact the Court has allowed a party to appear as a guardian of a minor and to conduct the proceedings in her behalf, the mere circumstance that a notice was not issued to the guardian is immaterial and is curable as an irregularity under S. 578, Civ. Pro. Code, 1882 (e). **Jahnavi Prasad Singh v. Gharbaran Dubey**, 35 Ind. Cas. 404.

MULLICK and KINGSFORD, JJ.

References:—(a) 28 C. 73, R. (b) 20 A. 267 (P.C.) R. (c) 11 C.W.N. 1078, R. (d) 51 L.J. C.P. 905, D; 14 C.L.J. 530, F (e) 30 C. 1031 (P.C.), R.

(24) *Suit by mortgagee—Owner of equity of redemption not made party—Dispossession of owner by mortgagee decree-holder—Right of such owner to sue for khas possession.*

Where the owner of the equity of redemption was not made a party to a suit on the mortgage and the mortgagee having purchased the property in execution of a decree obtained by him in the suit, dispossessed the owner of the property, the latter can sue for khas possession of the property, and need not sue for redemption. **Gopal Ram Marwari v. Narsingh Prasad Misra**, 36 Ind. Cas. 744.

MULLICK, J.

Reference:—7 C.W.N. 11, R.

(25) *Sale of mortgaged property—Right of purchaser to redeem mortgage without paying further charge.*

Plaintiff purchased plaintiff properties subject to the payment of a mortgage on the property. He brought a suit for redemption of the property purchased by him. The defendant, mortgagee, set up a deed of further charge upon the property and pleaded that that money also should be paid before the plaintiff could redeem the property. The Court found that the deed which evidenced the alleged further charge did not amount to a hypothecation on the property but amounted to a simple money bond. Held that under the circumstances there could be no consolidation. The equity that existed between the original mortgagor and the mortgagee was a matter of personal obligation and did not estop the plaintiff from exercising the right of redemption over the property purchased by him until he satisfied the amount due under the simple money bond. There was no equity between the mortgagee and the subsequent transferee for value. **Puran Singh v. Balkham Singh**, 36 Ind. Cas. 709.

STUART, J.C.

References:—25 Ind. Cas. 995=17 O.C. 303, R.

(25-a) *Mortgage (Usufructuary)—Redemption—Mortgagee and purchaser of equity of*

Mortgage—(Continued).**—7.—Redemption—(Continued).**

redemption, arrangement between—Extinguishment of mortgage—Merger—Mesne profits and interest—Limitation Act (1908), Art. 105—Creditor having funds belonging to debtor for payment to himself—Question of limitation

An arrangement between the usufructuary mortgagee and the purchaser of portion of the equity of redemption *re* the leaving of the consideration money to be credited towards the mortgage-debt held not to be binding on the mortgagor.

The merger of the right of the mortgagor and the mortgagee in one and the same person with a liability to satisfy the entire mortgage-debt operated as an extinguishment of the mortgage:

A mortgagee makes his mortgage as a security for his debt and has no right to be in possession of the estate after he has paid himself what is due to him. If he holds the property subsequent to his having been paid, the mortgagor would be entitled to possession and surplus profits together with interest thereon (a). The limitation applicable for recovery of such surplus with interest thereon is that provided by Art. 105 of the Limitation Act, 1908.

No question of limitation arises where a creditor has funds belonging to the debtor at his disposal charged with an obligation to pay himself out of the fund. **Abdul Hasan Khan v. Jagwanta**, 32 Ind. Cas. 729.

KANAIYA LAL, A.J.C.

References:—35 Ch. D. 544, F; 16 B. 141, R.

(26) *Jurisdiction—Appeal—Value of principal—Interest to be excluded though Court fee paid.* **Mahamad Jallaldeh Marakayar v. Vijaya-swami**, (1915) M.W.N. 239=29 M.L.J. 142=28 Ind. Cas. 621=39 M. 447. See Final Part, 1915, Col. 1072.

(27) *Mortgage debt—Provision for repayment within a specified period—Right to redeem before the expiry of that period.* **Chandu alias Shrinivasa Pal v. Kooja Povjarl**, 29 M.L.J. 86=30 Ind. Cas. 370. See Final Part, 1915, Col. 1075.

(28) *Term fixed within which property might be redeemed, meaning of—Compromise, ratification of, after attaining majority—Hastings—Act I of 1869, S. G.* **Raja v. Mahant Santram Das**, 18 O.C. 95=30 Ind. Cas. 193. See Final Part, 1915, Col. 1075.

(29) *Mortgagor's right to redeem before delivery of possession to mortgagee—Transfer of Property Act—Terms of the deed, enforcement of.* **Mohammad Sher Khan v. Raja Seth Swami Dayal**, 18 O.C. 105=30 Ind. Cas. 377. See Final Part, 1915, Col. 1076.

(30) *Usufructuary mortgage—Second mortgage of same property—Consolidation—Covenant to pay second mortgage first—Suit on second mortgage barred by limitation, effect of.* **Kesar Kunwar v. Kashi Ram**, 13 A.L.J. 889=37 A. 634=30 Ind. Cas. 777. See Final Part, 1915, Col. 1076.

(31) *Redemption of mortgage—Previous decree in mortgagee's favour for possession, it bars*

Mortgage—(Continued).**—7.—Redemption—(Continued).**

redemption suit—Civ. Pro. Code (1882), S. 244 —Order in execution of decree in suit for possession directing mortgagee to furnish accounts and permitting redemption, effect of—Preliminary decree, appeal against — Final decrees passed pending appeal if bar to hearing of appeal. **Raja Peary Mohun Mukherji v. Chandra Sekhar Sarker**, 19 C.W.N. 1132=33 Ind. Cas. 59. See Final Part, 1915, Col. 1078.

(32) *Suit for redemption—Mortgage money fixed by Court—Second suit for redemption on payment of the amount so fixed—Decree for larger amount—Appeal—Court fee—Calculation of mortgage money payable.* **Chun Lal v. Bell Ram**, 58 P.R. 1915=166 P.W.R. 1915=30 Ind. Cas. 104=58 P.L.R. 1916. See Final Part, 1915, Col. 1078.

(33) *Joint estate—Mortgage by all the joint-holders severally—Redemption by one joint-holder of all the land mortgaged by all the joint owners severally—Objection by one joint owner's widow—Priority of right of redemption—Transfer of Property Act, S. 91.* **Jiwan Singh v. Achhar Singh**, 92 P.W.R. 1915=56 P.L.R. 1916=30 Ind. Cas. 389. See Final Part, 1915, Col. 1080.

(34) *Mortgagor and mortgagee—Prior suit for sale—Decree obtained with option of redemption—Decree not executed—Subsequent suit for redemption—Res judicata—Transfer of Property Act, Ss. 60, 67, 86, 88, 89, 93—Civ. Pro. Code (1908), S. 11, O. XXXIV, rr. 2, 4, 5 and 8.* **Ranga Iyengar v. Narayanachariar**, 18 M.L.J. 596=30 M.L.J. 13=32 Ind. Cas. 30=39 M. 896. See Final Part, 1915, Col. 1082.

(35) *Usufructuary mortgage—Stipulation for mortgagee becoming permanent lessee after payment of principal money—Clog on equity of redemption—Unenforceability.* **Daolat Rai v. Shelkh Chand**, 11 N.L.R. 180=31 Ind. Cas. 869. See Final Part, 1915, Col. 1082.

(36) *Suit for redemption—Prayer to set aside sale-deed as fraudulent—Suit outside the scope of the Act.* See BOM. ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), No. 3, 18 Bom. L.R. 763.

(37) *Suit for redemption of mortgage—Relief sought being setting aside of a consent decree between the parties and a prior sale deed as fraudulent.* See BOM. ACT XVII OF 1879 (DEKKHAN AGRICULTURISTS' RELIEF), No. 2, 18 Bom. L.R. 708.

(38) *Suit for redemption—Plea of occupancy right by defendant—Cognizability by Civil Court.* See PUN. ACT XVI OF 1887 (TENANCY), No. 13, 59 P.R. 1916.

(39) *First suit by mortgagor to redeem in his personal right—Abatement of suit—Second suit to redeem by his co-parceners whether barred.* See CIV. PRO. CODE (1882), No. 27, 18 Bom. L.R. 33.

(40) *Redemption suit fully contested by Manager of joint Hindu family—Representation of minors—Irregular appointment of guardian ad litem—Effect.* See CIV. PRO. CODE (1908), No. 581, 14 A.L.J. 589.

Mortgage—(Continued).**—7.—Redemption—(Concluded).**

(41) See CIV. PRO. CODE (1908), No. 352, 35 Ind. Cas. 252.

(42) *Construction of covenant—Clause as to payment upon mortgagee receiving less than the stipulated amount of profits—Sum payable on redemption.* See CONSTRUCTION OF DEED, No. 3, 14 A.L.J. 996.

(43) *Redemption of mortgage—Appeal from decree of lower Court—Stamp duty payable on memorandum of appeal.* See COURT FEES, No. 4, 30 Ind. Cas. 322.

(44) *Date of document—Date of mortgagee obtaining possession—Interest during interval—Damdupat, rule of—Non-applicability.* See DAMDUPAT, No. 1, 12 N.L.R. 1.

(45) *Right of mortgagee to dispute mortgagor's right.* See ESTOPPEL, No. 3, 30 Ind. Cas. 234.

(46) *Redemption suit—Plea of oral sale discharging mortgage-debt, if admissible—Mortgagee's possession, nature of.* See EVIDENCE ACT, No. 58, 31 Ind. Cas. 678.

(47) *Suit for redemption—Mortgage deed in mortgagee's possession—Mortgagee's failure to produce deed—Admissibility of oral evidence.* See EVIDENCE ACT, No. 33, 9 Bur. L.T. 52.

(48) *Suit for redemption—Mortgage deed in possession of mortgagee—Admissibility of secondary evidence—Absence of notice to produce original.* See EVIDENCE ACT, No. 37, 36 Ind. Cas. 696.

(49) *Mitakshara family—Mortgage decree against father—Sons not parties—Sale in execution of decree—Suit by sons to redeem—Maintainability—Limitation—Art. 12, Limitation Act (1908).* See HINDU LAW (ALIENATION), No. 14, 1 Pat. L.J. 180.

(50) See LIMITATION ACT (1908), No. 243, (1916) 2 M.W.N. 324.

(51) *Mortgage by conditional sale—Transfer by mortgagee—Redemption—Limitation.* See LIMITATION ACT (1908), No. 233, 3 L.W. 19.

(52) See MALAHAR LAW (MORTGAGE), No. 1, (1916) 2 M.W.N. 358.

(53) See MORTGAGE (SALE OF MORTGAGED PROPERTY), No. 2, 9 Bur. L.T. 234.

(54) *Sale of mortgage—Construction of deed.* See SALE, No. 9, 18 Bom. L.R. 350.

(55) *Deposit—Interest stops from what date—Deposit falling short by 9½ pias—Effect—Fractions of day—Calculation of interest—Interest for day of deposit—Bona fide mistake in calculating the days for which interest payable—Effect.* See TRANSFER OF PROPERTY ACT, No. 116, 30 M.L.J. 607.

—8.—Sale of Mortgaged Property.

(1) *Mortgagor and mortgagee—Sale of the mortgaged properties—Power of the Court to prescribe by decree the order in which properties should be sold.*

The Court has power to prescribe by its decrees, at the instance of the mortgagee, the order in which the mortgaged properties are to

Mortgage—(Continued).**—8.—Sale of Mortgaged Property—(Cld.).**

be sold. *Arunachallam Chetty v. Murugappa Chetty*, 20 M.L.T. 233=4 L.W. 327=(1916) 2 M.W.N. 133=36 Ind. Cas. 516.
AYLING and SRINIVASA IYENDAR, JJ.

(2) Redemption of mortgage out of purchase money—Extinguishment of mortgage.

A purchaser of mortgaged property who pays off the mortgage at the time of purchase cannot claim the rights of the redeemed mortgagee as against a subsequent purchaser, the mortgage having been extinguished as soon as the mortgage was paid off by the purchaser. *Ma Kyun v. Myaling Shiao*, 9 Bur. L.T. 231.
U KIN, J.

(3) Suit on prior mortgage—Puisne mortgagee not a party—Sale in execution pending suit by puisne mortgagee against prior mortgagee and mortgagor—Right of purchaser—Right of puisne mortgagee to bring to sale the equity of redemption.

A puisne mortgagee is entitled to a sale of the property secured by his mortgage, subject to the rights of the first mortgagee, even after the property had been sold in execution of a decree obtained by the first mortgagee in a suit to which the puisne mortgagee was not a party. If a person purchases the property in execution of the prior mortgagee's decree during the pendency of the suit brought by the puisne mortgagee for the sale of the mortgaged property against the prior mortgagee and the mortgagor, the purchaser would be bound by the result of any proceedings which may be taken in execution of the decree obtained in that suit, to the same extent to which the prior mortgagee, who was a party to it, can be bound. The purchaser is not entitled to stop the sale of the equity of redemption (a). *Kundan Lal v. Wajid Husain*, 32 Ind. Cas. 359.

KANHAIYA LAL, A.J.C.

References:—(a) 29 A. 385—A W.N. (1907) 97=4 A.L.J. 273=2 M.L.T. 218 (F.B.); 10 M.L.J. 347; 30 C. 599=7 C.W.N. 766 (F.B.), R.

—9.—Simple.

Simple mortgage—Mortgagor's power to create leases binding on mortgagee.

A simple mortgage in India, unlike a legal mortgage in England, does not arrest the mortgagor's power of leasing in the ordinary course of management, and the mortgagor acts within his powers in creating a temporary lease which does not impair the value or impede the operation of the mortgage. *Balmukund Ruyia v. Moti Lal Barman*, 20 C.W.N. 350=32 Ind. Cas. 195.

JENKINS, C.J. and HOLMWOOD, J.

References:—10 W.R. 325, R.; 1 Douglas 21 (1779), Not applied.

—10.—Subrogation.

(1) Partial discharge of prior encumbrance—Purchaser of equity of redemption entitled to stand in the shoes of prior encumbrancer to the extent that encumbrance has been discharged.

Mortgage—(Continued).**—10.—Subrogation—(Concluded).**

A purchaser of the equity of redemption is entitled to stand in the shoes of a prior encumbrancer, where the purchaser has, with the consent of that encumbrancer, partially discharged the liability. *Udit Narain Mistr v. Asharfi Lal*, 14 A.L.J. 662=38 A. 502=35 Ind. Cas. 732.

RICHARDS, C.J. and RAFIQ, J.

References:—36 C. 193, Diss.; (1899) 1 Ch. 553, F.

(2) Payment of prior mortgage with money borrowed—Right of lender.

The mere fact that the money borrowed by a debtor is used to pay off a prior mortgage does not entitle the lender to the benefit of the discharged security. *Ma Pyu v. Y.R.N.E. Chetty Firm*, 36 Ind. Cas. 992.

FOX, C.J. and TWOMBLY, J.

(3) Purchaser of equity of redemption of two later mortgages—Three mortgages—Purchaser retaining consideration money for payment of two later mortgage—Purchaser, paying two earlier mortgages—Later mortgagee enabling mortgagor to commit fraud—Purchaser, if had charge for payment of first mortgage. *Har Shyam Chowdhury v. Shyam Lal Sahu*, 22 C.L.J. 237=20 C.W.N. 601=43 C. 69=31 Ind. Cas. 22. See Final Part, 1916, Col. 1087.

(4) Stranger paying off a subsisting mortgage—Subrogation to mortgagee's position. See CONTRACT ACT. No. 77, 18 Bom. L.R. 700.

—11.—Usufructuary.

(1) Lease to mortgagors—Lessee agreeing to pay rent in cash and deliver certain other things in kind—Rasum zemindari—Rent or cess—Land Revenue Act (III of 1901), Ss. 56, 86.

A usufructuary mortgage was made of certain zemindari property. The mortgagees let the property to the mortgagors who agreed to pay as rent a certain sum of money in cash. In addition to this they agreed to deliver certain articles, such as *blusa*, and things of the kind which were described in the *kabuliat* as *rasum zemindari*. In a suit to recover rent it was objected that the latter articles were not recoverable as they were cesses which had not been recorded by the settlement officer:

Held, that the plaintiffs were entitled to recover the *blusa*, etc., as part of their rent which had been agreed to be paid partially in cash and partially in kind. *Rangilal v. Jassa*, 14 A.L.J. 393=38 A. 286=35 Ind. Cas. 208 (F.B.).

RICHARDS, C.J., KNOX and TUDBALD, JJ.

Reference:—35 A. 19, Dist.

(2) Equity of redemption—Adverse possession—Limitation Act (1908), Sch. I, Art. 144.

A person cannot be said to be in adverse possession against the owner when the former is neither in actual possession or in constructive possession by receipt of rents and profits.

Mortgage—(Continued).**—11.—Usufructuary—(Continued).**

Hence, where a mortgagee was in possession of certain property under a usufructuary mortgage, and certain persons succeeded in having their names recorded in the revenue papers in place of the mortgagor and his heirs in spite of resistance offered by the latter, *neld*, that such persons could not acquire adverse possession of the right to redeem. **Kuar Sen v. Darbari Lal**, 14 A.L.J. 498=38 A. 411=34 Ind. Cas. 171.

RICHARDS, C. J. and BANERJI, J.

Reference :—6 C.W.N. 601, Diss.

(3) *Mortgagee purchasing property in execution of his decree on simple mortgage.*

On a usufructuary mortgagee purchasing property in execution of his own decree on simple mortgage, he becomes absolute owner of the property and the mortgagee's right ceases to exist by virtue of the law of merger. **Jawahir Mal v. Udai Ram**, 31 Ind. Cas. 891.

RICHARDS, C. J. and BANERJI, J.

References :—(a) 41 Ch. D. 126; 58 L.J. Ch. 361; 60 L.T. 614; 37 W.R. 411, *Rel.*

(4) *Mortgagor allowed in possession under a lease—Non-payment of lease amount—Mortgagee's suit for account—Maintainability of.*

A usufructuary mortgagor who allows the mortgagor to continue in possession of the mortgaged properties notwithstanding the mortgage under a lease executed by the mortgagor, who, however, never paid any rent to the mortgagee, is nevertheless entitled to sue the mortgagor for an account of the mortgage moneys due to him. His right to rent is supplementary to and not in substitution of his right to interest on the mortgage money. The suit is maintainable even against a purchaser of the properties from the mortgagor (a). **Yepa Kamesam v. Varigonda Narasimham**, 31 Ind. Cas. 701.

SHEPARD and SUBRAMANIA AIVAR, JJ.

(5) *Property sold under Revenue Sale Act—Mortgage right—Extinction—Personal covenant—Right to sue—Purchaser letting subsequently to mortgagee—Effects, Surplus proceeds—Transfer of Property Act, 1882, S. 90—Mortgagors jointly and severally liable.*

Plaintiff had a usufructuary mortgage bond executed in his favour in 1891. The mortgaged property was sold out by the Revenue Authorities for arrears due under Revenue Sale Act in 1905. The auction purchaser got actual possession of the land in 1906 and conveyed it in 1908 to some person as a gift and the donee on that very date let off a major portion to the mortgagee under the deed of 1891. The said mortgagee brought a suit in 1911 on the basis of his mortgage of 1891 for a personal decree against the mortgagors.

Held that the suit was not barred by limitation, the cause of action having accrued to the said mortgagee in 1906 when he was ousted from the property: that under the Revenue Sale Act, 1905, the mortgage security having

Mortgage—(Concluded).**—11.—Usufructuary—(Concluded)**

been extinguished, the subsequent re-letting to the mortgagee of 1891 had not the effect of operation as a graft on the original interest of the mortgagor. In order that the doctrine of graft could apply there must be some life in the old stock, that is, in the old interest (a).

S. 90 of the Transfer of Property Act has no application except in cases where the mortgage-deed has already been sued upon and a decree granted as against the land and the proceeds of the sale of the land prove insufficient to discharge the mortgage-debt. It has always been recognised that a mortgagee has the right to proceed concurrently with all the remedies he is entitled to, to enable him to realize the mortgage-debt. If he has elected to proceed on the personal covenant contained in the mortgage-deed, he is clearly entitled to do so.

Mortgagors are jointly and severally liable, though as between themselves, there may be contribution. **Raja Ram Lal v. Hauman Upadhyaya**, 35 Ind. Cas. 43.

ATKINSON, J.

References :—(a) 5 C. 198 (P.C.); 36 B. 539, D.

(6) *Usufructuary mortgage of Zemindari including Sir—N.W.P. Rent Act (XII of 1881)—Agra Tenancy Act (II of 1901), S. 10, cl. 12—Expropriatory tenant—Right of mortgagee not affected—General Clauses Act (Local), S. 6, cl. 3. Bhagwana v. Bhagwan Das*, 13 A.L.J. 925=30 Ind. Cas. 911. See Final Part, 1915, Col. 1088.

(7) *Right of redemption of prior mortgage by—Usufructuary mortgagees getting money from mortgagor for redemption of prior mortgage, effect of default in making redemption by—Redemption made subsequently by mortgagor, effect of. Husaini alias Hashmat (Mussammatt) v. Ram Charan*, 18 O.C. 280=32 Ind. Cas. 341. See Final Part, 1915, Col. 1089.

(8) *Mortgage with possession—Mortgaged property leased to mortgagor—First suit for rent—Second suit for principal money not barred under O. II, r. 2, Civ. Pro. Code. See CIV. PRO. CODE (1905), No. 315, 102 P.L.R. 1916.*

(9) See **LANDLORD AND TENANT**, No. 57, 33 Ind. Cas. 556.

(10) *Simple mortgage-deed and lease executed simultaneously, effect of. See MORTGAGE—GENERAL*, No. 31, 19 O.C. 328.

(11) *Suit for possession and profits of property usufructually mortgaged. See LIMITATION ACT (1908), No. 177, 31 Ind. Cas. 801.*

(12) *Lease, provision in, for forfeiture on alienation—Usufructuary mortgage by lessee without divesting himself of possession. See TRANSFER OF PROPERTY ACT, No. 143, 31 Ind. Cas. 451.*

(13) *Rent—Assignment—Debt—Simple mortgage and subsequent lease of the hypotheca to mortgagee Mesne profit. See TRANSFER OF PROPERTY ACT, No. 16, 31 Ind. Cas. 473.*

Mortgage-decree.

(1) Execution. See LIMITATION ACT (1908), No. 297, 4 L.W. 291.

(2) Lease by mortgagor after, but before sale, whether binds the auction purchaser—Nature of mortgage decree—*Lis pendens*—Transfer of Property Act, Ss. 52, 88. See SMALL CAUSE COURT, JURISDICTION OF, No. 1, 20 M.L.T. 512.

Mortgagee.

Privity of estate—Mortgagor who has mortgaged before suit cannot represent the estate—Decree not binding on, not a party. See RES JUDICATA, No. 14, 18 Bom. L.R. 757.

Mortgagee in Possession.

(1) Bringing adjacent land under cultivation, if accession to the mortgaged holding. See ACCESSION, No. 1, U.B.R. (1916), 2nd Qr., p. 110.

(2) Duty of—To keep mortgaged property in repair—Reasonable expenditure on irrigation—Impossibility to ascertain sums spent—Right to amount spent therefor. See MORTGAGE (GENERAL), No. 33, 1 Pat. L.J. 589.

Mortgage Suit.

(1) Joinder of party claiming adversely to mortgagor, irregular—Claim of person so joined, dismissed—Appeal by claimant to Privy Council—Subject-matter of appeal, if mortgage-debt or property claimed—Appellable value—Civ. Pro. Code (Act V of 1908), S. 110.

In a suit by a mortgagee to enforce his mortgage, it is irregular to join as parties persons who set up adverse claims to the mortgaged property.

Where in a mortgage suit a person who claimed a certain share in the mortgaged property as against the mortgagor under a title adverse to his, was made a party defendant, and her claim was allowed in part by the trial Court, but wholly disallowed by the High Court, and she sought to appeal from that decree to His Majesty in Council.

Held—That the subject-matter of the appeal was the property which she was claiming and its value was the value of that property and not the value of the mortgage debt. *Mussammat Radha Kunwar v. Thakur Reoti Singh*, 20 C.W.N. 1279=20 M.L.T. 211=38 A. 438=24 C.L.J. 303=14 A.L.J. 1002=18 Bom. L.R. 850=(1916) 2 M.W.N. 200=31 M.L.J. 571=5 L.W. 456=35 Ind. Cas. 939 (P.C.).

LORD CHANCELLOR, LORD ATKINSON and SIR JOHN EDGE.

(2) See CIV. PRO. CODE (1908), No. 308, 1 Pat. L.J. 468.

(3) Costs, award of, principles regarding. See TRANSFER OF PROPERTY ACT, No. 113, 34 Ind. Cas. 690.

Mortgagor.

Privity of estate—Who has mortgaged before suit cannot represent the estate—Decree not binding on mortgagee not a party. See RES JUDICATA, No. 14, 18 Bom. L.R. 757.

Moveable Property.

(1) "Distress," how affects the meaning of—Debt, if moveable property. See CRIM. PRO. CODE, No. 6, 4 L.W. 613.

(2) Mortgage of—Rights of mortgagee. See HYPOTHECATION, No. 1, 18 Bom. L.R. 587.

(3) Hypothecation, decree—Moveable property converted into immovable property—Substituted security. See LIMITATION ACT (1908), No. 214, 14 A.L.J. 1025.

(4) Hypothec—Oral charge on moveable property—Validity—Subsequent written unregistered mortgage—Priority—S. 48, Registration Act. See MORTGAGE (GENERAL), No. 6, 32 P.R. 1916.

(5) Execution of document transferring standing tree—Nature of property moveable or immovable. See REGISTRATION ACT (1908), No. 4, 30 Ind. Cas. 281.

Muafi.

Muafi resumed—*Muafidars recorded as tenants at privileged rates of rent—Tenant—Suit to recover possession as proprietor not maintainable—Civil Court—Jurisdiction. Kulsum-un-nissa Bibi v. Dauru Nath*, 13 A.L.J. 557=30 Ind. Cas. 552. See Final Part, 1915, Col. 1090.

Muafi Khairati.

Whether resumable—Revenue. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 42, 31 Ind. Cas. 898.

Mukhtar.

(1) Suit against Ziladar and, for rent collected—Limitation prescribed by Oudh Rent Act, applicability of, to suits in Civil Courts. See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 4, 19 O.C. 314.

(2) See WAJIB-UL-ARZ, No. 2, 30 Ind. Cas. 605.

Mukhtars, Pleaders and Revenue Agents Act.

See ACT XX OF 1865.

Municipal Act.

See BEN, ACT III OF 1884.

See BEN, ACT III OF 1899.

See MAD. ACT III OF 1904.

See U.P. ACT I OF 1900.

See PUN. ACT III OF 1911.

Municipal Committee.

Remedy of persons dissatisfied with any act of—Power of committee to direct removal of verandah projecting on public street on payment of compensation. See PUNJAB ACT (II OF 1911 (MUNICIPALITY), No. 3, 101 P.R. 1916.

Municipalities (District), Act.

See BOM. ACT III OF 1901.

See MAD. ACT IV OF 1884.

Mutation.

(1) *Gilt*—Entry of mutation made in the lifetime of the donor though not sanctioned owing to the machinations of Patwari—Duty of mutation officers—Questions of religion and customs not to

Mutation—(Continued).

be gone into at mutation—Will—Illegitimate son by a Mahomedan wife—Gift. **Lal Singh alias Lal Din v. Maluk Singh and Makhan Singh**, 1 P.W.R. 1915 (Rev.) = 30 Ind. Cas. 839. See **Final Part**, 1915, Col. 1093.

(2) Tenancy relinquished in favour of creditor—Of names.—See **EVIDENCE ACT**, No. 60, 35 Ind. Cas. 103.

(3) Duty of, officer to attest deed of gift. See **GIFT**, No. 3, 30 Ind. Cas. 839.

(4) In favour of mortgagee refused—Declaratory suit—Limitation when commences. See **LIMITATION ACT** (1908), No. 202, 71 P.L.R. 1916.

Mutation Proceedings.

(1) Registration of petitions of compromise filed in—Revenue Court, mutation proceedings in. See **FAMILY ARRANGEMENT**, No. 1, 19 O.C. 75.

(2) Property in possession of a receiver—*Prima facie* right. See **HINDU LAW (ADOPTION)**, No. 15, 34 Ind. Cas. 495.

(3) Admissible to prove alienation irrespective of the said-deed. See **REGISTRATION ACT** (1908), No. 19, 110 P.W.R. 1916.

Mutt.

(1) *Matathipathi—Succession to—Usage—Proof—Dwandwa mutts of South Canara—Nomination—Evidence Act, Ss. 32, 33—Statements of deceased persons regarding facts in issue—Admissibility of—Facts in issue and relevant facts.*

There is no universal rule of law relating to succession to a Matathipathi. Each case must be determined by reference to the past custom or usage of the particular institution.

No general rule can be laid down as to the nature or quantum of proof necessary to establish a custom in any particular case except that it must be proved by clear and cogent evidence. In cases where the custom set up is not at variance with law, the Court will not insist upon such strict proof thereof as when the custom set up is in derogation of the general law. Although ordinarily the Courts would require proof of at least more than one instance in which the alleged customary right has been exercised in the manner alleged still there is no hard and fast rule to that effect. Where the occasions for the exercise of the right are, in the nature of things, very rare and far between, the Courts will not insist by calling for proof of numerous instances when the right was exercised as alleged. In proper cases even proof of a single instance may be sufficient to establish a custom (a). Where a right is found to have been exercised in a certain way upon the only occasions when it is known to have arisen during the last 150 years there is strong evidence to support the theory that that particular method of exercising the right is the customary one, especially where there is no evidence of any custom other than the one set up.

The existence of such custom is also rendered probable by the fact that similar mutts in the

Mutt—(Continued).

same neighbourhood also follow the same custom.

In the Udipi Mutts of South Canara the mode of succession is for the Swami of the Mutt to appoint a successor before he dies who becomes the Swami after his death. But if the Swami dies without appointing his successor or there is a vacancy in the headship of the Mutt, such power of appointment is vested in the Swami of the Dwandwa or sister Mutt.

According to the usage of the Madwa Mutts for the valid appointment of a successor, the person to be appointed must be a Sanyasi (i.e., a person who has renounced all worldly ties and has been initiated into the brotherhood by a person competent to make the nomination) and the Sanyasam must have been received by him when he was a *bala brahmachari* (i.e. a bachelor below the age of 15) at the time of and with a view to such appointment.

A fact in issue is a relevant fact and statements of deceased persons relating to a fact in issue is admissible under S. 32, cl. 4 of the Evidence Act (b).

Depositions of deceased persons are not admissible under S. 33 of the Evidence Act unless the subject-matter of the dispute in the two suits is the same and also the subsequent suit is between the same parties or their representatives in interest (c).

Abdur Rahim, J.—A fact in issue is always a relevant fact and there is no reason for excluding from the operation of S. 32, cl. 4 of the Indian Evidence Act statements relating to facts in issue. If they were to be excluded much valuable evidence hitherto considered admissible would be unavailable as will be apparent from the illustrations to S. 32 and also the definitions of facts in issue and relevant facts.

Phillips, J.—A fact must either be relevant or irrelevant and there is no third class of facts in issue which are neither relevant nor irrelevant. To hold that facts in issue are not relevant facts within the meaning of S. 32 of the Evidence Act would lead to startling results and most important evidence would then be shut out by the Court framing issues as regards all relevant facts. Facts in issue are facts about which there is a question in issue between the parties and though all relevant facts are not necessarily facts in issue, still facts in issue cannot be other than relevant to the determination of the suit and this is clear from the language of S. 6 of the Evidence Act. **Raghubhushana Thirtaswami v. Vidyavaridhi Thirtaswami**, 34 Ind. Cas. 875.

ABDUR RAHIM and PHILLIPS, JJ.

References:—(a) 3 B. 34; 19 B. 428; 18 C.L.J. 559 = 18 C.W.N. 55 = 21 Ind. Cas. 810; 37 A. 298 = 42 I.A. 115 = 29 Ind. Cas. 724; 1 M. 235 = 4 I.A. 76, R. (b) 15 B. 565, *dissented from*; 27 M. 228, R. (c) 28 M.L.J. 669 = 24 Ind. Cas. 519.

(2) Nature and constitution of mutts—Position of junior Pandarasannadhi—Power of senior to remove him—Grounds for removal—Compromise decree recognizing plaintiff as

Mutt—(Concluded).

junior **Pandarasannadhi**—Validity and effect—Immorality of holders of religious offices—Whether entails forfeiture of their offices—S. 367, Civ. Pro. Code (1882)—Suit by legal representative to establish his position—Duty of plaintiff. See **RELIGIOUS ENDOWMENTS**, No. 1, 30 M.L.J. 274.

Mutwalli.

(1) *Civ. Pro. Code (1908), S. 92, scope of reliefs under—Mutwalli, appointment of, by, founder—Mutwalli, when and how can resign mutwalli-ship—Appointment by founder, how far effects original deed of wakf. Abdul Ghafoor Mia v. Altaf Hosain*, 29 Ind. Cas. 423 = 20 C.W.N. 605. See Final Part, 1915, Col. 1095.

(2) Lease of wakf house property for more than a year—Sanction of kazi—Earnest money paid to, for a lease—Right to recover. See **MAHOMEDAN LAW (WAKF)**, No. 10, 32 Ind. Cas. 205.

(3) Powers of. See **MAHOMEDAN LAW (WAKF)**, No. 1, 36 P.W.R. 1916.

Nankar.

(1) *Settlement Decree—Nankar, calculation of, on the rental of specified property out of which it was to be paid—Nankar, charge upon the village—Limitation Act, Art. 132—General Clauses Act (X of 1897), S. 3, cl. (25)—Money charged on rents and profits of land, treatment of.*

Where a settlement decree awarded a *Nankar* allowance of 10 per cent. on the *Hasilat Nikasi* of a particular village, held, that the calculation of the property on the rental of which the *Nankar* was to be calculated indicated the stock out of which it was to be paid and must therefore be deemed to be a charge upon the village.

Held further, that money charged on the rents and profits of land is treated as money charged on immovable property for the purposes of Art. 132, Limitation Act, read with S. 3, cl. (25) of the General Clauses Act (X of 1897). **Ram Jiawan v. Judu Nath**, 18 O.C. 380 = 33 Ind. Cas. 555.

PANDIT KANHAIYA LAL, A.J.C.

(2) *Nankar payable out of profits of land, nature of—Nankar, whether a charge—Immovable property—Limitation Act, Art. 132.*

A right to receive a cash *Nankar* out of the profits of a particular village is a benefit to arise out of land and is therefore "immovable property" as defined by S. 3 of Act X of 1897 and is at all events a *hag* of the nature contemplated by the explanation appended to Art. 132, Limitation Act.

Held also, that it must be treated as money charged upon immovable property. **Deputy Commissioner, Fyzabad for Ajodhya Estate v. Jagjiwan Bakhsh Singh**, 19 O.C. 49 = 33 Ind. Cas. 461.

PANDIT KANHAIYA LAL, A.J.C.

References:—7 A. 120; 1 O.C. 163; 5 A. 11; 7 O.C. 108, R.

(3) See **UNDER-PROPRIETARY RIGHT**, No. 3, 30 Ind. Cas. 373.

Nankar—(Concluded).

(4) Sale of share in—Acquisition of full right by purchaser—Necessity for purchaser to apply for possession. See **CIV. PRO. CODE (1908)**, No. 527, 36 Ind. Cas. 768.

Nattukkottal Chetties.

(1) *Agreement to pay something to agent for collecting old debts without specifying any amount—Enforceability—Test. S. V. A. R. Yellayam Chetty v. K.L.S.T. Kulandavelappa Chetty*, 29 M.L.J. 749 = 31 Ind. Cas. 783. See Final Part, 1915, Col. 1096.

(2) Suit for money on *thavani* account—Custom of—Fixing of rate of interest. See **LIMITATION ACT (1908)**, No. 130, 36 Ind. Cas. 497.

(3) Agency, expiry of—Salary chit, meaning of—Intention and conduct of parties to be considered. See **PRINCIPAL AND AGENT**, No. 3, 31 M.L.J. 685.

(4) Agency, termination of—Question of fact—Salary chit, meaning of—Evidence to be taken—Relevant considerations in deciding the question, what are—Practice among. See **PRINCIPAL AND AGENT**, No. 1, 31 M.L.J. 687.

Natural Right.

Right to discharge surplus water through water course—Easement—Proof. See **LIMITATION ACT (1908)**, No. 88, 35 Ind. Cas. 394.

Navayats.

Navayats, a sect of Mahomedans—How far Hindu Law and usage applicable—Suit for partition between ascendants of two brothers—A trading family under Hindu and Mahomedan Law—Custom—Estoppel—Ss. 241, 249, 253, Contract Act. Hussain Salb v. Haseen Salb, (1915) M.W.N. 880 = 2 L.W. 1140 = 31 Ind. Cas. 927. See Final Part, 1915, Col. 1100.

Nazlr.

(1) Warrant—Direction to bailiff to attach goods—Execution by—Resistance to his entry—No offence—No day mentioned in the warrant of day before which it is to be executed—Illegality. See **PENAL CODE**, No. 3, 1 Pat. L.J. 550.

Necessity.

Acquiescence and—Questions of fact. See **ALIENATION**, No. 1, 107 P.R. 1916.

Negligence.

(1) Presentation of appeal—On last day of limitation—Inability to get stamps—Unforeseen contingency—If proper ground for extension of time—Limitation Act, S. 5. See **APPEAL (GENERAL)**, No. 12, 12 N.L.R. 171.

(2) See **DAMAGES**, No. 1, 34 Ind. Cas. 273.

(3) *Res-judicata*—Gross, of guardian—Confession on judgment by guardian. See **GUARDIAN AND WARD**, No. 1, 117 P.L.R. 1916.

(4) Failure to collect rent—Gross, and misconduct—Liability to pay amount of profits. See **LAMBARDAR**, No. 2, 30 Ind. Cas. 203.

Negligence—(Concluded).

(5) *Grave*—Re-planting of trees—Landlord, consent of, to object—Inference. See **LANDLORD AND TENANT**, No. 49, 33 Ind. Cas. 324.

(6) Guardian of minor, gross of. See **MINOR**, No. 6, 19 O.C. 119.

(7) Gross and culpable, of vendor (first mortgage) in leaving title-deeds with vendee (mortgagor)—Whether prior mortgage postponed thereby in favour of subsequent mortgage by deposit of title-deeds. See **MORTGAGE (GENERAL)**, No. 29, 43 C. 1052.

(8) Wilful neglect—Meaning. See **RAILWAY**, No. 2, 9 S L.R. 177.

(9) Risk note form II, consignment under—Wilful neglect. See **RAILWAY COMPANY**, No. 1, 35 Ind. Cas. 265.

(10) Fraud—Incorrect allegations in plaint—Setting aside decree—Suit against minor—Proper person to be appointed *guardian ad litem*—Gross, of guardian. See **SETTING ASIDE DECREE**, No. 2, 33 Ind. Cas. 481.

(11) Suit for damages for injuries caused by animal, to be proved. See **TORT**, No. 1, 8 L.B. R. 388.

Negotiable Instrument.

(1) *Non presentment of a hundi not fatal defect.*

A suit cannot fail for lack of presentment of a *hundi* sued upon as, in equity, such an objection has no foundation. **Gokal Chand v. Hukam Chand**, 109 P.W.R. 1916=154 P.L.R. 1916=34 Ind. Cas. 714

RATTIGAN, SHAH DIN and LE-ROSSIGNOL, JJ.

(3) *Rights of payee or his endorsee—Liability of the maker—Fraudulent transfer—Who to suffer.* **Vithaldas Kahandas v. S.M. Indrapaloo**, 8 Bur. L.T. 161=29 Ind. Cas. 336=8 L.B.R. 202. See Final Part, 1915, Col. 1100.

(3) Construction of—Practice. See **EVIDENCE ACT**, No. 57, 4 L.W. 329.

Negotiable Instruments Act (XXVI of 1881).

(1) *Bill of exchange—Acceptance of the bill—On due date, the acceptor claiming set off of amounts owing to him by the bank—Tender of the balance—Release of the drawer by such tender.*

On the 31st July 1913, N drew a bill of exchange for Rs. 10,000, on M payable to the plaintiff-bank twelve months after date: the bill was duly accepted by M. The plaintiff-bank went into liquidation on the 23rd November 1913: it was indebted to M in a sum of Rs. 8,000. The bill fell due on the 3rd August 1914 and as it was not paid that day, it was treated as dishonored. Notice of dishonor was given to N on the 4th idem. On the 29th, M tendered to the plaintiff bank the balance of Rs. 10,000 after setting off his claim against the bank. The plaintiff-bank declined to accept the tender and sued N for the money. M, who was brought in as a third party, paid the balance into Court and contended that the plaintiff's claim was satisfied:

Negotiable Instruments Act (XXVI of 1881—(Continued).

Held, (1) that, as between the liquidator of the Bank and M (the acceptor), the liquidator was not entitled to claim from him the full amount of the acceptance and leave him to prove his claim in liquidation and trust to see what dividend he would get; but that the liquidator was bound to allow a set off;

(2) that, as M did not pay on the due date, N's liability was running from 3rd August to 29th August; but when M., the principal debtor, made a good tender of what was due to him on his acceptance, that tender extinguished the liability of N: and

(3) that, assuming that the tender was not made and that the liability of the drawer as a surety still continued, N was still entitled to the benefit of any set off which existed in favour of the principal debtor, M, as against the creditor. **Indian Specie Bank, Ltd. v. Nagindas Harjivandas Nanavati**, 18 Bom. L.R. 689=35 Ind. Cas. 628.

MACLEOD, J.

(2) Ss. 1 and 19—Promissory note payable on demand to person or bearer or order—If illegal and void—Right of creditor to get a decree apart from the note. See **ACT II OF 1910 (PAPER CURRENCY)**, No. 1, (1916) 2 M.W.N. 210.

(3) Ss. 4 and 64—Promissory note—Execution out of British India—Not paid, presented or negotiated in British India—No stamp—Maintainability of suit in British India. See **STAMP ACT (1899)**, No. 3, 9 S L.R. 150.

(4) S. 9—*Holder in due course—Promissory note, suit on—Indorsement in plaintiff's name absent—Suit, whether maintainable.*

A person cannot sue upon a promissory note which has not been indorsed to him. **Ulagappa Chetty v. Ramanathan Chetty**, 3 L.W. 171=32 Ind. Cas. 821.

COUTTS-TROTTER, J.

References:—31 M. 534, *Not F.*; 17 M.L.J. 393, *F.*

(5) Ss. 9, 10, 59, 60 and 82—Promissory note—Suit by holder in due course—Discharge of maker—Payment in due course—Plea of payment to payee before endorsement—Validity of defence—Equities between maker and payee, if applicable to endorsee.

It is not open to the maker of a promissory note payable on demand to plead against a holder in due course that he paid the money to the payee before the endorsement (a).

S. 60 of the Negotiable Instruments Act which prohibits negotiation by the payee after payment or satisfaction does not effect a holder in due course who under the terms of S. 9 becomes the possessor of the note for consideration before the amount mentioned in it becomes payable and not before the amount is paid.

Where the maker who pays off the amount due under the note fails to secure the return of the same, he cannot be said to have acted in good faith and without negligence and consequently his payment is not in due course and

Negotiable Instruments Act (XXVI of 1881)
—(Continued).

he is not discharged from liability under S. 82 of the Act.

Whenever one of two innocent persons must suffer by the acts of a third, he who is enabled such third person to occasion the loss must sustain it (b).

The maker must suffer for the consequences of his carelessness in having left the note with the payee which enabled the latter to endorse it to the plaintiff.

Dubitante. Whether, after the act, knowledge on the part of the endorsee of a demand by the payee would subject him to the equities subsisting between the maker and the latter. **Duraisami Reddi v. Velu Aarai**, 4 L.W. 34 = (1916) 2 M.W.N. 107 = 35 Ind. Cas. 591.

SESHAGIRI AIYAR, J.

References:—(a) 7 M.H.C.R. 271, D. (b) (1787) 2 T.R. 63, 70 = 1 R.R. 425, F.

(6) S. 10. See No. 5, *supra*.

(7) S. 19. See No. 2, *supra*.

(8) S. 22—Hundi—Payable after sixty one days—Maturity.

By S. 22 of the Negotiable Instruments Act a bill of exchange which is not expressed to be payable on demand, at sight or on presentment is at maturity on the third day after the day on which it is expressed to be payable.

Hence, where a hundi was drawn on 7th May 1914, and was payable after sixty-one days, and the hundi was sent on the 9th or 10th to the drawee, held, that the endorsee was not liable to present it before the 10th July 1914. **Ganga Prasad v. Hiralal**, 14 A.L.J. 1166 = 39 A. 86.

SUNDAR LAL and WALSH, JJ.

(9) Ss. 30, 71—Negotiable Instrument—Surety—Contract of guarantee—Drawer not party—Dis honour—Payment by surety—Suit by surety on the negotiable instrument—Rights of surety. See CONTRACT ACT, No. 128, 30 M.L.J. 369.

(10) S. 32—Pro-note—Collateral agreement fixing time for payment—Starting point of limitation—Agreements to give time—Validity. See LIMITATION ACT (1908), No. 149, 3 L.W. 38.

(11) Ss. 32, 37 and 44—Principles governing liability of maker etc.—Execution of note to help friend of maker—Subsequent advance to third party—Consideration for note—Reduction of liability of maker on less amount being advanced.

In dealing with Negotiable Instruments there are two principles to be borne in mind. First, the moment it is admitted that the maker of a note or acceptor of a bill made or accepted it, the onus is upon him to get rid of his liability. It is not for the plaintiff, unless he is charged with fraud and some *prima facie* case is made against him, to explain the circumstances at all; and secondly, except under peculiar circumstances, the proof of which lies upon the defendant, a man who signs a bill is presumed to be liable for the whole amount appearing on the face of the document.

Negotiable Instruments Act (XXVI of 1881)
—(Continued).

Where a promissory note was executed to help a friend of the maker, for raising money on it, it would be considered to have been executed for consideration, if subsequent to the execution of the document money is advanced on it to a third party though it was executed in the absence and without the knowledge of the payee.

Under S. 44 of the Negotiable Instruments Act, the liability of the maker would be reduced proportionately if the amount advanced on it by the payee be found less than is shown in the promissory note. **Nazir Ali v. Kher Chand**, 36 Ind. Cas. 996.

WALSH and STUART, JJ.

(12) Ss. 32, 43. See BILL OF EXCHANGE, No. 1, 18 Bom. L.R. 521.

(13) S. 37. See No. 11, *supra*.

(14) S. 43. See No. 12, *supra*.

(15) S. 44. See No. 11, *supra*.

(16) S. 59. See No. 5, *supra*.

(17) S. 60. See No. 5, *supra*.

(18) S. 64. See No. 3, *supra*.

(19) S. 74. See No. 9, *supra*.

(20) S. 80—Promissory note—No stipulation for interest—Separate agreement in writing for interest—Validity of latter—Right to claim interest.

A separate written agreement to pay interest, made simultaneously with the execution of a promissory note, but not embodied therein, is valid, and the whole of the terms of such agreement, can be enforced as between the original parties to the two documents, before any negotiation of the promissory-note has been made (a).

S. 80 of the Negotiable Instruments Act, does not purport to deprive those dealing with such instruments of the freedom of contract possessed by other contracting parties. It purports to confer a right to interest, not to take away such a right otherwise existing (b). **Rangappa v. Bismilla Khan**, 12 N.L.R. 9 = 32 Ind. Cas. 238.

STANBYN, A.J.C.

References:—(a) & (b) 29 A. 33, F.; 6 A.L.J. 233; 23 M. 18; 17 M.L.J. 296, R.

(21) S. 80—Hundi silent as to interest—Rate of interest—Oral agreement to pay interest at 12 per cent.—Admissibility—S. 92, Evidence Act.

Where in a suit by the payee of a Hundi against the drawer and the acceptor, the Hundi is silent as to interest, the plaintiff is entitled only to 6 per cent. interest under S. 30, Negotiable Instruments Act. Evidence of a contemporaneous oral agreement to pay interest at 12 per cent. is not admissible under S. 92, Evidence Act. **Banwari Lal v. Jagarnath Prasad**, 1 Pat.L.J. 71 = 35 Ind. Cas. 431.

MULLICK, J.

Reference:—18 C.W.N. 1263, R.

(22) S. 82. See No. 5, *supra*.

Negotiable Instruments Act (XXVI of 1881) —(Concluded).

- (23) S. 118—*Promissory note by a young boy just emerged from minority with large expectations—Burden of proof re-passing of consideration.*

Where the alleged executant of the suit promissory note had just emerged from minority and had large expectations and no present command of money, the burden should be thrown on the plaintiff, to prove that consideration had passed for the purpose. **Saini Sah v. Parthasarathy Chetti**, 31 Ind. Cas. 739.

WALLIS, C.J. and SESHAGIRI Aiyar, J. *References*:—20 B. 367; 29 M.L.J. 236, F.

(24) S. 118. See **HINDU LAW—ATTESTATION**, No. 24, 34 Ind. Cas. 617.

(25) S. 118 (a)—*Pro-notes—Executant a young man of extravagant habits—Borrowings in quick succession—Transactions of suspicious nature—Burden of proof of consideration—S. 114, ul. (c), Evidence Act. Sundrammal alias Sowbhagiammal v. Y. Subramania Chettiar*, 29 M.L.J. 236=30 Ind. Cas. 971. See **Final Part**, 1915, Col. 41.

Newspaper.

Newspaper article—Fair comment—Imputation of motives—Justification—Statement of full facts if necessary—"Well-founded criticism," meaning of—Statement of facts when amounts only to comment. See **LIBEL**, No. 1, 3 L.W. 67.

Noabad Taluk.

Whether a tenure—Non-permanent taluk—Sale for arrears of rent—Purchaser's title. See **CAUSE OF ACTION**, No. 1, 20 C.W.N. 636.

Non-compoundable Offence.

Conveyance executed by accused in consideration of complainant withdrawing prosecution for—Suit to set aside such sale-deed if lies. See **SPECIFIC RELIEF ACT**, No. 23, 20 C.W. N. 760.

Non-existent Person.

Society formed for the purpose of spreading Sanskrit learning—Society not registered—Gift of property to such society prior to registration void. See **GIFT**, No. 1, 14 A.L.J. 1038.

Non-joinder of Parties.

(1) See **CIV. PRO. CODE** (1908), No. 308, 1 Pat. L.J. 464.

(2) Want of proper parties to suit—Dismissal of suit. See **CIV. PRO. CODE** (1908), No. 305, 1 Pat. L.J. 472 N.

(3) Suit by manager—Want of necessary parties—Dismissal. See **HINDU LAW—JOINT FAMILY**, No. 11, 1 Pat. L.J. 468.

(4) See **LIMITATION ACT** (1908), No. 38, 1 Pat. L.J. 573=35 Ind. Cas. 868.

(5) See **MORTGAGE—GENERAL**, No. 44, 33 Ind. Cas. 760.

(6) Suit by two out of three members of a committee—Bad for non-joinder of parties. See **RELIGIOUS ENDOWMENTS ACT**, No. 3, 1 Pat. L.J. 437.

Non-occupancy Raiyat.

Interest of non-occupancy raiyat—Heritability—Custom. See **LANDLORD AND TENANT**, No. 19, 1 Pat. L.J. 273.

Non-occupancy Tenant.

(1) Mortgage to—Rights of occupancy, acquisition of. See **U.P. ACT II OF 1901 (AGRA TENANCY)**, No. 7-b, 32 Ind. Cas. 387.

(2) See **LANDLORD AND TENANT**, No. 51, 33 Ind. Cas. 425.

Non-transferable Holding.

(1) *Question of transferability if arises between vendor and vendee and between vendee and co-sharer landlords. Rajab Ali v. Dina Nath Saha*, 19 C.W.N. 1305=33 Ind. Cas. 261. See **Final Part**, 1915, Col. 1101.

(2) See **LANDLORD AND TENANT**, No. 28, 43 C. 878.

(3) See **TENANT-AT-WILL**, No. 1, 19 O.C. 117.

Notice.

(1) *Omission to give—Irregularity—Defect vitiating proceeding.*

The omission to give notice, as required by O. XXI, r. 22 of the Code of Civil Procedure, is not a mere irregularity which makes the proceeding voidable, but is a defect which goes to the root of the proceeding and renders it void for want of jurisdiction (a).

Such omission renders proceedings inoperative even though a stranger may have acquired title in course thereof. **Syam Mandal v. Sati Nath Banerjee**, 21 C.L.J. 523.

MOOKERJEE and CUMING, JJ.

References:—(a) 20 C. 370; 21 C. 19; 33 B. 572, R.

(2) **Waste Lands Act** applies to all lands—Burden of proof on those who plead it—Land sold under it—False description, in, under it, effect of. See **ACT XXIII OF 1863 (WASTE LANDS)**, No. 1, 14 A.L.J. 1205 (P.C.).

(3) See **BEN. ACT VIII OF 1885 (TENANCY)**, No. 28-b, 34 Ind. Cas. 614.

(4) Insufficiency or invalidity of, if can be pleaded for the first time in Second Appeal. See **MAD. ACT I OF 1908 (ESTATES LAND)**, No. 20, 4 L.W. 168.

(5) Demanding payment from tenants—Omission to state date of running of time—Material irregularity. See **U.P. ACT II OF 1901 (AGRA TENANCY)**, No. 35, 30 Ind. Cas. 788.

(6) Of ejectment—Decretal amount not deposited on account of illness—Service of notice—Diligence in effecting personal service. See **U. P. ACT II OF 1901 (AGRA TENANCY)**, No. 34-a, 32 Ind. Cas. 17.

(7) Ejectment in spite of insufficient. See **CIV. PRO. CODE** (1908), No. 351, 31 Ind. Cas. 479.

(8) Of delivery of judgment—Limitation Act, S. 5. See **CIV. PRO. CODE** (1908), No. 405, 9 Bur. L.T. 250.

(9) See **EJECTMENT**, No. 11, 33 Ind. Cas. 141.

Notice—(Concluded).

(10) Ejectment, notice of—Land from which tenant to be ejected, clear specification of—Omission to include plots in tenant's possession—Notice bad. See **EJECTMENT**, No. 12, 33 Ind. Cas. 168.

(11) Of hearing—Burden of proof. See **EVIDENCE ACT**, No. 84, 4 L.W. 611. •

(12) See **GUARDIAN**, No. 1, 36 Ind. Cas. 286 = 25 C.L.J. 149.

(13) Person when deemed to have notice under S. 3, Transfer of Property Act. See **KANOM**, No. 1, (1916) 2 M.W.N. 91.

(14) See **LANDLORD AND TENANT**, No. 46, 33 Ind. Cas. 263.

(15) See **LANDLORD AND TENANT**, No. 61, 34 Ind. Cas. 304.

(16) See **LANDLORD AND TENANT**, No. 61, 34 Ind. Cas. 711.

(17) Of ejectment by single co-sharer—If proper. See **LANDLORD AND TENANT**, No. 41, 33 Ind. Cas. 215.

(18) Transfer of Property Act, S. 41—Real owner holding out another—Transfer of latter—Burden of proof, whether lies on the purchaser or owner—Benamidar having interest in property, if notice or shifts onus. See **LIMITATION ACT** (1908), No. 182, 4 L.W. 200.

(19) See **MORTGAGE (REDEMPTION)**, No. 23, 35 Ind. Cas. 101.

(20) Question of, decided without an issue thereon—Objection if can be raised in appeal—Practice. See **MORTGAGE (GENERAL)**, No. 26, 4 L.W. 502.

(21) Information given to pleader as to date of hearing, not served on party—Appearance by pleader without instructions—Dismissal for default, legality of. See **SERVICE OF NOTICE**, No. 1, 30 Ind. Cas. 199.

(22) Court auction—Sale—Irregularity in the conduct of—*Bona fide* purchaser not protected—Major judgment-debtor—Treated as minor—Vitiates sale—Execution. See **SETTING ASIDE SALE**, No. 1, 20 M.L.T. 479.

(23) See **SPECIFIC RELIEF ACT**, No. 18, 34 Ind. Cas. 396

(24) See **TRUSTEE**, No. 1, 35 Ind. Cas. 204.

Notice to quit.

(1) Notice given by one of two joint Receivers if valid. See **EJECTMENT**, No. 3, 25 C.L.J. 453.

(2) See **LEASE**, No. 14, 34 Ind. Cas. 516.

(3) When unnecessary. See **LEASE**, No. 4, 24 C.L.J. 30. •

Novation.

See **CONTRACT**, Nos. 18 and 19, 30 Ind. Cas. 323.

Nuisance.

(1) *Public and private nuisances—Right of suit—English and Indian Law—Special damage—Obstruction of public thoroughfare—Right to hold procession.*

Nuisance—(Continued).

The principle governing the law as to public and private nuisances and the right of action, thereon is the same both in England and in India. It is this, that, no *private* action can be maintained for a public injury. For instance such an action does not lie for obstructing a man's passage, in a highway, because ordinarily, he has no more damage than other members of the public. The common rule is that no one shall have an action for what every one suffers. An obstruction of a public thoroughfare is always a public nuisance, and where it is not legalized by law or contract it is (1) indictable and (2) a cause of action for a public suit. Such a suit is now expressly provided for by S. 91 of the Civ. Pro. Code, 1908. But a *private* nuisance is always subject to a suit by the person or persons injured by it, and in such a case it is not necessary to show special injury any more than necessarily follows from the nature of the nuisance.

An obstruction of passage on a public highway may be common or particular, and the injury caused by it may be public or private(a).

Where a street is blocked so as to stop the public generally, and, among them, a religious procession, a *private* action will not lie at the instance of those promoting the procession against the person or persons responsible for the obstruction. The suit would have to be brought by relators representing the public. It would now, in British India, be a suit under S. 91 of the Civ. Pro. Code, 1908. But if there was no obstruction of the general public, but only of a particular religious procession, which was the concern of no one except those promoting and those opposing it, that would be a case of *private* injury, and a suit by the person injured would lie (b).

The right of every class of the community to use the public streets for religious and musical processions, subject to the law against nuisances is a well recognized civil right (c).

When a religious procession, accompanied by music, passes along a public street, the person or sect promoting such procession is exercising a civil right. An unlawful infringement of that right will give a cause of action. If the procession is interfered with, as the result of an obstruction common to all persons using the same street, then the civil remedy lies in a relator suit only, and no *private* action can be maintained; but if the obstruction is particular to the procession, every one else being allowed to pass unobstructed, then there is obviously a *private* injury only, and the person or persons entitled to carry out the procession can sue the person or persons obstructing. Conversely the music, or other noise of the procession, may be a cause of general inconvenience to the public occupying the houses on each side of the street, or the guns, fireworks or torches may be a cause of general danger to the public in the neighbourhood. Here again, there is a public nuisance, to be controlled only by an indictment or public suit. But where the music offends no one, except the congregation in a

Nuisance—(Concluded).

particular mosque, or the noise causes danger only to a particular person who lies seriously ill, then the matter is not a public concern, and a private suit will be sustained (*d*).

Offending the sentiments of a particular class or sect is not indictable as a public nuisance, though it may be a private nuisance (*a*).
Shelkh Chand v. Laxman, 12 N.L.R. 130=36 Ind. Cas. 534.

STANYON, A.J.C.

References:—(a) 2 B. 457; 11 N.L.R. 132 at pp. 136 and 137, *F.*; 18 B. 693, *D.* (b) 2 B. 457; 9 M. 463; 14 M. 177; 10 A. 498; 5 C.W.N. 285, *F.* (c) 2 M. 140; 6 M. 203; 26 M. 376; 26 M. 554; 30 M. 185; 32 M. 478, *F.* (d) 30 M. 15, *F.* (e) 7 M. 590; 12 B. 437; 18 P.R. 1867, *Cr.*; 15 P.R. 1868, *Cr.*; 10 A. 44; 11 N.L.R. 132 at pp. 142 and 145, *F.*

(2) *Slaughter of animals for food—When actionable nuisance—Right of private persons to sue for abatement of nuisance—Construction of slaughter house by Municipal Committee—Site of the building—Previous approval of Deputy Commissioner, not obtained—Illegality—Central Provinces Municipal Act, S. 71. Municipal Committee of Saugor v. Nilkanth*, 11 N.L.R. 132=31 Ind. Cas. 62. See Final Part, 1915, Col. 1102.

(3) *Erection of horse stables—Easement of nuisance—Easements Act, S. 15—Different kinds of nuisances—Erection of stables on approved pattern is no defence to an action of nuisance—Relief by way of injunction and damages. Bai Bhalcaiji v. Perojshaw Jivanji Kerawalla*, 17 Bom. L.R. 1040=40 B. 401=33 Ind. Cas. 192. See Final Part, 1915, Col. 1103.

Oath.

(1) *Of opposite party, agreement to abide by—Resulting from agreement subsequently, effect of.*

Where the defendant first offered to abide by the plaintiff's oath and then resiled from it, held, that the plaintiff could not be entitled to a decree merely on that ground. **Ram Dayal v. Ram Newas**, 19 O.C. 161.

STUART, J.C.

(2) *Refusal to take a particular oath—Effect. See CIV. PRO CODE (1908), No. 366, 38 P.W. R. 1916.*

Oaths Act.

See ACT X OF 1873.

Occupancy.

(1) *Ejectment—Non transferable occupancy holding—Purchaser of a share.*

A purchaser of a share of an occupancy holding is entitled to possession even as against the landlord, inasmuch as the tenancy is not determined and interposes a barrier, between him and the landlord. **Purna Chandra Trivedi v. Chandra Mohini Dassi**, 23 C.L.J. 304=20 C.W.N. 586 (*F.B.*)=33 Ind. Cas. 49.

SANDERSON, C. J., WOODROFFE, MOOKERJEE, HOLMWOOD and D. CHATTERJEE, JJ.

Occupancy—(Continued).

References:—42 C. 172 (222)=20 C.L.J. 52=18 C.W.N. 971, *F.*

(2) *Occupancy holding—Non-transferable—Purchase by co-sharer landlord, effect of.*

The voluntary transfer by the original raiyat is operative against the raiyat and all persons, other than the landlord, including a subsequent purchaser from the same raiyat (*a*).

The fact that the purchasers are co-sharer landlords does not put them in a better position than a stranger purchaser would be. **Lala Deosaran Lal v. Bateswar Mondal**, 23 C.L.J. 569=32 Ind. Cas. 1009.

SHARFUDDIN and TEUNON, JJ.

References:—(a) 42 C. 172=20 C.L.J. 52 (*F.B.*), *R.*

(3) *Money decree against occupancy tenant—Holding not transferable—Sale of portion of holding in execution—Validity.*

The holder of a money decree against an occupancy tenant, whose holding is not transferable by local custom, is not entitled in execution of that decree to bring to sale a portion of the holding. **Sadavi Kunwar v. Palknath Rai**, 1 Pat. L.J. 257=33 Ind. Cas. 937.

CHAMBER, C. J. and JWALA PRASAD, J.

Reference:—42 C. 172 (*F.B.*), *F.*

(4) *Non-transferable holding, mortgage of—Purchase of holding by co-sharer landlord in execution of decree for his share of rent—Money-decree—Question of transferability if arises. Chandi Prasanno Sen v. Gour Chandra Dey*, 19 C.W.N. 1307=33 Ind. Cas. 434. See Final Part, 1915, Col. 1106.

(5) *Occupancy tenant—Usufructuary mortgage executed by him—Mortgages in possession—Relinquishment in favour of zemindar, validity of. Sheo Mangal Singh v. Chedu*, 13 A.L.J. 1137=31 Ind. Cas. 914. See Final Part, 1915, Col. 1107.

(6) *Occupancy holding—Continuous realisation of rent at an illegal rate—Contract enhancing rent at more than 2 annas in the rupee if void—Division of holding—New tenancy. See BEN. ACT VIII OF 1885 (TENANCY), No. 20, 23 C.L.J. 580.*

(7) *Tenant having occupancy right in certain Jamas in one village—Another tenancy under the same landlord in different village—Applicability of S. 182, Bengal Tenancy Act. See BEN. ACT VIII OF 1885 (TENANCY), No. 89, 43 C. 195.*

(8) *Admission to waste land for pasturage only whether confers right of occupancy. See MAD. ACT I OF 1908 (ESTATES LAND), No. 12, 3 L.W. 582.*

(9) *Saline land leased only for pasture—Tenant thereof whether entitled to occupancy right. See MAD. ACT I OF 1908 (ESTATES LAND), No. 11, 3 L.W. 486.*

(10) *Hindu female in possession of occupancy tenancy as such—Law applicable. See U. P. ACT II OF 1901 (AGRA TENANCY), No. 14, 14 A.L.J. 127.*

Occupancy—(Concluded).

(11) Joint Hindu family—Occupancy holding—Death of one member—Succession—Devolution of interest. See U. P. ACT II OF 1901 (AGRA TENANCY), No. 13, 14 A.L.J. 278.

(12) Occupancy holding, non-transferable—Sale by landlord in execution of rent-decree, under Civ. Pro. Code, prevented by deposit by purchaser from registered tenant—Withdrawal of deposit by landlord, if amounts to recognition of purchaser as tenant. See LANDLORD AND TENANT, No. 13, 20 C.W.N. 849.

(13) Sale of portion of occupancy holding—Whether causes forfeiture. See LANDLORD AND TENANT, No. 16, 24 C.L.J. 113.

(14) Occupancy holding and fixed rate holding—Sale by the same deed—Suit to set aside the sale—Maintainability. See SALE, No. 7, 14 A.L.J. 270.

Occupancy Holding.

(1) Recognition of transfer by one co-sharer landlord—Effect—Sub division of holding.

There is nothing in law to prevent one co-sharer landlord from recognising a transfer of a non-transferable holding in respect of his own share, although such a recognition is not in any way binding upon other co-sharers and may not as such prevent other co-sharers from effecting a sub-division of the holding. *Mohamed Ali v. Jnanada Sundari*, 32 Ind. Cas. 577.

D. CHATTERJEE and BEACHCROFT, JJ.

(2) Insolvent an agriculturist—Lease of, ordered to be surrendered—House ordered to be sold—Order illegal. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 22, 14 A.L.J. 1031.

(3) See BEN. ACT VIII OF 1885 (TENANCY), No. 86, 35 Ind. Cas. 584.

(4) Unregistered transfer of whole holding—Whether transferee has an interest "voidable by the sale." See BEN. ACT VIII OF 1885 (TENANCY), No. 81, 1 Pat. L.J. 403.

(5) Mortgaged prior to Agra Tenancy Act—Rent suit—Parties—Civ. Pro. Code (1908), O.I. r. 9. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 20, 31 Ind. Cas. 456.

(6) Non-transferable, sale of, under rent decree—Right of mortgagee to set aside. See CIV. PRO. CODE (1908), No. 342, 31 Ind. Cas. 869.

(7) See MORTGAGE—GENERAL, No. 51, 35 Ind. Cas. 202.

Occupancy Raiyat.

(1) Tenancy, real nature of, how determined, holding at a rent not charged for 40 years, if raiyat at fixed rate. See BEN. ACT VIII OF 1885 (TENANCY), No. 5, 24 C.L.J. 363.

(2) Subsequently acquiring melvaram—Rule of merger, whether applies. See MAD. ACT I OF 1908 (ESTATES LAND), No. 20, 4 L.W. 162.

Occupancy Rights.

(1) *Occupancy holding, if may be sold in execution of a money-decree against the raiyat with landlord's consent—Concurrence of landlord and raiyat necessary to convey title to purchaser.*

The Full Bench decision in 18 C.W.N. 971 has impliedly laid down that an occupancy holding or any part of it cannot be sold in execution of a decree for money obtained against the raiyat, when the raiyat objects, even if the landlords give their consent to the sale.

The above rule does not, as expressly laid down by the Full Bench, apply to a sale held in execution of a decree founded on a mortgage or a charge voluntarily created by the raiyat.

7 C.W.N. 572, and 16 C.W.N. 420, have been impliedly overruled by the Full Bench. *Narayani Dossya v. Nabin Chandra Chowdhry*, 36 Ind. Cas. 803=25 C.L.J. 351=21 C.W.N. 400.

CHATTERJEE and SHEEPHANKS, JJ.

Reference:—(a) 19 C.W.N. 814, *Ref. to*.

(2) See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), No. 5, 4 L.W. 102.

(3) See BEN. ACT VIII OF 1885 (TENANCY), No. 9, 35 Ind. Cas. 622.

(4) See MAD. ACT I OF 1908 (ESTATES LAND), No. 9, 20 M.L.T. 520.

(5) See MAD. ACT I OF 1908 (ESTATES LAND), No. 17, 39 M. 944=34 Ind. Cas. 444.

(6) Acquisition by landholder of—Acquisition by tenant of landholder's right, difference between. See MAD. ACT I OF 1908 (ESTATES LAND), No. 17, 39 M. 944=34 Ind. Cas. 444.

(7) See OUDH ACT XXII OF 1886 (RENT), No. 9-a, 32 Ind. Cas. 415.

(8) See OUDH ACT XXII OF 1886 (RENT), No. 26, 33 Ind. Cas. 166.

(9) See U. P. ACT XII OF 1891 (N.W.P. RENT), No. 1, 31 Ind. Cas. 445.

(10) Acquisition of. See U. P. ACT II OF 1901 (AGRA TENANCY), No. 7-d, 32 Ind. Cas. 379.

(11) Acquisition of—Possession for more than 12 years—Payment of rent. See U. P. ACT II OF 1901 (AGRA TENANCY), No. 7, 30 Ind. Cas. 798.

(12) Modes of determination. See U. P. ACT II OF 1901 (AGRA TENANCY), No. 37, 33 Ind. Cas. 488.

(13) Mortgage to non-occupancy tenant—Rights of occupancy, acquisition of. See U. P. ACT II OF 1901 (AGRA TENANCY), No. 7-b, 32 Ind. Cas. 387.

(14) Tank land—Acquisition of right of occupancy—Continuous occupation for twelve years. See U. P. ACT II OF 1901 (AGRA TENANCY), No. 1, 31 Ind. Cas. 458.

(15) Tenant holding without landlord's consent. See U. P. ACT II OF 1901 (AGRA TENANCY), No. 8, 31 Ind. Cas. 486.

Occupancy Rights—(Concluded).

(16) Co-share^d becoming tenant—Assertion of estoppel. See U.P. ACT III OF 1901 (LAND REVENUE), No. 2, 32 Ind. Cas. 387.

(17) Record of rights—Entry of—Presumption. See BURDEN OF PROOF, No. 2, 34 Ind. Cas. 506.

(18) See LANDLORD AND TENANT, No. 44, 33 Ind. Cas. 236.

(19) See TRUST, No. 4, 33 Ind. Cas. 57.

Occupancy Tenants.

(1) See BEN. ACT VIII OF 1885 (TENANCY), No. 44-a, 32 Ind. Cas. 355.

(2) Grove—Occupancy tenant—Mortgage by him to another—Mortgagor's death without heirs—Mortgagee in possession for less than 12 years—Whether liable to be ejected by landlord. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 31, 34 Ind. Cas. 84.

(3) See LANDLORD AND TENANT, Nos. 39 and 40, 33 Ind. Cas. 214.

(4) See LANDLORD AND TENANT, No. 54, 33 Ind. Cas. 425.

Offence.

Suit for damages for not amounting to, against property—Non-recognizability by Small Cause Court. See JURISDICTION OF SMALL CAUSE COURTS, No. 1, 33 Ind. Cas. 728.

Office

Succession to, of darugo — Custom. See RELIGIOUS ENDOWMENTS ACT, No. 3, 1 Pat. L.J. 437.

Offices (Hereditary) Act.

See BOM. ACT III OF 1874.

Official Assignee.

(1) Official Assignee if may examine petitioning creditor's claim and remove his name. See ACT III OF 1909 (PRESIDENCY TOWNS INSOLVENCY), No. 5, 20 C.W.N. 995.

(2) Whether a representative of the Insolvent. See ACT III OF 1909 (PRESIDENCY TOWNS INSOLVENCY), No. 16, 20 C.W.N. 554.

(3) See EXECUTION OF DECREE, No. 33, 32 Ind. Cas. 489.

Official Liquidator.

Company wound up—Appeal against order appointing—Managing director, if competent to appeal on company's behalf—Practice. See COMPANIES ACT (1882), No. 7, 4 L.W. 226.

Official Receiver.

(1) Mortgage by insolvent within 2 years of insolvency—Petition to set aside—Report by Official Receiver—Inquiry not by Court—No power to delegate functions to Official Receiver. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 47, (1916) 2 M.W.N. 182.

(2) Proceedings to set aside alienation by insolvent—Record of statements made before—Admissibility of such statements in proceedings before Court. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 47-a, 36 Ind. Cas. 906.

Official Receiver—(Concluded).

(3) Report of—Admissibility as evidence. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 47-a, 36 Ind. Cas. 906.

(4) See CIV. PROC. CODE (1908), No. 519, 10 S.L.R. 53.

Old Document.

Secondary evidence of—Discretion to admit—Presumption when original not forthcoming. See EVIDENCE ACT, No. 34, 35 Ind. Cas. 328.

Old Waste.

See MAD. ACT I OF 1908 (ESTATES LAND), No. 9, 20 M.L.T. 520.

Onus of Proof.

Loss of sale deed. See SHAMILAT, No. 2, 36 Ind. Cas. 601=3 P.R. 917.

Oral Agreement.

(1) To pay enhanced rent. See LANDLORD AND TENANT, No. 51, 33 Ind. Cas. 417.

(2) Putting mortgagee in possession in lieu of interest—Evidence of such agreement, admissibility of—Evidence Act, S. 92. See MORTGAGE BY CONDITIONAL SALE, No. 1, 19 O.C. 166.

Oral Evidence.

(1) Mutual mistake in description of land in registered mortgage deed, to prove—Construction of document. See EVIDENCE ACT, No. 73, 31 Ind. Cas. 671.

(2) Promissory note—Endorsement—Presumption of consideration—Oral evidence to prove consideration for endorsement. See EVIDENCE ACT, No. 62, 32 Ind. Cas. 233.

(3) Registered partition deed silent as to some items of property, if admissible to explain those items. See EVIDENCE ACT, No. 57, 4 L.W. 329.

(4) Registered sale deed to prove the same to be a mortgage—Inadmissibility. See EVIDENCE ACT, No. 35, 34 Ind. Cas. 153.

(5) Suit on pro-note—To show agreement for different rate of interest from that provided in pro-note—Proof of repugnant or inconsistent terms. See EVIDENCE ACT, No. 61, 36 Ind. Cas. 957.

(6) Torrens in partnership contract in writing not clear—Construction—Parol evidence—Evidence Act, S. 93. See CONTRACT ACT, No. 35, 31 Ind. Cas. 632.

(7) Admissibility in evidence, of the terms of agreement—Evidence Act (I of 1872), S. 91. See SUB-LEASE, No. 1, 24 C.L.J. 539.

(8) Proof of testator's intention—Admissibility of. See WILL, No. 17, 30 Ind. Cas. 391.

Oral Sale.

Redemption suit—Plea of, discharging mortgage debt, if admissible—Mortgagee's possession, nature of. See EVIDENCE ACT, No. 58, 31 Ind. Cas. 678.

Oral Will.

Modification of will,—to be very distinct, etc.—Present and future intention to modify the will. See WILL, No. 12, 112 P.W.R. 1916.

Order.

(1) Interlocutory orders covered by the term. See BEN. ACT VIII OF 1885 (TENANCY), No. 69, 34 Ind. Cas. 301.

(2) Applicability of S. 105, Civ. Pro. Code, to, and interlocutory orders. See CIV. PRO. CODE (1908), No. 60, 4 L.W. 411.

(3) Restitution—Dependent judgment or — Restitution, when to be had. See RESTITUTION, No. 1, 24 C.L.J. 467.

Ornaments.

Gold deposited with goldsmith to be made into ornaments—Suit to recover—Limitation. See LIMITATION ACT (1908), No. 129, 20 C.W. N. 232.

Ottl.

(1) Renewal of an—Deed by *Karnavan*, validity of. See MALABAR LAW (TARWAD), No. 1, 39 M. 918.

Oudh Laws Act.

See OUDH ACT XVIII OF 1876.

Oudh Settlement.

Effect of—Proprietary rights, proof of. See SUMMARY SETTLEMENT, No. 1, 34 Ind. Cas. 768.

Ouster.

Joint possession—What constitutes ouster. See CO-SHARERS, No. 1, 24 C.L.J. 165.

Ownership.

Elephant trapped in pit dug in another's land, of. See EVIDENCE ACT, No. 43, 34 Ind. Cas. 579.

Paddy.

Mortgage—Loan of — Limitation for suit. See LIMITATION ACT (1908), No. 196, 24 C.L.J. 348.

Paper Currency Act.

See ACT II OF 1916.

Pardanashin Ladies.

(1) *Fiduciary relationship—Pardanashin woman—Person trusted by her as manager and managing her properties, but acting adversely to her interests, acts of, if bind her—Betrayal of trust—Fraud by fiduciary, when may be condoned—Nullity—Sham arbitration proceedings and award—Limitation, if applies to defence—Time for recovery to run from termination of relationship—Family arrangement, award if may be upheld as.*

H, a Hindu, who had separated from his brothers, acquired considerable property by money lending and died in 1892 leaving a widow K and several daughters and a daughter's son P by a predeceased wife. K, who was not a woman of business, came under the influence of F, a separated brother of H, and F managed

Pardanashin Ladies—(Continued).

her properties and K believed that he was acting as her manager until he died in 1908. Shortly after H's death, F in collusion with P got up a sham arbitration proceeding, which resulted in an award by which the properties left by H were divided up amongst the various members of the family, K receiving only a share. The true nature and effect of the proceedings were concealed from her and she was misled and betrayed by F and P, both of whom had interests adverse to her and were acting in their own interests. In a suit by another member of the family to enforce, in his right under the award, a mortgage effected by F from advances made out of properties left by H, K denied the plaintiff's title altogether and claimed the entire mortgage money in her right as the widow of H. The High Court held that the arbitration was a sham, that it had not been shown that K had any independent advice or understood the effect of the so-called award on her interests, and believing that she never knowingly consented to the division of her husband's estate dismissed the suit.

Held, by the Judicial Committee (without dissenting from the conclusions of the High Court), that, from the death of K's husband, F stood to her in a fiduciary relationship which continued till he died, and she was entitled to receive from him a full disclosure of all the affairs which concerned her.

That F having betrayed the confidence K reposed in him, the question in the case was not whether K knew what she was doing, had done or proposed to do, but how her intention to act was produced, whether all that care and providence was placed round her as against those who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf.

That fraud, such as there was in this case, could not be condoned unless there was full knowledge of the facts and of the rights arising out of those facts and the parties were at arm's length(a).

That the Limitation Act was no bar to her defence, and even if she were suing to recover property of which she was deprived by the award, time would not, under the circumstances of the case, begin to run against her until F died.

That the award regarded as an award, or as a document embodying a family arrangement, was a nullity. *Sri Krishan Lal v. Musammam Kashmiro*, 20 C.W.N. 957=3 L.W. 528= (1916) M.W.N. 433=31 M.L.J. 362=14 A.L.J. 1236=34 Ind. Cas. 37 (P.C.).

VISCOUNT HALDANE, SIR JOHN EDGE, MR. AMEER ALI and SIR LAWRENCE JENKINS.

References :—(a) 14 Ves. Jun. 273 (1807) ; 8 Ch. App. 891 (1873), *It*.

(2) *Transaction with—Gift deed—Undue influence—Bona fides—Onus—Maintainability of declaratory suit, when possession not delivered—Specific Relief Act, 1877, S. 42,*

Pardanashin' Ladies—(Concluded).

There are certain positions in which the existence of undue influence will be presumed, e.g. in case of transaction with pardanashin ladies; that is to say, it will be for the party who in such circumstances affirms the *bona fides* of a transaction to substantiate his affirmation (a).

A knowledge of letters and of figures and a capacity of dealing at first hand to some extent with her tenants, will not convert a pardanashin woman into a woman of the world so as to rebut the presumption of undue influence in respect of a transaction with such a woman.

When possession is not delivered, the plaintiff's claim for a declaratory relief is not barred by S. 42 of the Specific Relief Act. **Nisar Husain v. Ashraf-un-nissa**, 35 Ind. Cas. 395.

KANHAIYA LAL and KENDAL, A.J.CS.

Reference:—36 A. 81 (P.C.), R.

(3) *Execution of mortgage by—Attestation by witnesses.* **Musst. Rukmini Koeri v. Nilmani Bandyopadhyaya**, 19 C.W.N. 1309=32 Ind. Cas. 170. See Final Part, 1915, Col. 1114.

(4) *Purdanashin lady, illiterate, document executed by and drawn up under her instruction—Document is to be explained—Presumption of knowledge—Registration—Power of attorney, scope of.* **Bhuban Mohini Das v. Gajalakshmi Debi**, 19 C.W.N. 1330=32 Ind. Cas. 119. See Final Part, 1915, Col. 1114.

(5) *Attestation of document executed by—Attesting witnesses not actually seeing the lady sign the deed, effect of.* **Sugra Bibi (Musammatt) v. Kamapat Ram**, 18 O.C. 147=30 Ind. Cas. 269. See Final Part, 1915, Col. 1113.

(6) See BURDEN OF PROOF, No. 6-a, 36 Ind. Cas. 673.

(7) *Ex-parte decree against—Suit to set aside decree on ground of fraud.* See BURDEN OF PROOF, No. 6, 36 Ind. Cas. 596.

(8) *Document executed by—Suit for cancellation on ground of fraud—Nature of fraud—Burden of proof.* See FRAUD, No. 1, 20 C.W. N. 638.

(9) *Executing sale-deed, liability of—Denial of receipt of consideration by executant of deed—Onus of proof.* See LIMITATION ACT (1908), No. 192-a, 33 Ind. Cas. 746.

Parent and Child.

Consent of children to proposed marriage—Parents' promise to marry their children, if enforceable. See BUDDHIST LAW (MARRIAGE), No. 2, 9 Bur. L.T. 77.

Partial Partition.

(1) See HINDU LAW—ALIENATION, No. 19, 10 S.L.R. 31.

(2) See HINDU LAW—PARTITION, No. 9, 34 Ind. Cas. 466.

(3) See HINDU LAW (PARTITION), No. 7, 31 M.L.J. 472.

(4) *Partition—Joint family property—Suit for, if maintainable—Plaintiff to be given option of amending the plaint—Costs on part decreed.* See PARTITION, No. 9, 156 P.W.R. 1916.

Parties to Suit.

(1) *Civ. Pro. Code, O. I, rr. 3 and 10—Necessary parties to suit—Intermediate purchaser—If necessary parties.*

As to who is a necessary party appears from O. I, rr. 3 and 10. There are two conditions to be satisfied: *First*, there must be a right to some relief against him in respect of the matter involved in the suit, and *second*, that his presence should be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. Hence in a suit to recover from the person in possession of property alleged to have been wrongly alienated by plaintiff's guardian during his minority, neither of the above stated two conditions makes any of the intermediate purchasers a necessary party where the plaintiff claimed no relief against any of them and as the question of the title and right of possession to the land could be decided without their presence. **Gehmal v. Karumal**, 10 S.L.R. 36=35 Ind. Cas. 551.

PRATT, J.C. and CROUCH, A.J.C.

(2) See BEN. ACT VIII OF 1885 (TENANCY), No. 51 b, 36 Ind. Cas. 795.

(3) *Suit for compensation for illegal ejectment—Parties—Limitation.* See OUDH ACT XXII OF 1886 (RENT), No. 34, 31 Ind. Cas. 447.

(4) *Occupancy holding mortgaged prior to Agra Tenancy Act—Rent suit—Parties—Civ. Pro. Code, 1908, O.I, r. 9.* See U.P. ACT II OF 1901 (AGRA TENANCY), No. 20, 31 Ind. Cas. 456.

(5) See CIV. PRO. CODE (1908), No. 299, 35 Ind. Cas. 788.

(6) *Alienees of temple properties—Not necessary parties to suit under S. 92 of Civ. Pro. Code.* See CIV. PRO. CODE (1908), No. 167, (1916) 2 M.W.N. 351.

(7) *Appellate Court to bring all parties on record—Wilful omission of necessary party—Decree for sale.* See CIV. PRO. CODE (1908), No. 212, 31 Ind. Cas. 814.

(8) *Appellate Court's powers to add party exonerated—Memorandum of objection.* See CIV. PRO. CODE (1908), No. 676, 31 Ind. Cas. 978.

(9) *Lessees pendente lite—Whether can be made.* See CIV. PRO. CODE (1908), No. 551, 1 Pat. L.J. 596.

(10) *Want of proper—Dismissal of suit.* See CIV. PRO. CODE (1908), No. 305, 1 Pat. L.J. 472 N.

(11) *Addition of parties on appeal if justifies remand.* See CIV. PRO. CODE (1908), No. 210, 20 C.W.N. 547.

(12) *Powers of Court in striking off or adding or transposing parties—Failure to exercise discretion vested under O. I, r. 10, Civ. Pro. Code—Revision if lies.* See CIV. PRO. CODE (1908), No. 254, 20 C.W.N. 752.

(13) *Power of Appellate Court to transfer defendants to category of plaintiffs.* See LIMITATION ACT (1908), No. 43, 20 C.W.N. 522.

Parties to Suit—(Concluded).

(14) Suit by manager—Want of necessary parties—Dismissal. See HINDU LAW JOINT FAMILY, No. 11, 1 Pat. L.J. 468.

(15) See HINDU LAW (WIDOW), No. 30, 35 Ind. Cas. 49.

(16) Partnership—Suit for account by representatives of a deceased partner—Parties—Cause of action. See LIMITATION ACT (1908), No. 31, 33 Ind. Cas. 564.

(17) See MORTGAGE (GENERAL), No. 25, 20 M.L.T. 295.

(18) Mortgage—Parties—Person claiming title paramount impleaded—Objection raised first in second appeal—Costs. See MORTGAGE (GENERAL), No. 53, 32 Ind. Cas. 358.

(19) Suit by mortgagee—Owner of equity of redemption not made party—Dispossession of owner by mortgagee decree-holder—Right of such owner to sue for khas possession. See MORTGAGE (REDEMPTION), No. 24, 36 Ind. Cas. 744.

(20) See PARTNERSHIP, No. 7, 113 P.W.R. 1916.

(21) Suit for rent—Title of third person set up—Parties. See RENT, No. 5, 32 Ind. Cas. 553.

(22) Specific performance, suit for—Strangers claiming to be in adverse possession of the property—If proper parties. See SPECIFIC PERFORMANCE, No. 8, (1916) 2 M.W.N. 191.

Partition.

(1) *Suit for, by lessee against co-sharers of lessor, if maintainable.*

Two properties A and B were jointly owned by X and Y. By mutual arrangement X held possession of A, while Y of B, but no final and definitive partition was effected between the parties. Y, though in possession of B, transferred to Z his one-half share in A:

Held, that Z was entitled to claim partition as against X.

A partition suit can include no property wherein each of the parties to the suit does not claim an interest. *Sris Chandra Datta Chaudhuri v. Mahima Chandra Datta Chaudhuri*, 23 C.L.J. 331 = 33 Ind. Cas. 17.

MOOKERJEE and ROE, JJ.
Reference:—18 C.L.J. 556, R.

(2) *Partition suit—Court-fee—Plaintiff in possession of property sought to be divided—Mode of partition.*

The suit was instituted for possession by partition of joint land. At a subsequent stage houses were included in the claim. A preliminary decree was passed settling shares of the parties and a Commissioner was appointed. He was directed that the separate prices of immovable property shall be auctioned by the Commissioner among the parties, the share-holders only being allowed bid, the total sum thus raised to be divided among the parties in the proportionate shares settled by Court. The defendant appealed and objected to the mode of partition

Partition—(Continued).

adopted by the Court and paid Rs. 10 as Court-fee. It was objected by the respondent that the Court-fee was insufficient.

Held, that, under the circumstances, the Court-fee was sufficient under Art. 17, cl. vi, Sch. II of the Court Fees Act, and S. 7 (iv) (b) was not applicable to the case (a).

Held, that the mode of partition was open to objection and the fact that the appellant had bid at the auction did not estop him from filing his appeal. The Chief Court ordered partition to be made in the ordinary way by allotting to each sharer houses approximately of the value of his share, at the same time respecting so far as possible previous actual possession, any small excess or deficiency being made good by money payment. *Fatteh Chand v. Bilas Rai*, 61 P. L.R. 1916 = 99 P.W.R. 1916 = 96 P.R. 1916 = 140 P.W.R. 1916 = 34 Ind. Cas. 857.

JOHNSTONE, C.J., and SCOTT-SMITH, J.
References:—(a) 28 P.R. 1903 = 65 P.L.R. 1903, D.

(3) *Partition suit—Issue between co-defendants—Previous partition suit instituted by third parties against present defendants and the vendor of the plaintiff—Issue regarding the share of the plaintiff's vendor being subject to other defendants' mokurari raised but expunged—Final decree in the previous partition suit passed on the basis of the mokurari interest and allocation made thereunder—Bar of res judicata, to present suit—Expl. IV of S. 11, Civ. Pro. Code (1908).*

In a previous partition suit instituted by Y against the present plaintiff's vendor T and the present defendants, an issue was raised as to the share of T being subject to the *mokurari* interest of the other defendants but was expunged by the order of the Court. But when the partition was actually carried into effect, the present defendants were allotted possession not only of their proprietary share but also the *mokurari* of the share which they claimed to hold under the daughter of T. In a subsequent partition suit instituted by the vendee of T against the defendants for a declaration that T's share was not subject to any *mokurari* and for allotting to the plaintiffs a separate *takhta* out of the *takhta* which was allotted to the defendants in the previous suit:

Held—that the question was not expressly decided in the previous suit and it was impossible to hold that a decision might and ought to have been obtained in the previous partition suit by T or the present plaintiffs, and that the defendants failed to make out that the plaintiffs were barred by the rule of *res judicata*. *Syed Latif Hussain v. Basdeo Singh*, 20 C.W.N. 1177.

CHAPMAN and ATKINSON, JJ.

(4) *Partition suit—Omission by plaintiff to put in some properties in the list of joint properties in the plaint—Dismissal of suit—Power of amendment of plaint by the first Court as also by the appellate Court—Civ. Pro. Code (1908), S. 153. O. VI, r. 17.*

Partition—(Continued).

Per Jwala Prasad, J.—In a suit for partition of joint family property by a Hindu, all the properties must be included in the action, and the reason for this proposition is to save the parties from multiplicity of proceedings. If by inadvertence, mistake or fraud of any of the parties, some of the joint properties are not partitioned in the original suit, there will be no bar, after the partition, to have the properties, excluded at the first partition, divided when the mistake or fraud is discovered (a).

O. VI, r. 17, enables the Court to allow either party to alter or amend his pleadings at any stage on such terms as may be just. S. 153 Civ. Pro. Code, empowers the Court to make itself all necessary amendments for the purpose of determining the real questions or issues raised in the action. This power is vested both in the original as well as in the appellate Court (b).

Per Atkinson, J.—To avoid multiplicity of suits, the law has endowed all Courts in all countries with just and most ample powers of amendment. The widest power of amendment is given not only to the primary Court but to the High Court, which enables the Court to try all matters properly in dispute between the parties **Mukunda Lal Chakravarti v. Jogesh Chandra Chakravarti**, 20 C.W.N. 1276—1 Pat. L.J. 393=35 Ind. Cas. 370.

ATKINSON and JWALA PRASAD, JJ.

References:—(a) 14 C. 122; 35 C. 961=12 C.W.N. 127, 1. (b) 28 C. 769, *Appr.*

(5) *Partition suit—Preliminary decree, appeal against—Final decree passed pending the appeal against preliminary decree—No appeal filed against final decree—Whether appeal against preliminary decree can proceed.*

Where in a partition suit, a preliminary decree was passed on 29th May 1913, and an appeal was filed against it on 3rd July 1913, but a final decree was passed on 27th September 1913 despite the objection of the appellant that the final decree should not be passed until the appeal had been disposed of, and no appeal was filed against the final decree, and the hearing of the appeal against the preliminary decree was objected to on the ground that the appeal could not proceed inasmuch as a final decree had been passed in the case and no appeal had been preferred against that decree.

Held, on a review of authorities, that the preliminary objection should be overruled. The appeal could be heard although a final decree had been passed in the case and no appeal had been filed against that decree (a).

18 C.L.J. 321; 27 Ind. Cas. 35; 33 Ind. Cas. 137; 33 Ind. Cas. 146, were distinguishable, because in those cases the final decree had been passed before the appeal against the preliminary decree was filed.

Per Sharfuddin, J.—A preliminary decree in a partition suit has existence independent of the final decree and the final decree really is dependent upon and subordinate to the preliminary decree, and instead of extinguishing a preliminary decree gives effect to it.

Partition—(Continued).

Chamier, C.J.—A defendant cannot resist partition of a mehal on the ground that by an agreement the members of the family agreed to keep *ijmali* when the defendant claimed partition of it in a previous suit and succeeded in effecting partition. **Musamat Bibi Wahldunnisa v. Babu Deep Narain Prasad**, 20 C.W.N. 1174=35 Ind. Cas. 873=1 Pat. L.J. 406 (F.B.).

CHAMIER, C.J., SHARFUDDIN, ATKINSON and KINGSFORD, JJ.

References:—(a) 36 A. 532; 17 C.W.N. 368=18 C.L.J. 209; 18 C.L.J. 214; 18 C.L.J. 223; 22 C.L.J. 90; 37 M. 29, F.; 18 C.L.J. 321; 27 Ind. Cas. 135; 33 Ind. Cas. 137; 33 Ind. Cas. 146, D.

(6) *Suit for, if maintainable by a lessee of mining rights for a term against lessor's co-owners—Partition of underground mines and minerals, if possible—S. 2, Partition Act (IV of 1893).*

According to the English authorities, it is clear that a lessee for a term of years may maintain a claim for partition. There is no reason for holding that a different rule prevails in India.

The authority of 20 C. 379 has been much shaken by the decision of the Full Bench in 24 C. 575 at p. 581=1 C.W.N. 406 (a).

There may be no special difficulty in effecting a partition of the underground mines and minerals, but in case any such difficulty arises, the power to order a sale under S. 2 of the Partition Act of 1893 may be exercised. **Lalit Kishore Mitra v. Thakur Giridhar Singh**, 20 C.W.N. 1306=1 Pat. L.J. 441.

CHAMIER, C.J. and SHARFUDDIN, J.

References:—(a) 16 Boav. 147; 37 C. 918=14 C.W.N. 962, 1 V. & B. 551, R.

(7) *Trust deed executed by administrator with the permission of the District Judge—Trust deed empowering trustee to grant permanent leases—Person interested not impeaching the lease.*

A trust deed was executed with the sanction of the District Judge, by an administrator of the estate of a deceased co-owner in favour of a mortgagee, with power to trustees to grant permanent leases. In pursuance of that deed a permanent lease was executed in favour of the plaintiff. The latter remained in possession with other co-owners for about 7 years, when he brought a suit for partition. In that suit he impleaded a person who was interested in opposing the lease. He did not contest the lease.

Held, that the plaintiff had sufficient interest to maintain such a suit for partition. **Nawab Salmullah Bahadur v. Prabhat Chandra Sen**, 24 C.L.J. 26=43 C. 1118=33 Ind. Cas. 129.

N. R. CHATTERJEE and RICHARDSON, JJ.

References:—16 I.A. 186=12 A. 51; 37 I.A. 198=37 C. 918, F.

(8) *Revenue Court's power to make partition of trees along with land—Land Revenue Act (III of 1901), S. 119.*

Partition—(Continued).

Trees growing upon land subject to partition by Revenue authorities may properly be partitioned by those authorities along with the land.

The addition of provisions to the Land Revenue Act (III of 1901) which did not exist in Act XIX of 1873 have not altered the law on the subject and ousted the jurisdiction of Revenue Courts in the matter of the partition of trees. *Sumer Singh v. Mashal Singh*, 19 O.C. 161=36 Ind. Cas. 832.

STUART, J C.

- (9) *Joint family property—Suit for partial partition, if maintainable—Plaintiff to be given option of amending the plaint—Costs on part decreed.*

Held, that a suit does not lie for partition of a portion of a joint family property. But, in such a case, the best and the most equitable course for the Court to adopt is to give the plaintiff an opportunity of amending the plaint if he so desires (a).

Held, also that pleader's fee can be allowed only on the portion of the claim decreed, and not on the whole amount in dispute. *Ranku v. Mussammat Hukmi*, 156 P.W.R. 1916=2 P.L.R. 1917=35 Ind. Cas. 515.

SCOTT-SMITH and BROADWAY, JJ.

References:—(a) 17 P. R. 1893, D.; 77 P. R. 1887; 1 P.L.R. 1902; 2 P.W.R. 1912=13 Ind. Cas. 863; 7 C. 577=9 C.L.R. 173; 70 P. R. 1912=91 P.W.R. 1912=14 Ind. Cas. 45; 10 Ind. Cas. 57=10 M.L.T. 313, R.

- (10) *Mortgages in possession—Purchase of proprietorship by mortgagee—Objection to method of partition.*

Where a mortgagee in possession of a share did not raise any objection to the method of partition before the proceedings were drawn up, he could not be permitted to urge his objections after confirmation of the proceedings, though he had become a full proprietor after the proceedings had been drawn up. *Udit Narain Singh v. Ram Ball*, 30 Ind. Cas. 316.

HOLMS, J.M.

(11) *Decree—Execution—Partition decree—One of the defendants obtaining by partition a larger share of lands and house to which he was not entitled—Shares can be again adjusted on application by defendants suffering from such excess in distribution* *Ramchandra Dinkar Prabhu v. Krihnaji Sakharam Prabhu*, 17 Bom. L.R. 967=40 B. 118=31 Ind. Cas. 311. See Final Part, 1915, Col 1117.

(12) See U.P. ACT III OF 1901 (LAND REVENUE), No. 10, 34 Ind. Cas. 689.

(13) See ARBITRATION, No. 7, 33 Ind. Cas. 467.

(14) Decree. See CIV. PRO. CODE (1908), No. 128, 8 L.B.R. 338.

(15) Suits for partition—Decrees passed—Prior execution application dismissed on one ground—Implied adjudication as to another ground, whether can be inferred—Certain items of property left undivided—Subsequent execution application for division of same—

Partition—(Concluded).

Res judicata, if a bar. See CIV. PRO. CODE (1908), No. 37, 4 L.W. 101.

(16) Suit for—Written statement by widow—Admissibility. See EVIDENCE ACT, No. 4, 33 Ind. Cas. 446.

(17) Agreement among members not to partition—How far binding. See HINDU LAW (JOINT FAMILY), No. 21, 33 Ind. Cas. 33.

(18) Properties in different jurisdiction—Successive suits for partition in different Courts whether barred. See LETTEMS PATENT (MADRAS), No. 4, 3 L.W. 107.

(19) Suits for, by younger sons compromised, presumption from. See PRIMOGENITURE, No. 1, 1 Pat. L.J. 509.

(20) Documents evidencing partition—Registration—Unregistered document—Admissibility for collateral purpose. See REGISTRATION ACT (1877), No. 1, 35 P.R. 1916.

(21) Deed of partition of moveables and immoveables—Registration whether necessary—Admissibility in evidence without registration. See REGISTRATION ACT (1908), No. 19, 19 M. L.T. 50.

(22) Suit not to be dismissed because there is prayer of a declaration only and not for possession—Amendment of plaint proper. See SPECIFIC RELIEF ACT, No. 1, 35 Ind. Cas. 792.

(23) Proprietor purchasing proprietary rights—Subsequent loss of proprietary rights—Decision regarding his status—Effect of. See UNDER PROPRIETARY RIGHTS, No. 4, 34 Ind. Cas. 733.

Partition Act.

See ACT IV OF 1893.

Partition Act (Estates).

See BEN. ACT VIII OF 1876.

See BEN. ACT V OF 1897.

Partition Deed.

Registered, silent as to some items of property—Oral evidence, if admissible to explain those items. See EVIDENCE ACT, No. 57, 4 L.W. 329.

Partition Papers.

Clerical error in—If enhancement of rent. See LANDLORD AND TENANT, No. 43, 33 Ind. Cas. 234.

Partition Suit.

See COMPROMISE, No. 4, 34 Ind. Cas. 518.

Partnership.

(1) *Joint Hindu family—Membership of the manager not membership of the family—Termination on the death of the manager—Suit for dissolution—Imputation.*

Where a manager of a joint Hindu family is a member of a trading partnership, the family as a whole does not become a member of the partnership firm. Therefore the partnership terminates on his death though the family continues to exist, and a suit for dissolution of partnership brought more than 3 years after

Partnership—(Continued).

his death is barred by limitation. **Ramanatham Chetty v. Yegappa Chetty**, 19 M.L.J. T. 66=30 M.L.J. 241=(1916) M.W.N. 81=32 Ind. Cas. 427.

COUTTS-TROTTER and SRINIVASA IYENGAR, JJ.

• *Reference* :—28 M. 344, F.

(2) *Interest—Partner contributing excess sum towards capital.*

Subject to any agreement between the parties, interest is payable on money paid or advanced by one partner for partnership purposes beyond the amount of capital to which he had agreed to subscribe, as the advance is not an increase of its capital but rather a loan. **Goviinda Chandra Basak v. Haridas Basak**, 23 C.L.J. 148=20 C.W.N. 634=35 Ind. Cas. 48.

MOOKERJEE and ROE, JJ.

(3) *Suit for dissolution of partnership—Jurisdiction—S. 254 (5) and (6), Contract Act.*

Where, in a suit for dissolution of partnership and for rendition of accounts, the causes of action set up by the plaintiff were the misconduct of his partner and the fact that the business could only be carried on at a loss—(Vide sub-Ss. 5 and 6 of S. 254, Contract Act) and those causes of action arose wholly at Ramkot in the Jammu State, held, the Court in Jammu State had jurisdiction, and the fact, that a part or even the whole of the capital was subscribed at Gurdaspur was immaterial and the Court at Gurdaspur had no jurisdiction to entertain the suit. **Allah Ditta v. Shankar Das**, 42 P.R. 1916=98 P.W.R. 1916=33 Ind. Cas. 953.

SHADI LAL and LESLIE-JONES, JJ.

(4) *Property bought with money belonging to firm, nature of—Partnership at will, how dissolved—Intention—Suit for dissolution of partnership and rendition of accounts—Limitation Act (1908), Sch. I, Art. 106.*

In the case of a partnership at will, the intention to dissolve may be inferred from circumstances showing that a partner has in fact abandoned his interest in the concern (a).

A suit for the dissolution of partnership not entered into for a fixed term and for rendition of accounts was filed in July 1913. It appeared, however, that the business of the firm began to fail in *Sambat* 1963 (1906 A.D.) and was closed in *Sambat* 1966, the only work done subsequently consisted of realising assets, paying debts due to the creditors and recovering rents from tenants in occupancy of the immovable property belonging to the partnership.

Held, that, as the partnership came to an end long before three years prior to the date of institution of the suit for dissolution of partnership, the suit did not lie, and that the prayer for the rendition of the accounts of a dissolved partnership could not be granted in view of the lapse of the period prescribed by Art. 106 of the Limitation Act.

Lands or houses bought in the name of one partner and paid for by the firm or from the profits of the partnership business are *prima facie* partnership property, unless it be proved

Partnership—(Continued).

that from time to time portions of the partnership assets were, by mutual agreement, withdrawn from the partnership and converted into land or house to be owned by the partners as co-owners (b). **Amir Chand v. Jawahir Mal**, 49 P.W.R. 1916=32 Ind. Cas. 853.

SHADI LAL, J.

References :—(a) 25 M. 149 at p. 164=11 M.L.J. 353; 28 C. 53=5 C.W.N. 114=27 I.A. 189 (P.C.), R. (b) 25 M. 149 at p. 164=11 M.L.J. 353; 97 P.R. 1910=142 P.W.R. 1910=8 Ind. Cas. 999, R.

(5) *Promissory note for the partnership debt—Liability of partners not parties to the note—Consideration simultaneous with the passing of the note—If action on debt would lie.*

There is really distinction between the case where the advance of money and execution of a promissory note are simultaneous and that in which the advance is antecedent to the execution of the note. In either case, failing suit on the note, an action on the debt would lie, though it may be open to the parties to show that it was intended that the debt should become merged in the negotiable instrument.

A partner is always liable for the partnership debt unless there is a restriction express or implied on the liability to be incurred by one partner on a bill or promissory note which may be executed by another partner for partnership purposes. **Shanmuganatha Chettiar v. Srinivasa Aiyar**, (1916) 2 M.W.N. 14=4 L.W. 27=31 M.L.J. 138=20 M.L.T. 172=35 Ind. Cas. 219.

ABDUR RAHIM and SRINIVASA AIYANGAR, JJ.

References :—39 B. 261, F.; 17 M.L.J. 126; 26 M.L.J. 49, D.

(6) *Sub-partners under a partner—How far necessary or proper parties.*

In a partnership suit, the sub-partners under a partner cannot be made parties under O. I, r. 3 of the Civ. Pro. Code. An assignee of a share of the profits of a partner is no partner in that partnership; has no demand against it; has no account in it and must be satisfied with a share of the profits given to his assignor. The sub-partners must ordinarily accept the account taken between the partners, but have not the right and are not subject to any duty to take part in the proceedings in which it is taken. The sub-partners are not required to concern themselves with the account to be taken at the dissolution of the partnership. **Chidambaram Chetty v. Karuthan Chetty**, (1916) 2 M.W.N. 18=4 L.W. 10=20 M.L.T. 134=34 Ind. Cas. 543.

OLDFIELD and SRINIVASA AIYANGAR, JJ.

(7) *Contributory suit by one of the partners against another—Plaintiff in possession of partnership account and property—Principle that "one who seeks equity must do equity" discussed.*

Held that in a contributory suit by one partner against another all the partners should be

Partnership—(Continued).

made parties to it, and although the claim for rendition of the partnership account is otherwise barred by the Law of Limitation the plaintiff if in possession of the partnership account and property is in equity bound to render the accounts of profits and loss, and the defendant is entitled to get credit to the extent of his share in the profits if any, before he can be made liable for contribution.

Held, also, that if plaintiff seeks equity he must do equity **Kala Mal v. Shhara Mal**, 113 P.W.R. 1916=35 Ind. Cas. 910=42 P.L.R. 1917.

BROADWAY, J.

References:—73 P. R. 1906=49 P. W. R. 1906, D.; 18 S.W.R. 408, R.

(8) *Winding up — Power of one partner, to mortgage firm's assets—Acknowledgment.*

When a money-lending firm is being wound up, one partner has no authority to mortgage the firm's assets because he no longer has authority to borrow money, except perhaps in the case of necessity; and he cannot give an acknowledgment for a subsisting debt so as to bind the firm. Both the power to mortgage the firm's assets and the power to give an acknowledgment for an antecedent debt on behalf of the firm, must rest on the power to borrow on behalf of the firm. Any mortgage made by one partner under such circumstances would be binding on him alone (a). **Malayandi Chetty v. Narayanan Chetty**, 8 B.L.R. 363=9 Bur. L.T. 239=36 Ind. Cas. 225.

ORMOND and TWOMEY, JJ.

References:—(a) 4 Do G.M. and G. 542; 43 E.R. 619; (1885) 31 Ch. D. 324; (1906) 2 Ch. D. 427, R.

(9) *Admission by partner in insolvency petition—Effect on other partners.*

The signing of a schedule attached to an insolvency petition filed by a partner of a firm does not operate to make it an acknowledgment of liability within the meaning of S. 19 of the Limitation Act, so as to bind the other partners of the firm.

Per Phillips, J.—Where an acknowledgment of liability is made by a partner of a firm not in the ordinary course of business, but in accordance with statutory provision it cannot be presumed to have been made on the authority of or on behalf of the other members of the firm. **Kissendass v. Khatan Makanjee Spinning and Weaving Co., Ltd.**, 36 Ind. Cas. 389.

WALLIS, C.J. and PHILLIPS, J.

(10) *How constituted—Partner, if and when can purchase partnership property—Settled accounts, balance of, if can be restrained—Presumption—Contract Act, S. 180—Baile, suit by, against wrong-doer.* **Ramnath Gagoi v. Pitambar Deb Goswami**, 22 C.L.J. 339=43 C. 733=31 Ind. Cas. 430. See Final Part, 1915, Col. 1120.

(11) *Appointment of a Receiver on dissolution of a partnership—Purpose—Goodwill—Securing its value for each partner.* **E. F. Dover v. E. S. Dover**, 8 Bur. L.T. 57=29 Ind. Cas. 684=8 L.B.R. 332. See Final Part, 1915, Col. 1125.

Partnership—(Concluded).

(12) *Contract to admit a person as partner—Breach—Damages—Measure—Contract Act, S. 73.* **Tansey v. Rivett**, 64 P.R. 1915=142 P.W.R. 1915=31 Ind. Cas. 73. See Final Part, 1915, Col. 1126.

(13) *Partner, suit by, against other partners for damages for use and occupation of partnership property, maintenance of.* **Syed Mani-ruddin v. Jnanendra Nath Basu**, 19 C.W.N. 1115=31 Ind. Cas. 707. See Final Part, 1915, Col. 1126.

(14) *Joinder of parties—Dormant partners not necessary parties.* **Paydayya v. Venkata Reddi**, (1915) M.W.N. 564=31 Ind. Cas. 913. See Final Part, 1916, Col. 1126.

(15) *Joint Hindu family carrying on business in partnership—Contract by family if terminates with death of co-partner, See BROKERAGE CONTRACT, No. 1, 20 C.W.N. 708.*

(16) *Partners holding a joint decree—Payment to two out of three partners when valid—Definiteness of shares in the decree debt—Joint Hindu family and partnership compared.* See CIV. PRO. CODE (1908), No. 420, 3 L.W. 579.

(17) *Deed, construction of—Deed between owner of soil and capitalist—Transfer of land, effect of.* See CONSTRUCTION OF DEEDS, No. 4, 10 S.L.R. 58.

(18) *Debt, appropriation of.* See CONTRACT ACT, No. 60, 1 Pat. L.J. 474.

(19) *Terms in, contract in writing not clear—Construction—Parol evidence—Evidence Act.* See CONTRACT ACT, No. 35, 31 Ind. Cas. 632.

(20) *Decree against a firm—Order refusing execution as against an alleged partner—Appeal—Court-fee.* See COURT-FEES ACT, No. 26, 8 L.V.R. 300.

(21) *Suit for account by representatives of a deceased partner—Parties—Cause of action.* See LIMITATION ACT (1908), No. 31, 33 Ind. Cas. 564.

(22) *Death of one partner—Accountability of the continuing partners to the representatives of the deceased.* See MAHOMEDAN LAW (GUARDIANSHIP), No. 4, (1916) 2 M.W.N. 341.

(23) *Death of partner leaving will—Executor if can sue for dissolution before probate obtained.* See STRAITS SETTLEMENTS LIMITATION ORDINANCE, No. 1, 20 C.W.N. 833.

(24) *Surviving partner if can get succession certificate.* See SUCCESSION CERTIFICATE ACT, No. 6, 31 Ind. Cas. 904.

Part-Payment.

(1) *Entry must appear in debtor's handwriting—Merge signature not enough.* See LIMITATION ACT (1908), No. 71, 18 Bom. L.R. 973.

(2) *Money decree not bearing interest—Payment—Application for execution.* See LIMITATION ACT (1908), No. 74, 35 Ind. Cas. 177.

(3) *Requisition of valid, for purposes saving limitation.* See LIMITATION ACT (1908), No. 70, 1 Pat. L.J. 474.

Part Payment—(Concluded).

(4) Payments indorsed on the back—Period of limitation extended by such payments—Payments treated as in discharge of the original debt. See STAMP ACT (1899), No. 1, 34 Ind. Cas. 417.

Pasturage.

Lease—Lessee's possession disturbed by persons with paramount rights of, over premises demised—Lessee's right to abatement of rent. See BEN. ACT VIII OF 1885 (TENANCY), No. 68, 34 Ind. Cas. 851.

Pasturage Dues.

Suit for—Jurisdiction of Civil Courts. See MAD. ACT I OF 1908 (ESTATES LAND), No. 11, 9 L.W. 485.

Patent Ambiguity.

Construction of decrees by executing Court—Absence of—Alteration of decree under guise of interpretation. See CIV. PRO. CODE (1908), No. 116, 36 Ind. Cas. 500.

Patta.

(2) Tender of, when valid—Manager of joint Hindu family, if competent to tender patta. See MAD. ACT VIII OF 1865 (RENT RECOVERY), No. 2, 4 L.W. 654.

(3) Ryot out of possession of the holding whether can sue for a patta. See MAD. ACT I OF 1908 (ESTATES LAND), No. 18, 20 M.L. T. 86.

Patwari.

Rights and duties—How far can the acts of the patwari be binding on the master—Transfer of holding.

The *patwari* is a poorly paid underling employed only to collect rents due to his master and to grant receipts for the same. His implied authority would extend to all subordinate acts which are necessary or incidental to his express authority. He has no authority to manage any part of the property. It is not within the scope of the authority of a rent collector to consent on behalf of his master to the transfer of an occupancy holding. That is an important act to be performed only by a person having some at least of the powers of a manager.

It is not correct to say that it lies on the landlord to prove that the *patwari* had not authority to consent to the transfer of the holding. Landlords would be in a very difficult position if it were held that *patwaris* and other underlings should be presumed till the contrary is shown to have the power to sign away their masters' rights. *A. W. N. Wyatt v. Seogobind Sahu*, 1 Pat. L.J. 414=36 Ind. Cas. 777.

CHAMIER, C.J. and KINGSFORD, J.

References:—14 W.R. 211; 25 W.R. 19; 25 C. 531, R.

Pauper.

See FORMA PAUPERIS.

Rejection of application for leave to sue as pauper—Course open to applicant. See CIV. PRO. CODE (1908), No. 591, 20 C.W.N. 669.

Pauper Appeal.

(1) *Payment of Court-fees before conclusion of enquiry into pauperism—Appeal if within time—Limitation Act (IX of 1908), S. 5—Co-owner's suit for share of profits—"Tax, rate or assessment," meaning of—Lower Burma Town and Village Lands Act (IV of 1898), Ss. 24, 25, 26—Burma Land and Revenue Act (II of 1876).*

When an application for leave to appeal in *forma pauperis*, presented beyond the proper time, is admitted under S. 5 of the Limitation Act, and enquiry as to pauperism is directed, but full Court fees as on the ordinary memorandum of appeal are paid before the enquiry is concluded, the appeal must be deemed to have been presented on the day on which application for leave to appeal as pauper was presented (a).

Although a suit for damages for use and occupation of land by one co-owner against another will not lie, such suit being founded upon an agreement between the parties, a co-owner is entitled to a share of the reasonable profits of the land, till he is put in possession on partition, and he should not be deprived of his rights merely because he put his claim in wrong and inappropriate words.

Under English Law, ground rent would not come within any of the terms "taxes, rates and assessments," but under Ss. 24, 25 and 26 of the Lower Burma Town and Village Lands Act, ground rent due to Government is in a different position from ground or other rent due to an ordinary landlord. These sections virtually make ground rent payable to Government a tax or assessment. *Swan Tee v. Ma Ngwe*, 9 Bur. L.T. 69=32 Ind. Cas. 630.

FOX, C.J. and PARLETT, J.

References:—2 A. 241; 6 I.A. 126, F.

(2) Application for leave to appeal as pauper—Dismissal of—Time given for payment of Court-fee—Court-fee paid within such time—Appeal not barred. See CIV. PRO. CODE (1908), No. 690, 31 M.L.J. 269.

Pauper Suit.

(1) *Allegation of prima facie cause of action—Dismissal of suit on surmises—Procedure.*

Where the allegations in a suit in *forma pauperis* suggest a *prima facie* case and show a cause of action, it is not open to the Judge to dismiss it on surmises, which are not based upon any evidence or upon the pleadings filed in the case. In such a case the proper course is to frame an issue and have the same decided on evidence taken upon that issue. *Devupallil Ammanu v. Pedfredia Narayanasami Naidu*, 30 Ind. Cas. 689.

SESHAGIRI AIYAR, J.

References:—11 Ind. Cas. 55=13 C.L.J. 593, F.

(2) Application for leave to sue as pauper See CIV. PRO. CODE (1908), No. 592, 9 Bur. L.T. 228.

(3) By woman—Security not required. See CIV. PRO. CODE (1908), No. 571, 8 L.B.R. 387.

Pawn.

'Pledge' of goods—Nature of transaction—How effected—Necessity for endorsement in

Pawn—(Concluded).

case of Government securities—Rights of pawnee. See CONTRACT ACT, No. 130, 33 Ind. Cas. 891.

Pay in Property.

Kanwin and, property—Transfer of Property Act, S. 123. See BUDDHIST LAW (GIFT), No. 1, 9 Bur. L.T. 87.

Payment.

(1) Meaning of. See CONTRIBUTION, No. 4, 19 O.O. 347.

(2) Co-mortgagees—Payment to one if discharges the debt. See MORTGAGE (GENERAL), No. 3, 3 L.W. 22.

Payment into Court.

Tender of money on the last day of payment in the Court, application made for permission to make payment—Money tendered though not deposited on that date through mistake of Court or its officers—Next day holiday—Payment made on the next first opening day of the Court, whether such a payment within time and sufficient compliance with the terms of the decree. See PRE-EMPTION, No. 12, 123 P.W. R. 1916.

Payment out of Court.

Payment made out of Court, not certified—Non-recognisability by executing Court. See CIV. PRO. CODE (1908), No. 100, 33 Ind. Cas. 71.

Pedigree.

(1) Filed in Settlement Court, proof of—Admissibility in evidence of settlement pedigrees—Evidence Act, S. 32—Ancient document bearing signature made by a person on behalf of another—Presumption about authority to make the signature—Evidence Act, S. 90.

Where in order to establish a pedigree reliance was placed upon a genealogical table put in at the time of settlement, but it was not established that the document was prepared by a member of the family or an official whose duty it was to record it or that any member of the family was privy to its preparation or that its contents were admitted by the members of the family and there was evidence that the entries in the *khewat* made at the time of settlement were not recorded upon its basis, *held*, that the genealogical table was inadmissible in evidence (a).

The signatures of persons appearing on documents more than 30 years old and produced from proper custody can be presumed to be in the handwriting of persons in whose handwriting they purport to be. But it cannot be presumed under any provision of the Evidence Act that a person signing on behalf of another had authority to make the signature on his behalf. *Kashi Singh v. Ram Narain*, 19 O. C. 321.

STUART, J.C.

Reference :—(a) 25 Ind. Cas. 823, *Dist.*

(2) Withdrawal of suit—Filed with plaint being found wrong—No formal defect—Liberty

Pedigree—(Concluded).

to bring fresh suit. See CIV. PRO. CODE (1908), No. 557, 30 Ind. Cas. 351.

(3) Preparation of, at time of settlement—Admissibility thereof in civil suit. See EVIDENCE ACT, No. 17, 36 Ind. Cas. 66.

Penal Clause.

(1) Mortgage—Award of compensation for breach of—Amount awarded a charge on mortgaged property. See LIMITATION, No. 4, 30 Ind. Cas. 323.

(2) Attested agreement to deliver merchandise with a, not bond. See STAMP ACT (1899), No. 4, 9 Bur. L.T. 111.

Penal Code.

(1) S. 8. See LEGAL PRACTITIONERS, No. 1, 24 O.L.J. 392.

(2) Ss. 147, 325—Agreement to compound offences under—Public policy. See AGREEMENT, No. 1, 20 C.W.N. 946.

(3) Ss. 183, 196, 353 — Warrant—Direction to *basht* to attach goods—Execution by *Nazir*—Resistance to his entry—No offence—No day mentioned in the warrant of day before which it is to be executed—Illegality—Civ. Pro. Code, 1908, O. XXI, r. 24, O. XXXVIII, r. 7.

Where a Civil Court issued a warrant directed to the *basht* of the Court directing him to seize certain goods that were in accused's workshop, where the warrant specified no day upon which or before which it was to be executed and where the *Nazir* of the Court who sought to enter the defendant's house for the purpose of executing such warrant was resisted by the accused.

Held that the accused committed no offence. The *Nazir* was not the person who was clothed with lawful authority under the warrant to execute it. If he took upon himself the voluntary execution of it, the execution so made by him was not in pursuance of the warrant and therefore not lawful (a).

The warrant was bad also because it was absolutely blank in point of time, uncertain and would operate as a continuing authority indefinitely. *Mohini Mohan Banerji v. King-Emperor*, 1 Pat. L.J. 550=36 Ind. Cas. 871.

ATKINSON and KINGSFORD, JJ.

References :—(a) 37 O. 122, *F.* (b) 40 C. 849, *F.*

(4) S. 186. See No. 3, *supra*.

(5) S. 188—Disobedience to an injunction issued by a Civil Court, if punishable under—'Promulgated,' import of. *Pommanalchintakath Mammali v. Thazhithattathkutti Ammu*, 2 L.W. 410=17 M.L.T. 391=16 Cr. L.J. 592=30 Ind. Cas. 144=39 M. 543. See Final Part 1916, Col. 1130.

(6) Ss. 191, 193. See CIV. PRO. CODE (1908), No. 369, 20 C.W.N. 1192.

(7) S. 193. See No. 6, *supra*.

(8) S. 225-B—Preliminary enquiry, necessity of. See CRIM. PRO. CODE, No. 7, 21 C.W.N. 126.

Penal Code—(Concluded).

(9) S. 266—Release deed—Relinquishment of rights in favour of father and uncles—Creditors deluded—Illegal objects—Fraudulent alienation. See **FRAUDULENT TRANSFERS**, No. 1, 9 S.L.R. 108.

(10) S. 296. See **SPECIFIC RELIEF ACT**, No. 51, 35 Ind. Cas. 106.

(11) S. 325. See No. 2, *supra*.

(12) S. 353. See No. 3, *supra*.

Penalty.

(1) High rate of interest and damages in Mukurari lease, if—Contract Act (IX of 1872), S. 74. See **BEN. ACT VIII OF 1885 (TENANCY)**, No. 37, 21 C.W.N. 108.

(2) Stipulation to pay interest on arrears of rent "at 75 per cent. with full damages," if by way of—Contract Act (IX of 1872), S. 74—Mere high rate if sufficient to demand interference. See **BEN. ACT VIII OF 1885 (TENANCY)**, No. 36, 21 C.W.N. 112.

(3) See **CONTRACT ACT**, No. 92, 35 Ind. Cas. 624.

(4) Deposit not a—Forfeiture of deposit—Right of defaulter to claim credit in mitigation of damages. See **CONTRACT ACT**, No. 87, 10 S.L.R. 4.

(5) If limited to money—Stipulation to convey immoveable property in default, whether a penalty. See **CONTRACT ACT**, No. 90, 4 L.W. 173.

(6) In compromise decrees—Power of execution Court to interfere. See **CONTRACT ACT**, No. 94, 32 Ind. Cas. 697.

(7) Interest at 75 per cent. in a mortgage by poor and ignorant men—Reasonable compensation. See **CONTRACT ACT**, No. 99, 34 Ind. Cas. 609.

(8) Provision regarding payment of interest on default—Compound interest—Relief against penal clause—Assessment of compensation—Conduct of parties. See **CONTRACT ACT**, No. 93, 30 Ind. Cas. 323.

(9) Repayment in kind by instalment—Default—Contract Act, 1872, Ss. 37, 74. See **EVIDENCE ACT**, No. 59, 35 Ind. Cas. 111.

Performance of Contract.

(1) If after a contract is made it becomes illegal to carry it out, it cannot be enforced. **S. K. R. Cama & Co. v. K. K. Shah**, 9 Bur. L. T. 99=33 Ind. Cas. 96.

FOX, C.J.

References:—28 Ind. Cas. 433; 17 Bom. L.R. 249; 40 B. 11, F.

(2) Term of contract impossible to perform—Period fixed for performance—Test of impossibility. See **CONTRACT ACT**, No. 56, (1916) 2 M.W.N. 131.

Permanent 'grant' Tenure.

See **LANDLORD AND TENANT**, No. 53, 33 Ind. Cas. 420.

Permanent Lease.

Husband and wife—To wife alone—Deed containing no words of conveyance to children.

Permanent Lease—(Concluded).

See **MALABAR LAW—(HUSBAND AND WIFE)**, No. 1, 31 Ind. Cas. 854.

Permanently-settled Estate.

Area if can be changed by agreement between Zemindar and Government Agreement by Zemindar to hold ryoti land on ryotwari patta—Rent suit—Jurisdiction. See **ZAMINDARI**, No. 1, 30 M.L.J. 545.

Permanent Settlement.

(1) *Presumption backward—Permanent settlement, long possession after.*

The principle of *praesumitur retro* is not confined to cases where the question is as to the existence of a taluk at the time of the Permanent settlement but it also applies to cases where the question is whether certain lands, possessed for a long time after the Permanent settlement, as part of taluk from before the Permanent settlement appertained to the taluk at the time of the Permanent settlement (a).

The presumption is no doubt one of fact: it is open to the Court to attach such weight as it likes or to hold, having regard to the other facts and circumstances of a particular case, that it is of no assistance to a party. **Ram Kristo Chakraborty v. Narendra Kishore Roy**, 35 Ind. Cas. 885.

CHATTERJEE and RICHARDSON, JJ.

References:—(a) 3 C.W.N. 341; 10 C.W.N. 503; 14 C. 740 (P.C.), R.

(2) Grant to Brahmin before, for subsistence—Onus—Suit for commutation of rent. See **MAD ACT I OF 1908 (ESTATES LAND)**, No. 4-a, 32 Ind. Cas. 229.

(3) Position of the Inamdar same as Zamindar under—Inamdar not a permanent lessee under Government. See **CROWN GRANTS**, No. 1, 31 M.L.J. 483.

Permanent Tenure.

Created before Transfer of Property Act—Transferability—Decree for rent against registered tenant—Sale of tenure in execution—Rights of prior purchaser. See **LANDLORD AND TENANT**, No. 56, 33 Ind. Cas. 502.

Perpetua Injunction.

Right to use water decreed in previous suit—Owner filling up tank. See **SPECIFIC RELIEF ACT**, No. 49, 35 Ind. Cas. 40.

Perpetuities.

Rule against—Agreement to reconvey land—No period fixed for reconveyance—Not void as opposed to public policy—Validity of contract—Transfer of Property Act, S. 14—Indian and English Law—Difference between. **Avula Charamudi v. Marriboyina Raghavulu**, 29 M. L.J. 471=18 M.L.T. 76=(1915) M.W.N. 596=28 Ind. Cas. 871=39 M. 462. See Final Part, 1915, Col. 1131.

Plaint.

(1) Return of plaint under S. 23 (1), Act IX of 1887—High Court's power of interference in revision. See **ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS)**, No. 7, 20 C.W.N. 1000.

Plaint—(Concluded).

(2) Verified, if evidence. See CIV. PRO. CODE (1908), No. 369, 20 C.W.N. 1192.

(3) Signed by authorised agent—Act II of 1901 (Agra Tenancy), S. 193. See CIV. PRO. CODE (1908), No. 342, 31 Ind. Cas. 859.

(4) See HINDU LAW (REVERSIONERS), No. 3, 19 O.C. 221.

(5) In first suit returned for presentation to proper Court—No re-presentation—Subsequent suit if barred under O. II, r. 2, Civ. Pro. Code—Effect of non-presentation. See LIMITATION ACT (1908), No. 149, 3 L.W. 192.

(6) Return of—Permission to refile in proper Court—Order allowing further time—Court, power of—Suit, filing of—Last day—Plaintiff, risk of—Prosecution of a suit in a Court—Return of plaint, termination on. See LIMITATION ACT (1908), No. 51, 24 C.L.J. 355.

(7) Award of larger relief than in—Legality—Injunction against community. See SPECIFIC RELIEF ACT, No. 51, 35 Ind. Cas. 106.

(8) Amendment of. See TRANSFER OF PROPERTY ACT, No. 79, 9 Bur. L.T. 177.

Plaintiff.

(1) *Presumption as to claim by plaintiff being for his benefit.*

In the absence of proof to the contrary, a plaintiff will be presumed to sue for his own benefit. *Sham Sundar v. Harbans Singh*, 30 Ind. Cas. 517.

JOINSTONE and SHAH DIN, JJ.

(2) Liability of, and defendant under joint decree—Plaintiff paying and suing defendant for recovery of whole sum—Nature of defence open. See PLEADINGS, No. 5, (1916) 2 M. W.N. 214.

Pleader.

(1) Vakalatnama, acceptance of, by pleader—Endorsement of acceptance in writing, if necessary—Civ. Pro. Code (1908), O. III, r. 4—High Court General Rules and Circular Orders, Ch. XI, r. 45 (e), Vol. I, p. 301, interpretation of—Endorsement if must be made in all cases before vakalatnama is filed.

An acceptance or act by a pleader named in a vakalatnama would, if allowed by Court expressly or by implication, be valid and operative even without an endorsement in writing on the vakalatnama by the pleader, but r. 45 (e), Ch. XI, p. 301, Vol. I, of the General Rules and Circular Orders of the High Court requiring acceptance of a vakalatnama by endorsement in writing ought to be complied with.

Per *D. Chatterjee, J.*—The Rule is a salutary rule proscribed for safe-guarding the interests of litigants and should be followed if the Moffusil in the manner indicated by the construction placed thereon by the High Court. Courts in the Moffusil must be specially careful in enforcing this rule in cases of compromise and withdrawal of cases and withdrawal of money or documents.

Pleader—(Continued).

Beachcroft, J.—Courts should insist on the Rule being observed by pleaders practising before them and the pleader who does not conform to it ought not to be heard.

Per *Beachcroft, J.* (on the interpretation of the Rule).—*Quere*—Whether, after the first acceptance, a mere endorsement of acceptance is sufficient in the case of pleaders subsequently appearing.

Per *D. Chatterjee, J.*—Such endorsement made in the presence of the Court or the *sheristadar* or the Bench Officer and dated (provided all the pleaders so accepting a vakalatnama are named in it) should be sufficient. *Mohesh Chandra Addy v. Panchu Mudali*, 20 C.W.N. 287=23 C.L.J. 297=32 Ind. Cas. 395=43 C. 884.

D. CHATTERJEE and BEACHCROFT, JJ.

(2) *Unprofessional conduct—Rules as to receiving instructions and accepting vakalatnamas, compliance with—Judge's duty to enforce compliance and take disciplinary measures on breach—One pleader appearing for another—Practice—Court to be informed.*

Where a pleader, who was charged with having filed a petition for revival of a suit without authority, alleged in defence that, he had been instructed to appear by a clerk of the Muktear of the party, and that it had been (erroneously) represented to him that the vakalatnama filed in the original suit contained his name:

Held, that the pleader had acted in contravention of S. 13, cl (a) of the Legal Practitioners Act in the matter of receiving instructions.

That, even if the vakalatnama did contain the pleader's name, mere verbal acceptance of it would not be in compliance with cl. (e), r. 45, Ch. XI of the High Court's General Rules and Circular Orders.

Where a pleader appears for another pleader who is unable at the moment to attend Court, he ought to let the Court know that he is so appearing.

Per *Richardson, J.*—The rule in regard to the compliance of vakalatnamas should be strictly and scrupulously observed in the Subordinate Courts. In connection with the enforcement of the rules, it is always open to a Judge to refuse to hear a pleader or to refuse to allow a pleader to act who has not accepted a vakalatnama in the prescribed manner. It is also the duty of the Judge to take such action as may be appropriate, in regard to infractions of the rule which escape notice at the time and are brought to light subsequently. *In the matter of Jogesh Chandra Gupta*, 20 C.W.N. 283=17 Cr. L.J. 191=33 Ind. Cas. 831.

CARNDUFF and RICHARDSON, JJ.

(3) *Unprofessional conduct—Pleader a party to suit, threatening to sue Court for unwarrantable and illegal act—Court's duty to enquire into complaints against subordinate officers—Anonymous complaint to Judge—S. 14, Legal Practitioners Act.*

Two brothers, decree-holders, one of whom

Pleader—(Concluded).

was a pleader, fixing on the date fixed for sale that the sale proclamation had not been duly published, applied for issue of a fresh sale proclamation on the ground that the non-publication was due to the negligence of the Court Officers. The Munsif rejected the petition and struck off the case, whereupon they caused a notice to be written and served on the Munsif threatening him with legal proceedings to recover the costs which the notice stated had been suffered owing to the Munsif's illegal and unwarrantable conduct. The District Judge to whom the matter was reported called on the pleader to apologise to the Munsif, but he refused, and the District Judge thereupon referred the matter to the High Court under S. 14 of the Legal Practitioners Act, holding that the pleader was guilty of grossly improper conduct in the discharge of his professional duty.

Held, that in the circumstances, no action should be taken against the pleader under S. 14 of the Legal Practitioners Act.

Per D. Chatterjee, J.—What was done in this case was done by an individual in the capacity of a suitor in respect of his supposed rights as a suitor, and of an imaginary injury done to him as a suitor and it had no connection whatever with his professional character or anything done by him professionally.

Per Beachcroft, J.—That, on the facts stated, the Munsif's order dismissing the execution case was wholly indefensible, and human nature being what it is, the action of the pleader was not to be taken too seriously, though he would have been well advised to offer the Munsif an apology.

Remarks on the impropriety of addressing anonymous complaints to Court in connection with pending cases. *In the matter of Purna Chandra Addy*, 20 O.W.N. 278=23 C.L.J. 237=32 Ind. Cas. 657=43 C. 685=17 Or. L.J. 65.

CHATTERJEE and BEACHCROFT, JJ.

(4) *Use of title not authorised—Necessity to take notice of such conduct.*

Where a pleader arrogates to himself title which he is not authorised to use his conduct deserves to be noticed by the Chief Court. *Sham Sundar v. Harbans Singh*, 30 Ind. Cas. 517.

JOHNSTONE and SHAH DIN, JJ.

(5) *Appearance by, not duly authorized—Delegation of duties by one legal practitioner to another, practice as to—Legality—Power-of-attorney.* See CIV. PRO. CODE (1908), No. 344, 12 N.L.R. 189.

(6) *Authority of—Withdrawal of a plea—Withdrawal binding on the party.* See CONSTRUCTION OF DEEDS, No. 5, 34 Ind. Cas. 390.

(7) *Information given to, as to date of hearing—Notice not served on party—Appearance by pleader without instructions—Dismissal for default, legality of.* See SERVICE OF NOTICE, No. 1, 30 Ind. Cas. 199.

Pleader and Client.

(1) *Pleader appointing another legal practitioner in his place—Condition in printed*

Pleader and Client—(Continued).

power-of-attorney binding on client—Refusal of the client to get his work done by the person so appointed—His incompetency to get refund of fee—Pleader when not bound to refund fee—Practice—Extent of the liability of one of a deceased pleader's several representatives—Contract Act, S. 43—Revision under S. 25 of Act IX of 1887.

1. Where the printed power of attorney expressly authorizes a pleader to engage another legal practitioner either along with or instead of himself, the client is not entitled to claim refund of the fee if he refuses to get his work done by the legal practitioner so appointed by his pleader in his place, and his plea that he did not read the power of attorney at the time of signing it is altogether untenable as every person is supposed to have read the document which he signs.

2. The understanding between a pleader and his client is that the former shall do his best for the latter and if this is done no refund of fee is claimable.

3. A refund is no doubt claimable when the pleader through neglect does not appear. But when a pleader is prevented by sudden illness, or death or other unavoidable cause from appearing, refund of fee cannot legally be claimed.

4. Where refund can be legally allowed, one of the several representatives of a deceased pleader cannot be compelled to refund the whole. His liability extends to the extent of, and in proportion to, the share of the estate which he has actually got. S. 43 of the Contract Act does not apply here, because this is not a case of one of several joint promisors, but of one of several representatives of a single promisor. *Devil Parshad v. Ram Rakha Mal*, 20 P.W.R. 1916=33 Ind. Cas. 993.

CHEVIS, J.

(2) *Karpardaz and pleader—Refusal to go on with case when adjournment refused—Gross neglect—Whether can be condoned.*

Refusal on the part of a Karpardaz and a pleader to go on with the case when the application for adjournment has been rejected amounts to a very gross neglect of the client's interests. Condonement of such negligence can result only in its continuance. *Sri Rang Behari Lal v. Racheya Lal*, 1 Pat. L.J. 65=35 Ind. Cas. 429.

MULLICK and ROE, JJ.

(3) *Minor party—Admission by pleader—Whether binding.*

Where the pleader of minor plaintiffs admitted the *factum* of the will which was the subject of the contest and the minors were represented by their brother as next friend:

Held, that the minor plaintiffs were bound by the statement made by their duly appointed pleaders. *Indar Singh v. Karm Singh*, 86 F.L.R. 1916=164 P.W.R. 1916=35 Ind. Cas. 870.

SCOTT-SMITH, J.

(4) *Pleader—Professional misconduct—Altering Court's record to conceal error due to carelessness.*

Pleader and Client—(Continued).

Where a property to be sold in execution of a decree was, through the carelessness of the pleader for the decree-holder and his clerk, misdescribed in the application for execution, in the warrant of attachment, and in the sale proclamation, and after they had been presented to Court, the clerk actuated by a desire to conceal his and his master's carelessness from the decree-holder altered the descriptions and the alterations were initiated by the pleader :

Held (ordering the pleader's suspension for three months), that to tamper with the Court's records is at all times a serious matter and the pleader had acted without due care and caution and without that sense of responsibility which should govern the conduct of all officers of the Court in matters of such importance. *In the matter of a pleader*, 20 C.W.N. 1069=36 Ind. Cas. 874.

TEUNON and CHAUDHURI, JJ.

- (5) *Pleader's acts how far binding on clients—Pleader's authority to compromise—Vakalatnamah containing such authority whether sufficient—Form IV, Sind Courts Civil Circulars—O. III, r. 1, Civ. Pro. Code.*

A pleader who is duly appointed to act for the party has authority to do all acts incidental to that general authority. He may make applications on behalf of his clients, he may make admissions binding against his clients and he may make an application referring the matter in dispute to arbitration. A presumption of such power is essential to the due conduct of the litigation. But no such presumption is necessary in the case of an authority to compromise; and the case of 8 S.L.R. 91 shows that a general power to compromise given in a vakalatnama is not only irregular as not warranted by Form IV, page 160, Sind Courts Civil Circulars, but is also inadequate to support a particular compromise in the course of the suit. Proof of specific authority for that compromise is necessary.

Such a specific authority may however be inferred from the party's silence amounting to an acquiescence or tacit ratification of the pleader's authority. *Mussammat Sardarkhan v. Muradali*, 9 S.L.R. 218=34 Ind. Cas. 928.

PRATT, J.C. and CROUCH, A J.C.

References :—(1848) L.J. 17 Ex. 297 ; 8 S.L.R. 91 ; 24 O. 469, F.

- (6) *Execution proceedings in time—Act III of 1901 (U.P. Land Revenue) Sch. IV, r. (d), S. Nos. 47, 48.*

Parties are bound by what counsel do in the exercise of their discretion acting within the scope of their authority.

Walsh, J.—The bar has privileges of audience and a good deal more than audience which involve correlative obligations, and matters like admissions, consents, withdrawals by counsel in the conduct of their cases made in open Court are, unless they have been induced or misled by some circumstances, final and binding on the parties.

Sundar Lal, J.—Under Sch. IV, r. (d) Serial Nos. 47 and 48, Act III of 1901 (Agra

Pleader and Client—(Concluded).

an application for execution of a decree under Rs. 600 can be made at any time within 3 years, and in the case of a decree over Rs. 600 the rules applicable to the execution of decrees of the Revenue Court and the application for execution must be made within the time fixed by the said article. *Brij Bhukan Lal v. Mahadeo Pershad*, 35 Ind. Cas. 205.

WALSH and SUNDAR LAL, JJ.

- (7) *Pleader paying pre-emption money for his minor client on the ground that the pre-empted property was sold to him by his next friend—No proof and invalidity of the alienation—Right of pleader to get back his money without lien on the property—Pleader commencing to act without fee, his incompetency to claim any from his client's representative—Indian Contract Act, Ss. 64, 65, 68 and 70—Costs against plaintiff even when successful—Form of decree in such a case—Misconduct of pleader.* *Chanda Singh v. Sodhi Harbans Singh*, 108 P.W.R. 1915=12 P.L.R. 1916=30 Ind. Cas. 513. See Final Part, 1915, Col. 1133.

- (8) *Professional misconduct—Pleader accepting fees for whole case and failing to appear after few hearings—Presumption—Terms of engagement—Procedure.* *In the matter of A First Grade Pleader, Rangoon*, 16 Cr.L.J. 707=30 Ind. Cas. 995=8 L.B.R. 294. See Final Part, 1915, Col. 1134.

- (9) *Pleader's authority to refer to arbitration.* See AWARD, No. 10, 9 S.L.R. 183.

- (10) *Wrong admission by pleader—Whether binding.* See CIV. PRO. CODE (1909), No. 105, 104 P.L.R. 1916.

- (11) *Pleader advancing money to client—Public policy.* See CONTRACT ACT, No. 18, 19 O.C. 60.

- (12) *Taking instructions from unauthorised persons—Conduct improper.* See LEGAL PRACTITIONERS ACT (1879), No. 4, 20 C.W. N. 1016.

- (13) *Usurping functions of a pleader—Remedy.* See LEGAL PRACTITIONERS ACT, (1879), No. 3, 8 Bur. L.T. 280.

- (14) *Admission by pleader dispensing with proof—Effect.* See POSSESSION, No. 4, 9 S.L.R. 220.

Pleaders Amending Act.

See ACT XXIX OF 1865.

Pleader's Fees.

- (1) *Batohi appeals—Vakil's fee.* See COSTS, No. 1, 3 L.W. 249.

- (2) *Suit by reversioner contesting alienation—Pleader's fee.* See CUSTOMS (PUNJAB—ALIENATION), No. 5, 27 P.W.R. 1916.

- (3) *Fees to pleader authenticated by affidavit of agent—Payment by cheque.* See RULES OF PRACTICE, No. 1, 32 Ind. Cas. 194.

Pleaders, Mukhtars and Revenue Agents Act.

See ACT XX OF 1865.

Pleadings.

- (1) *Pleading and proof, variance between, when fatal to suit—Variance not affecting*

Pleadings—(Continued).

cardinal points in issue—Nature of the principle—Question one of circumstances rather than of law—Application of the principle in an abstract way leading to error of decision on the merits—Trial Judge's appreciation of witnesses examined in his presence, value of.

When a sum of money due by A to B was entered in B's account-book as having been paid on 5th November 1907 in cash, but B's case was that it was liquidated by a promissory note which however bore date the 7th November 1907; and whilst A alleged that the payment was in fact made on 5th November in cash and the note of 7th November was a forgery. B and his witnesses throughout the trial insisted that the date of the transaction was the 7th and the note was signed then, but the evidence and circumstances of the case showed that there was no payment in cash and that the promissory note was genuine, but had been executed not on the 7th but on the 5th—the entry in the account book to the effect that the payment was in cash being satisfactorily explained by the practice of entering payments be promissory notes as payments "in cash."

Held—that the variance of the case established from the case pleaded in the plaint (as to the date of the note), was not fatal to B's suit to enforce the promissory note, in which the cardinal points to be decided were whether the debt had been paid in cash and whether the note was a forgery.

That the High Court in relying for the dismissal of the suit on, amongst other grounds, that of variance between pleading and proof; had applied that principle in an abstract and unsatisfactory way which had misled them in estimating the merits of the case.

That the question, in ultimate analysis, was one of circumstances and not of law.

That the evidence adduced in support of the transaction having been effected on the 7th November was not necessarily perjured or fabricated when it appeared that the statements of witnesses and entries in account-books might be due to bona fide mistake. **Haji Umar Abdul Rahman v. Gustadji Muncherji Cooper**, 20 C.W.N. 297=(1916) M.W.N. 137=3 L.W. 308=30 M.L.J. 444 (P.C.)=34 Ind. Cas. 259.

VISCOUNT HALDANE, LORD PARMOOR, SIR JOHN EDGE and MR. AMEER ALI.

(2) *Practice—Pleading—Two sets of plaintiffs claiming reliefs in the alternative in the same suit—Legality—Civ. Pro. Code, 1908, s. 1, r. 1—Scope.*

Where, in a suit relating to the properties left by a deceased Arora of Sialkot, one set of plaintiffs were the brother's sons of the deceased and the other set were his daughters, and the plaintiffs also stated that they have by agreement among themselves arranged to divide the property in the event of either set of plaintiffs succeeding in the suit.

Held, that the suit ought not to have been dismissed on the ground that the plaint contained contradictory statements and made inconsistent claims.

Pleadings—(Continued)

The provisions of O. I, r. 1, Civ. Pro. Code, 1908, contemplate, even though they do not actually encourage, claims by different plaintiffs in the alternative, provided that there is a common question of law or fact which would arise if such plaintiffs brought separate suits. **Mussamat Rukman Devi v. Mussamat Shib Devi**, 10 P.R. 1916=32 Ind. Cas. 526.

RATTIGAN and SHAH DIN, JJ.

(3) *Pleadings and proof, variance between, when fatal—Objection, form of.*

The determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made (a).

The rule that the allegations and the proof must correspond is intended to serve a double purpose, namely, *first*, to apprise the defendant, distinctly and specifically, of the case he is called upon to answer, so that he may properly make his defence and may not be taken by surprise; and, *secondly*, to preserve the accurate record of the cause of action as a protection against a second proceeding founded upon the same allegations. Hence every variance between pleading and proof is not fatal (b).

The objection that the plaintiff should not be allowed to succeed on a case different from what he had set out in his plaint, should be one of substance and not one of form (c). **Hira Lal Chatterjee v. Gribala Debi**, 23 C.L.J. 429=34 Ind. Cas. 444.

MOOKERJEE and BEACHCROFT, JJ.

References:—(a) 11 M.I.A. 7=6 W.R. (P.C.) 57; 14 C. 801=14 I.A. 168; 8 C.W.N. 865=29 B. 1, R. (b) 18 C.W.N. 473, F. (c) 23 W.R. 369 (P.C.), R.

(4) *Plaint—False averment—Facts proved different from those averred—Relief on the basis of proved facts—Legality—Dismissal of suit—Not proper order—Agriculturist—Whether includes 'betel' cultivator—C.P. Act XI of 1898 (Tenancy).*

The plaintiff claimed possession of the land as an ordinary tenant thereof against the defendant as the trespasser. The defendant who admitted the tenure of the plaintiff set up a perpetual sub-tenure under a contract with the plaintiff. The lower Court found that the defendant was neither a trespasser nor a perpetual sub-lessee but a licensee and gave the relief which it thought the plaintiff was entitled to on the basis of its finding.

Held that the suit was not liable to be dismissed as based on a false averment and that the lower Court was entitled to apply the law to the facts actually proved by evidence (a).

The cultivation of *pan* plants (i.e., betel) is 'agriculture' within the meaning of that term in the C.P. Tenancy Act (1898). Therefore land let or sublet for the cultivation of betel is let or sublet for an agricultural purpose within the meaning of that Act (b). **Loola v. Pyare**, 12 N.L.R. 57=33 Ind. Cas. 497.

STANYON, A.C.J.

References:—(a) 15 C.P.L.R. 33 (35), *Not F.*; 1 N.L.R. 4; 25 A. 256; 25 A. 498; 31 A. 275, R. (b) 11 N.L.R. 49; 11 N.L.R. 122; 1 C.P.L.

Pleadings—(Continued).

R. 158; 11 C.P.L.R. 87; 17 M. 98; 5 N.W.P. H O.R. 155; R.

(5) *Liability of plaintiff and defendant under joint decree—Plaintiff paying and suing defendant for recovery of whole sum—Nature of defence open—Exaggerated claim—If ground for dismissing the suit.*

In a suit upon joint liability created by a decree which has been discharged by plaintiff, the only question that can be raised in the defence is as to the extent of the liability.

The fact that the plaintiff has exaggerated a claim for contribution into one for recovery of the whole decree amount is no ground for dismissing the suit. **Sambasiva Iyer v. Subramania Iyer**, (1916) 2 M.W.N. 214=4 L.W. 260.

SESHAGIRI IYER, J.

(6) *Point not raised in Trial Court—Issue thereon not asked for in appellate Court—Point whether can be urged in Final Court of appeal.*

Held, that a party cannot be allowed to urge a new point in the final Court of appeal which was not raised in any of the lower Courts and on which no issue was framed, and where even the memorandum of appeal to the lower appellate Court did not state that any issue in respect thereof was necessary and should have been drawn.

Where, therefore, the plaintiff's suit for possession of certain property consisting of a *takia*, a mosque and a well, on the ground that he was the sole owner thereof was dismissed and on appeal to the Chief Court he sought to recover possession as *mutwalli* of the mosque:

Held, that he could not urge that contention at the final stage of the suit, simply because there was a vague reference in the plaint to his being *mutwalli* of the mosque. **Sharaf Din v. Mohkam**, 86 P.W.R. 1916=33 Ind. Cas. 748.

SHADI LAL and LESLIE-JONES, JJ.

(7) It is in accordance with the principles of sound common sense and justice that a man who brings a case and fails to prove it should not get a decree on a different cause of action from that alleged by him. *In re Ma Htwe v. Maung Lun*, 9 Bur. L.T. 114=33 Ind. Cas. 163=8 L.B.R. 234 (F.B.).

FOX, C.J. ROBINSON and PARLETT, JJ.

(8) *Plaint, frame of, with reference to proof.*

A plaint must be so framed that, on proof of the facts set forth in the plaint, there can be no reasonable doubt in the mind of the Court as to the nature of the decree to be made upon the suit as framed. **Girwar Narain Mahton v. Mussamat Makbunessa**, 1 Pat. L.J. 468=36 Ind. Cas. 542.

ROF and JWALA PRASAD, JJ.

(9) *Hindu law—Joint family—Allegation of separation by a member—Adverse decision—Second appeal—Setting up existence of joint family.*

Where the allegation of a party to a suit that he had separated himself from the other members of the family was found against him, the Court holding that the family was joint, in a

Pleadings—(Continued).

second appeal preferred in the case it could be argued on his behalf on the basis of the joint family. **Mahadeo Prasad v. Musammatt Tikni**, 36 Ind. Cas. 685.

STUART, A.J.C.

(9-a) *Appeal (second appeal)—Plaintiff whether can resile from his original position in—Document—Construction on one not helping in construing another—Covenant that mortgagor not to redeem previous mortgage without paying subsequent advances—Charge—Further charge—Deed of—Clog on equity of redemption.*

In second appeal a plaintiff cannot be permitted to resile from the position he had taken up in the plaint.

The construction placed on one document cannot be of any material help in construing another.

Where subsequent advances are charged on the property covered by a previous mortgage, a covenant that the mortgagor shall not be permitted to redeem the latter without paying the former is valid and enforceable.

If the intention of the parties as gathered from the documents as a whole was to create a charge, the mere fact that the mortgaged property was not described, because the money advanced was tacked on to a previous mortgage would not detract from the validity of that charge (a). **Chapcharja Baksha v. Ram Karakh**, 32 Ind. Cas. 740.

KANHAIYA LAL, A.J.C.

References:—(a) 6 M.I.A. 393; 37 A. 369; 8 O.C. 132, 227; 6 A.L.J. 225; 31 A. 482; 32 A. 651; 28 B. 349, R.; 17 O.C. 303; 18 Ind. Cas. 461, *Expl.*

(10) *Plaint—Deeds, nature of—Different and inconsistent rights—Inconsistent state of facts.* **Mati Lal Poddar v. Juddhistir Das Teor**, 22 O. L.J. 251=20 C.W.N. 310=31 Ind. Cas. 181. See Final Part, 1915, Col. 1138.

(11) *Pleas—Preliminary pleas—Mortgage—Bai-bil-wata—Condition—Foreclosure proceedings—Burning of the record—Effect of—Presumption that the notices were served—Courts to insist on filing full pleas—Remand to be made if full pleas not filed—Redemption suit—Ground of appeal.* **Farma Nand v. Thikhu**, 121 P.W. R. 1915=57 P.L.R. 1916=30 Ind. Cas. 817. See Final Part, 1915, Col. 1138.

(12) *Dismissal of suit on pleadings alone—Propriety.* **S M Venkatarama Ayyar v. Rajagopala Iyer**, 29 M.L.J. 786=31 Ind. Cas. 704. See Final Part, 1915, Col. 1139.

(13) Title by adverse possession not set up in plaint—General prayer. See **BENAMI TRANSACTION**, No. 5-a, 32 Ind. Cas. 365.

(14) Defendant admitting plaintiff's title in written statement—Suit if may be dismissed for want of cause of action. See **CAUSE OF ACTION**, No. 1, 20 O.W.N. 636.

(15) Admission in—Necessity for investigation. See **CIV. PRO. CODE** (1908), No. 694, 30 Ind. Cas. 204.

(16) Amendment of. See **CIV. PRO. CODE** (1908), No. 355, 9 Bur. L.T. 150.

Pleadings—(Concluded).

(17) Fraud in, how to be stated. See CIV. PRO. CODE (1908), No. 352, 35 Ind. Cas. 252.

(18) Written statement—Specific denial—In absence of denial, facts alleged, treated as admitted—Practice—Proof of letter. See CIV. PRO. CODE (1908), No. 368, 18 Bom. L.R. 946.

(19) Agency—Plea not raised in first Court or in appeal memo. See CONTRACT ACT, No. 35, 31 Ind. Cas. 632.

(20) Fraud, allegations of—Specific charge and strict proof, necessity of. See CONTRACT ACT, No. 2, 24 O.L.J. 335.

(21) Setting up of custom different from that pleaded in written statement. See CUSTOM (GENERAL), No. 4, 36 Ind. Cas. 66.

(22) New defences whether can be raised in appeal. See CUSTOMS (PUNJAB—ADOPTION), No. 1, 8 P.W.R. 1916.

(23) Fraudulent motive—Pleadings and proof. See FRAUD, No. 5, 36 Ind. Cas. 965.

(24) See HINDU LAW (PARTITION), No. 9, 34 Ind. Cas. 466.

(25) Objection taken late in—Duty of Court to take cognisance of objection. See JURISDICTION OF CIVIL COURT, No. 7, 30 Ind. Cas. 209.

(26) Mofussil pleadings not to be strictly construed. See LIMITATION ACT (1908), No. 232, 12 N.L.R. 90.

(27) Right of plaintiff to recover according to, and proof. See PRACTICE AND PROCEDURE, No. 10, 36 Ind. Cas. 464.

(28) Amendment of, when can be allowed—Plea of limitation affected by proposed amendment—Practice. See PRINCIPAL AND AGENT, No. 5, 31 M.L.J. 688.

(29) Award of larger relief than in plaint—Legality—Injunction against community. See SPECIFIC RELIEF ACT, No. 51, 35 Ind. Cas. 106.

Pledge.

(1) Of goods—Nature of transaction—How effected—Necessity for endorsement in case of Government securities—Rights of pawnee. See CONTRACT ACT, No. 139, 33 Ind. Cas. 891.

(2) Commission agent for sale in possession of jewel—Pledge by him—Suit by owner to recover the jewel or its value from pledgee—Limitation—Rights of pledgees in good faith—Ss. 178 and 108 (Exception 1), Contract Act—Scope. See LIMITATION ACT (1908), No. 226, 30 M.L.J. 537.

Police (City) Act.

See MAQ. ACT III OF 1889.

Police (District) Act.

See BOM. ACT IV OF 1890.

Pollution.

Suit for damages for causing pollution and loss of caste—Cognizability by Small Cause Court. See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 31, 12 N.L.R. 7.

Possession.

(1) Cause of action—Title and adverse posses-

'Possession—(Continued).

sion—Decree on possessory title as against trespasser—When to be given.

Where the plaintiffs sued in ejectment basing their claim on title by ancestral right or by adverse possession for over 12 years and both the lower Courts found that the title was not proved but the lower appellate Court gave the plaintiffs a decree on the strength of their possessory title and dispossession by a trespasser. *Held*, that the decree of the lower Court must be reversed. Such a claim should not be allowed when the defendants have not had an opportunity of meeting it.

In a suit based upon possessory title the defendant may have grounds for opposing the claim which would be of no avail in a suit brought by the real owner. *Yenkatasami Nalk v. Kall Samatan*, (1916) M.W.N. 110=33 Ind. Cas. 167.

KUMARASWAMI SASTRI and PHILLIPS, JJ.

Reference :—(1914) M.W.N. 784, F.

(2) Suit for possession—Plaintiff or his predecessor never in possession—Defendant whether must prove adverse possession—Entry in revenue map whether proof of title—Art. 144, Limitation Act (1908).

Where, in a suit for possession, plaintiff has not shown possession by himself or his predecessor in title within 12 years before suit, it is not incumbent on defendants to prove adverse possession until plaintiff has proved his title. Art. 144, Limitation Act, applies to the case.

Held also that, plaintiff having failed to prove possession by his vendor at any time, the mere fact that the disputed land is shown as part of his holding in the revenue map is not sufficient to establish his title. *Aung Hla v. (1) Ton Gyl (2) Ma Hnin U*, 8 L.B.R. 264=9 Bur. L.T. 242=35 Ind. Cas. 432.

TWOMEY, J.

(3) Decree of ejectment—Decree not executed for three years—Possession over property obtained—Subsequent suit for possession if maintainable—Merger, when applicable.

The doctrine of merger does not apply to decrees for ejectment. If a party obtains a decree for a debt or for damages for tort, the original cause of action merges in the decree but a decree in ejectment differs very much from other decrees.

Plaintiff obtained a decree for possession of certain property which was not executed for three years. It was alleged that possession over the property had been obtained otherwise than in execution and that the plaintiff had been subsequently dispossessed. The Court of first instance found that plaintiff had been in possession within twelve years of the date of the suit. The lower appellate Court without recording a finding on that point held that the suit was barred by Ss. 11 and 47 of the Code of Civil Procedure.

Held, restoring the decree of the Court of first instance, that recovery of possession by the plaintiff subsequent to the date of the decree afforded a fresh cause of action and the suit was maintainable.

Possession—(Continued).

Quære.—Whether a suit is maintainable on foot of a decree when the execution of it has become time-barred. **Dhanraj Singh v. Lakh-rani Kuar**, 14 A.L.J. 709=38 A. 509=35 Ind. Cas. 601.

RICHARDS, C.J. and RAFIQ, J.

- (4) *Plaintiff when may succeed on the strength of his possession—Possession taken behind the back of defendant and not acquiesced in—Effect—Admission by pleader dispensing with proof—Effect—S. 58, Evidence Act.*

In order to succeed on the strength of his possession, plaintiff must show that he has juridical possession as against the defendant whom he wishes to evict. The same possession which is juridical as against one person may not be juridical as against another. A trespasser may have juridical possession as against a third person, though he has no juridical possession against the person whom he dispossessed.

Plaintiff obtained a sale-deed and a lease of certain plots situated within the limits of a Municipality from three persons on 20-10-1910. On 14-12-1910, the Municipality served the plaintiff with a notice to quit. Thereupon plaintiff brought this suit for declaration of his right of ownership and possession. It was found as a fact that neither plaintiff nor his vendors and lessors had possession prior to 20-10-1910. *Held* that, as plaintiff took possession behind the back of the Municipality who sought to evict him as soon as they discovered it, his possession, though not forcible, was furtive and precarious, and cannot be made the basis of a suit (a).

An admission made by a pleader for a party for the purpose of dispensing with further proof of the disputed facts is binding on the party and estops him, unless circumstances are shown which would justify the Court in requiring proof under the proviso to S. 58, Evidence Act. **Rao Bahadur Seth Vishandas v. The Municipality of Hyderabad**, 9 S.L.R. 220=34 Ind. Cas. 494.

PRATT, J.C. and CROUCH, A.J.C.

Reference:—(a) 5 B. 208 (221), R.

- (5) *Presumption of possession following title when arises—Evidence unworthy of credit on both sides—Effect—Art. 142, Limitation Act (1908)*

The presumption of possession following title arises only in cases where the evidence is equally strong on both sides, that is to say, when there is some evidence on both sides which the Court believes, and where, by reason of that evidence being equally balanced on both sides, it is extremely difficult to decide the dispute satisfactorily. But the principle does not apply to cases in which the evidence is equally unworthy of credit on both sides, except in respect of land of a special character such as waste, jungle or lands under water. **Fakira Lal Sahu v. Munshi Ramcharan Lal**, 1 Pat. L.J. 146=36 Ind. Cas. 554.

MULLICK, J.

References:—9 C. 744; 27 C. 25, P.; 8 C.W. N. 876, R.

- (6) *Suit by one Riaya against another for*

Possession—(Continued).

possession of village land appurtenant to dwelling house, maintainability of.

- *Held*, that a Riaya can maintain a suit for the recovery of possession of the village land appurtenant to his dwelling house against another Riaya who ousted him from it. **Ram Saran v. Sahabdin**, 19 O.C. 169.

STUART, J.C.

- (7) *Possession, constructive—Any possession is legal possession as against a trespasser.*

Any possession would be legal possession as against a wrong-doer. Where a person has up to the date of the trespass by the wrong-doer a bona fide claim to constructive possession through the at one time rightful owner, such person would be entitled to oust the trespasser and wrong-doer without proving the validity of his claim (a). **Asha Bibi v. Sulernan Ismail Atcha**, 8 L.B.R. 372=36 Ind. Cas. 249.

FOX, C.J. and PARLETT, J.

References:—(a) (1888) L.R. 13 A.O. 793; 29 C. 518; (1801) 1 East. 244, F.

- (8) *Possession under a gift by a limited owner—Gift invalid against reversioners—Trespass by a stranger—Suit by donees for possession based on title—Maintainability.* **Nallagonda Pedda Cheenna Reddi v. Asupalle Budda Reddy**, 2 L.W. 912=(1915) M.W.N. 815=18 M.L.T. 343=31 Ind. Cas. 55. See Final Part, 1915, Col. 1142.

• (9) *Trespasser in occupation—Right of owner to sue for, and damages—Necessity to recognise trespasser as tenant.* See OUDH ACT XXII OF 1886 (RENT), No. 44, 30 Ind. Cas. 264.

- (10) See U.P. ACT II OF 1901 (AGRA TENANCY), No. 9, 31 Ind. Cas. 863.

(11) See U.P. ACT II OF 1901 (AGRA TENANCY), No. 12-b, 32 Ind. Cas. 693.

- (12) *Regaining, after wrongful dispossession—Limitation Act 1908, S. 28.* See U.P. ACT II OF 1901 (AGRA TENANCY), No. 10, 31 Ind. Cas. 815.

(13) *Landlord taking forcible, of grove—Grove holder's remedy.* See U.P. ACT II OF 1901 (AGRA TENANCY), No. 32, 31 Ind. Cas. 453.

- (14) See U.P. ACT III OF 1901 (LAND REVENUE), No. 14-b, 36 Ind. Cas. 273.

(15) *Under an award—Value of* See ACT III OF 1901 (LAND REVENUE), No. 3-a, 34 Ind. Cas. 749. U.P.

- (16) *Vacant site—Follows title—Burden of proof.* See ADVERSE POSSESSION, No. 3, 116 P.W.R. 1916.

(17) See CIV. PRO CODE (1908), No. 33, 94 P.R. 1916.

- (18) *Attachment—Claim—Evidence of, not adduced—Decision on title.* See CIV. PRO. CODE (1908), No. 478, 32 Ind. Cas. 34.

(19) *Claim for mesne profits, subsequent to suit for, if barred.* See CIV. PRO. CODE (1908), No. 392, 9 Bur. L.T. 92.

- (20) *Ejectment suit—Benamidar—Certified purchaser, if can recover.* See CIV. PRO. CODE (1908), No. 150, 4 L.W. 609.

Possession¹—(Continued).

(21) Execution application for delivery of—Delivery effected—Subsequent application for the same relief. See CIV. PRO. CODE (1908), No. 271-a, 32 Ind. Cas. 46.

(22) Order under S. 144, Crim. Pro. Code, if bars prior suit for confirmation of possession. See CIV. PRO. CODE (1908), No. 149, 3 L.W. 233.

(23) Sale of share in Nankar rights—Acquisition of full right by purchaser—Necessity for, purchaser to apply for. See CIV. PRO. CODE (1908), No. 527, 36 Ind. Cas. 768.

(24) Suit for possession—Defendant found to have effected improvements in good faith—Defendant's right to compensation. See COMPENSATION, No. 1, 70 P.L.R. 1916.

(25) Suit for—Limitation Act (IX of 1908), Arts. 142, 144. See CONSIDERATION, No. 1, 18 Bom. L.R. 810.

(26) Co-owner's right to. See CO-OWNER, No. 1, 4 L.W. 286.

(27) Nature of, by co owner—Possession abandoned by one co-owner—Exclusive possession. See CO-SHARERS, No. 5, 35 Ind. Cas. 72.

(28) Declaratory suit for removal of a Mahant in, and declaration that plaintiff has the right to nominate a successor—Consequential relief for possession. See DECLARATORY DECREE, No. 1, 95 P.R. 1916.

(29) Suit to establish plaintiff's title and previous possession—Whether suit for mere declaration—Whether catching fish in a stream—let amounts to dispossession. See DECLARATORY SUIT, No. 1, 20 C.W.N. 1274.

(30) Suit for, and ejectment of trespasser—Landlord supporting trespasser. See EJECTMENT, No. 5, 1 Pat. L.J. 430.

(31) Redemption suit—Plea of oral sale discharging mortgage debt, if admissible—Mortgagee's, nature of. See EVIDENCE ACT, No. 58, 31 Ind. Cas. 678.

(32) Suit for—Admissibility of recital in judgment not *inter partes*. See EVIDENCE ACT, No. 5, 36 Ind. Cas. 892.

(33) Decree for—Duty of decree-holder to obtain possession through Court—Amicable delivery of possession. See EXECUTION OF DECREE, No. 22, 30 Ind. Cas. 606.

(34) Instalment decree for money—Order directing delivery of possession of land on failure to pay two consecutive instalments—Application for delivery of, presented more than 3 years from default—Bar of limitation. See EXECUTION OF DECREE, No. 20, 36 Ind. Cas. 978= 8 P.R. 1917.

(35) Gift of undivided share of Zamindari village—What constitutes delivery. See GIFT, No. 2, 31 M.L.J. 607.

(36) Aliance from a co-parcener, of specific property alienated, suit for, incompetent. See HINDU LAW—ALIENATION, No. 19, 10 S.L.R. 34.

(37) No action for damages on future loss of possession—Loss of title, substantial loss. See INDEMNITY BOND, No. 1, 20 M.L.T. 263.

Possession—(Continued).

(38) Suit for, or damages against perpetual hereditary lessees. See JURISDICTION OF CIVIL COURTS, No. 5, 19 O.C. 339.

(38 a) Symbolical possession, effect of—Execution purchaser's suit for—Limitation. See LANDLORD AND TENANT, No. 70-a, 32 Ind. Cas. 703.

(39) Tenant executing the lease but not let into, by the lessor—Whether tenant can deny lessor's title—Estoppel. See LANDLORD AND TENANT, No. 31, 31 M.L.J. 712.

(40) Suit for, by transferee from co-heir not in possession—Suit within 12 years from date of transfer. See LIMITATION, No. 7, 36 Ind. Cas. 100.

(41) See LIMITATION ACT (1908), No. 242, 34 Ind. Cas. 897.

(42) Contract of lease—Suit for, in the alternative for the return of premium—Mesne profits. See LIMITATION ACT (1908), No. 192, 32 Ind. Cas. 245.

(43) Jalkar—Suit to recover, of—Limitation. See LIMITATION ACT (1908), No. 255, 34 Ind. Cas. 841.

(44) Land—Possession by trespassers—Effect—Adverse *ab initio* to all persons. See LIMITATION ACT (1908), No. 260, 113 P.R. 1916.

(45) Suit for, and profits of property usufructually mortgaged. See LIMITATION ACT (1908), No. 177, 31 Ind. Cas. 801.

(46) Suit for—Defendants in possession under a void document—Cancellation not necessary—Limitation. See LIMITATION ACT (1908), No. 164, 14 A.L.J. 464.

(47) Nature of interest of co owners—Definite shares and separate interests—No joint interest—By one co-owner for benefit of all. See MAHOMEDAN LAW—INHERITANCE, No. 2, 36 Ind. Cas. 100.

(48) Decree for, and mesne profits—Assignment of decree with respect to mesne profits. See MESNE PROFITS, No. 1, 1 Pat. L.J. 427.

(49) See MORTGAGE—GENERAL, No. 25, 20 M.L.T. 295.

(50) Oral agreement putting mortgagee in, in lieu of interest—Evidence of such agreement, admissibility of—Evidence Act, S. 92. See MORTGAGE BY CONDITIONAL SALE, No. 1, 19 O.C. 166.

(51) Mortgage—Successive mortgages—Sale in execution of decree on second mortgage before sale in execution of decree on first mortgage—Right to—Form of suit. See MORTGAGE—REDEMPTION, No. 18, 14 A.L.J. 1146.

(52) Adverse possession—Disturbance of, under decree of Court—Decree reversed in second appeal—Continuity of possession broken—Evidence Act, S. 114. See RES JUDICATA, No. 12, (1916) 2 M.W.N. 133.

(53) Declaratory suit by claimant under Civ. Pro. Code, O. XXI, r. 63—No prayer for—S. 42, Specific Relief Act—No bar. See SALE, No. 12, 34 Ind. Cas. 125.

(54) Contract of sale—Suit for specific performance—Claim for possession against the

Possession—(Concluded).

vendor or his usufructuary mortgagee whether can be joined. See SPECIFIC PERFORMANCE. No. 2, (1916) M.W.N. 77.

(55) Suit for—Physical possession. See SPECIFIC RELIEF ACT, No. 3, 9 Bur. L.T. 172.

(56) See SUB-LEASE, No. 2, 24 C.L.J. 538.

(57) See SUB-LEASE, No. 1, 24 C.L.J. 539.

(58) Suit for—Plea of *ius tertii* by defendant. See TITLE, No. 4, 30 Ind. Cas. 503.

(59) Plaintiff when may succeed on strength of his long possession—Defendant's occupation by permission of landlord—Plaintiff whether can sue for declaration of title and possession—Interference in second appeal. See TRESPASSER, No. 1, 1 Pat. L.J. 47.

(59 a) Private transferee of certified purchaser, suit against, for confirmation of possession. See CIV. PRO. CODE (1908), No. 146-a, 32 Ind. Cas. 963.

Post dlem Interest.

See INTEREST, No. 2, 30 Ind. Cas. 323.

Post Office.

(1) Provident Fund money—Remittance by money order—Post Office whether agent—Attachment by decree-holder while money in custody of Post Office—Effect. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 37, 14 A. L.J. 236.

(2) Notice sent by post whether equivalent to 'giving' notice. See C.T. ACT XI OF 1898 (TENANCY), No. 1, 12 N.L.R. 42.

Power of Attorney.

(1) Scope of agent's authority—Liability of principal.

A general power to mortgage implies a power to borrow money on the principal's account, and where equitable mortgages are recognized as valid, to create an equitable mortgage by deposit of title deeds, but not to sign promissory notes on behalf of the principal.

The principal is not liable on a promissory note executed by an agent in professed exercise of a power to mortgage. *M A R. R. M. R. M. Chetty v. Badler Rahman Chowdry*, 9 Bur. L.T. 166=36 Ind. Cas. 19.

FOX, C.J. and HARTNOLL, J.

(2) General or special—Construction—Civ. Pro. Code (Act V of 1908), S. 123, *Bombay r. 3*, O. III, r. 2.

The power of attorney in question provided as follows: "I have constituted and appointed the above named person my true and lawful attorney in this matter to recover all moneys due to me in respect of the principal and interest of the aforesaid mortgage bond by suing on my behalf in a Civil Court or by coming to an amicable settlement...and to do all such acts in this one matter as I, if present, would have done or could have done or would have been permitted to do or would have been called upon to do."

Held, that the power was a special power of attorney, inasmuch as an agent's authorization extended, not to any class of business or em-

Power of Attorney—(Concluded).

ployment, but was restricted to the doing of all necessary acts in the accomplishment of one particular purpose, namely, the realization of one particular debt. *Yardaji v. Chandrappa*, 18 Bom. L.R. 821=36 Ind. Cas. 805=41 B. 40. BATCHELOR, AG. C.J. and SHAH, J.

(3) Construction of.

It is a well-settled rule of law that powers of attorney should be strictly construed.

General words of borrowing should be restricted to matters *eiusdem generis*, with those already stated (a). *Krishnan Kidavu v. Raman*, 39 M. 918.

SESHAGIRI AYYAR and NAPIER, JJ.

References:—(a) (1893) A.C. 170; (1870) L. R. 5 Q.B. 422; (1902) 1 Ch. 816. F.

(4) Agent to purchase, sell or mortgage—Power to borrow money.

A power to sell, purchase or mortgage property does not include a power to give simple money bond for money borrowed. There must be authority to that effect in the power of attorney. *Bhagwanji v. Ganga*, 36 Ind. Cas. 968.

FAWCETT, A.J.C.

References:—(1893) A.C. 170=62 L.J.C.P. 68=1 R. 336=68 L.T. 546=41 W.R. 600; 9 C. 1=4 Ind. Dec. (N.S.) 655; 7 C. 253=5 C. L.R. 433=3 Ind. Dec. (N.S.) 71, R.

(5) Construction of—Practice of Chetties—Two Chetties signing joint promissory notes—Liability—Burden of proof—Evidence Act, Ss. 102, 103—Power to sign accommodation notes when may be inferred. *Bank of Rangoon, Ltd. v. Somasundaram Chetty*, 26 Ind. Cas. 253=8 Bur. L.T. 1=8 L.B.R. 168. See Final Part, 1915, Col. 1145.

(6) Appearance by pleader not duly authorized—Delegation of duties by one legal practitioner to another, practice as to—Legality. See CIV. PRO. CODE (1908), No. 344, 12 N.L.R. 189.

(7) See CONTRACT ACT, No. 143, 36 Ind. Cas. 968.

(8) Admissibility of, in evidence. See EVIDENCE ACT, No. 43, 18 O.C. 372.

(9) Mortgage by agent under—Act done by agent fraudulently—Liability of principal—Burden of proving good faith. See TRANSFER OF PROPERTY ACT, No. 42, 36 Ind. Cas. 968.

Practice and Procedure.

(1) Incompetency of non-appealing co-defendant to support appeal—Rules 4 and 33 of O. XLI of Act V of 1908—Parties to be confined to their own objections—One defendant cannot avail of the plea raised by another.

Held (per) Shah Din and Le Rossignol, JJ.—

"In an appeal by one or more of the several defendants in which the non-appealing defendants are impleaded as co-respondents none of these defendants has any right either under r. 4 or r. 33 of O. XLI of the Civ. Pro. Code to be heard in support of the appeal."

The parties must be confined in appeal strictly to the objections taken by them in their own pleadings.

Practice and Procedure—(Continued).

A defendant-appellant cannot therefore avail himself of the pleas preferred by his co-defendant. *Gokal Chand v. Hukam Chand*, 109 P. W.R. 1916 = 154 P.L.R. 1916.

*RATTIGAN, SHAH DIN and LE ROSSIG-NOL, JJ.

- (2) *Procedure—Person admitting debt to a judgment-debtor but refusing to pay—Civ. Pro. Code (Act V of 1898), O. XXI, r. 46—R. 46 (a) of Chief Court Rules—Indian Succession Act (X of 1865), Ss. 179 and 190.*

The procedure to be followed when a debtor who admits he owes money to a judgment-debtor does not pay it into Court is laid down in r. 46 (a) added to the Code by the Chief Court of Lower Burma. All that can be done is to warn him that if he fails to pay the amount due by him into Court, he may be subjected to a suit. An order directing payment into Court cannot be made in such a case under O. XXI, r. 46.

Under Ss. 179 and 190 of the Indian Succession Act an executor or administrator of a deceased person is the legal representative of a deceased person, and no right to any part of the property of an intestate person can be established in a Court of justice unless letters of administration have been granted.

A question referred need not be answered if it will arise in the case at a later stage. *P.L., M. Firm v. Dassy M Stacey*, 9 Bur. L.T. 122, FOX, C.J. and PARLETT, J.

- (3) *Second appeal—Objection to maintainability of suit when allowed to be raised—Practice.*

Where an objection to the maintainability of a suit is raised for the first time in second appeal, such objection may be allowed even at that stage if it does not involve the ascertainment of any fresh facts. *Manjunatha Chetty v. Appaya alias Manuel Souza*, 31 M.L.J. 429 = 36 Ind. Cas. 988.

SESHAGIRI AIYAR and BAKEWELL, JJ.

(4) It is in accordance with the principles of sound commonsense and justice that a man who brings a case and fails to prove it should not get a decree on a different cause of action from that alleged by him. *In re Ma Htwe v. Maung Lun*, 9 Bur. L.T. 114 = 8 L.B.R. 384 (F.B.) = 33 Ind. Cas. 163.

FOX, C.J., ROBINSON and PARLETT, JJ.

- (5) *Extension of time, grant of, depends on circumstances of litigation.*

Whether an order for extension of time should be made or not, depends upon the circumstances of the litigation, that is, upon the circumstances disclosed at the original trial and the events subsequent. *Syam Mandal v. Sati Nath Banerjee*, 24 C.L.J. 523.

MOOKERJEE and CUMING, JJ.

- (6) *Revenue Court—Second appeal—Practice—First Court's judgment, not filed—Dismissal of appeal—Validity of—Oudh Rent Act, S. 135, O. XLI, XLII, Civ. Pro. Code.*

Where a memorandum of second appeal preferred to the Revenue Court is not accompanied

Practice and Procedure—(Continued).

by a copy of the first Court's judgment, held that there is no sufficient ground for dismissing the appeal summarily altogether without any hearing.

Under S. 135 of the Oudh Rent Act, O. XLI, r. 1, and O. XLII, Civ. Pro. Code, both apply to Revenue Courts also. *Raja Muhammad Abdul Hasan Khan v. Mussammat Raj Kumari*, 34 Ind. Cas. 706.

HOLMS, S.M.

Reference:—S.D. 14 of 1918, *Appl.*

(7) *Oldfield, J.*—It is for the party, who seeks to oust the jurisdiction of the ordinary Civil Courts, to establish right to do so (a). *District Board, Tanjore v. Rannuwami Thondaman*, 35 Ind. Cas. 121.

OLDFIELD and SADASIYA AIYAR, JJ.

References:—39 M. 21; 25 Ind. Cas. 891; 27 M.L.J. 233, R.

- (8) *Parties in default.*

When a party is in default either through failure of the Court officials to serve notice or from some neglect to pay the necessary process-fees, the question whether he should be denied a hearing or should be allowed an adjournment, is a question which must be judicially determined upon proper materials, i.e., upon evidence and for reasons to be given by the Judge who decides to deny him a hearing, so that such reasons may be reviewed if necessary by a higher tribunal. *Sarju Parshad v. Umanpat-gir*, 35 Ind. Cas. 464.

WALSH and SUNDAR LAL, JJ.

- (9) *Disposal of appeal on ground not urged.*

An appeal cannot be disposed of, on ground not urged for the defence and in respect of which the plaintiff had no opportunity to give evidence. *Abdur Razaq v. Partab Singh*, 35 Ind. Cas. 638.

RAFIQUE, J.

- (10) *Right of plaintiff to recover according to pleadings and proof.*

The plaintiff in a suit will succeed only according to his allegations in the plaint and the evidence let in by him (a).

The plaintiff and the defendants had executed a promissory note. In execution of a decree obtained on the pro-note the plaintiff was made to pay the whole amount of the decree. He now brought the present suit claiming a decree against the defendants for the full amount he had paid. The plaintiff alleged in his plaint that he was only a surety for the defendants. The Court, however, found that the money was borrowed by him for the purpose of a partnership business. On behalf of the plaintiff it was urged that a decree might be given in his favour as in a suit for contribution. Held that, as it was no part of the plaintiff's case, either in his plaint or in his evidence that he had signed the note for money borrowed for partnership purposes of the parties, the appropriate decree in a suit for contribution could not be made in the plaintiff's suit as framed by him and on the evidence produced by him.

Practice and Procedure—(Continued).

In the result the suit was dismissed. *Wong Mun Khoo v. Teong Shain*, 36 Ind. Cas. 464.

FOX, C.J. and TWOMEY, J.

References:—(a) 19 W.R. 12=11 B.L.R. 391=I.A. Sup. Vol. 31; 33 Ind. Cas. 163=9 Bur. L.T. 114=8 L.B.R. 334, R.

(10 a) *Procedure—Disposal of a suit in a manner not warranted by law—Consent of parties, how far a cure.* *Potla Subbarayadu v. Ravi Lakshayya*, 2 L.W. 605=18 M. L. T. 93=30 Ind. Cas. 260. See Final Part, 1915, Col. 1165.

(11) Suit on a promissory note—Agreement to abide by oath—Evidence recorded prior to agreement—Agreement proving abortive—Suit, if can be decided on evidence taken. See ACT X OF 1873 (OATHS), No. 2, 4 L.W. 258.

(12) Protracted trial of administration proceedings. See ACT V OF 1881, (PROBATE AND ADMINISTRATION), No. 1-a, 36 Ind. Cas. 266.

(13) Jurisdiction—Suit for declaration of title—Monies in hands of third person—Recovery not payable in same suit—Declaration, if an incidental relief—Suit, whether cognisable by the Presidency Small Cause Courts. See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), No. 1, 4 L.W. 339.

(14) Long practice if can confer jurisdiction. See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), No. 5, 4 L.W. 402.

(15) Decision of Subordinate Judge on the small cause side—Appeal—Revision—Procedure. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 55, 31 Ind. Cas. 15=5 L.W. 220.

(16) See BEN. ACT VIII OF 1885 (TENANCY), No. 61, 35 Ind. Cas. 76=21 C.W.N. 209.

(17) Concurrent findings of fact of Courts below, dismissal of appeal for. See BEN. ACT VIII OF 1885 (TENANCY), No. 67, 20 C.W.N. 1352.

(18) Grounds of appeal urged but not disposed of by the appellate Court. See PUN. ACT XVI OF 1887 (TENANCY), No. 19, 4 P.W.R. 1916 (Rev.).

(19) Judges of Division Bench differing on a question of law—Course to be adopted—Reference to Full Bench illegal—Reference to one or more of the Judges other than composing the Bench. See PUN. ACT III OF 1914 (COURTS), No. 5, 109 P.W.R. 1916.

(20) See U.P. ACT II OF 1901 (AGRA TENANCY), No. 52, 35 Ind. Cas. 105.

(21) Question of granting time—Discretion of Court—Duty of party applying for time—Delay in filing process fee—Effect. See ADJOURNMENT, No. 1, 1 Pat. L.J. 173.

(22) Admission—Statement in judgment of original Court as to—Appellate Court—Whether can discard such statement. See ADMISSION, No. 1, 31 M.L.J. 269.

(23) Second appeal—No prayer for amendment in lower Court—Power of second appellate Court to order amendment. See AMENDMENT OF PLAINT, No. 2, 30 Ind. Cas. 387.

Practice and Procedure—(Continued).

(24) As to reversal of findings of fact on appeal. See APPEAL (GENERAL), No. 4, 20 C.W.N. 335.

(25) Grounds of appeal—Argument by appellant differing from grounds. See APPEAL (GENERAL), No. 13, 30 Ind. Cas. 374.

(26) Raising mixed question of law and fact—Second appeal. See APPEAL (SECOND APPEAL), No. 7, 10 S.L.R. 38.

(27) Reference to arbitration—Execution by some of the parties. See ARBITRATION, No. 6, 9 Bur. L.T. 253.

(28) Pleadings—Title by adverse possession not set up in plaint—General prayer. See BENAMI TRANSACTION, No. 5-a, 32 Ind. Cas. 365.

(29) Absence of formal defect—Withdrawal of suit—Revision. See CIV. PRO. CODE, (1908), No. 257, 35 Ind. Cas. 843.

(30) Admission in pleadings—Necessity for investigation. See CIV. PRO. CODE (1908), No. 694, 30 Ind. Cas. 204.

(31) Appeal—Omission to specify date of hearing in notice of appeal—*Ex parte* decree—Right of re-hearing. See CIV. PRO. CODE (1908), No. 649, 36 Ind. Cas. 624.

(32) Costs if payable out of trust estate when no cause of action—Findings in the judgment, immaterial to the decision, if appealable—S. 115, Civ. Pro. Code, revision under, of decrees for costs. See CIV. PRO. CODE (1908), No. 177, 20 C.W.N. 1354.

(33) Decree confirmed in appeal—First Court, if can amend its own decree subsequently—Jurisdiction—Practice. See CIV. PRO. CODE (1908), No. 232, 4 L.W. 225.

(34) Decree *ex parte*—Application for re-hearing rejected—No appeal preferred—Appeal against decree. See CIV. PRO. CODE (1908), No. 390, 14 A.L.J. 1226.

(35) Examination of process-server before passing *ex parte* decree. See CIV. PRO. CODE (1908), No. 351, 31 Ind. Cas. 479.

(36) Judgment of appellate Court, contents of—Second appeal, Grounds of—Findings of fact—Consideration of evidence on record—Disposal of all grounds of appeal. See CIV. PRO. CODE (1908), No. 672, 108 P.L.R. 1916.

(37) Omission to obtain leave for suit for other reliefs on same cause of action—Subsequent suit barred—Jurisdiction to grant leave. See CIV. PRO. CODE (1908), No. 324, 9 Bur. L.T. 93.

(38) Pleadings—Written statement—Specific denial—In absence of denial, facts alleged, treated as admitted—Proof of letter. See CIV. PRO. CODE (1908), No. 368, 18 Bom. L.R. 946.

(39) Powers of High Court in revision under S. 115, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 60, 4 L.W. 411.

(40) Second appeal—Finding of fact binding in. See CIV. PRO. CODE (1908), No. 192, 14 A.L.J. 1066.

Practice and Procedure—(Continued).

(41) Taking up big original suits after 5-30 P.M.—Prejudice—Interference in second appeal. See CIV. PRO. CODE (1908), No. 191, 3 L.W. 368.

(42) Company wound up—Winding up order, passed—Effect of order on Company's properties—Discharge of servants, of company—Appeal against order appointing official liquidator—Managing director, if competent to appeal on Company's behalf—Practice. See COMPANIES ACT (1882), No. 7, 4 L.W. 226.

(43) Hire—Omission to return article after specified date—Remedy for breach of contract—Suit for damages. See CONTRACT, No. 21, 36 Ind. Cas. 276.

(44) Case decided finally by Chief Court without remand. See CUSTOMS (PUNJAB—ALIE-NATION), No. 1, 16 P.W.R. 1916.

(45) Certificate for second appeal filed after 90 days—Practice. See CUSTOMS (PUNJAB—SUCCESSION), No. 3, 143 P.W.R. 1916.

(46) Appellate Court—Appreciation of evidence—Findings of lower Court—Power to interfere. See DAMAGES, No. 1, 34 Ind. Cas. 273.

(47) Suit to declare lease as void and inoperative—Power of Court to grant declaration in modified form. See DECLARATION, No. 1, 30 Ind. Cas. 289.

(48) Practice—Appellate Court—Judgment—Contents of—Second appeal—Findings of fact—Interference. See EVIDENCE, No. 5, 34 Ind. Cas. 942.

(49) Evidence taken before a party is added as defendant is admissible against him—Objection taken for first time in second appeal. See EVIDENCE ACT, No. 20, 31 M.L.J. 472.

(50) Finding by Court of first instance—Value—Not to be disturbed by higher tribunal. See EVIDENCE ACT, No. 35, 34 Ind. Cas. 153.

(51) Negotiable instruments, construction of—Practice. See EVIDENCE ACT, No. 57, 4 L.W. 329.

(52) Conditional decree, execution of—Costs—Procedure. See EXECUTION OF DECREE, No. 25, 31 Ind. Cas. 564.

(53) Practice—Execution of decree—Transfer of decree by unrecognised transferee. See EXECUTION OF DECREE, No. 31, 33 Ind. Cas. 558.

(54) See HIGH COURT, JURISDICTION OF, No. 1, 31 M.L.J. 827.

(55) Objection to secondary evidence of registered will admitted without demur—Whether can be taken in appeal. See HINDU LAW (INHERITANCE), No. 5, 31 Ind. Cas. 600.

(56) Vacating order passed without jurisdiction. See JURISDICTION (GENERAL), No. 3, 31 M.L.J. 827.

(57) Counsel engaged for one party appearing for the opposite party, desirability of. See LEGAL PRACTITIONER, No. 2, 19 O.O. 237.

(58) Fraudulent nature of decree, if can be pleaded in defence. See LIMITATION ACT (1908), No. 242, 34 Ind. Cas. 897.

Practice and Procedure—(Concluded).

(59) Letters Patent, cl. 10—Point not argued before single Judge if may be urged in appeal. See LIMITATION ACT (1908), No. 25, 20 O.W.N. 1303.

(60) Money decree against different defendants at different times. See LIMITATION ACT (1908), No. 45, 31 Ind. Cas. 917.

(61) Practice—Pleading—Mortgagor wrongfully collecting rents—Suit by mortgagee against mortgagor for rents collected—Successive breaches of contract—Proper mode of framing the claim. See LIMITATION ACT (1908), No. 142, 34 Ind. Cas. 173.

(62) See MESNE PROFITS, No. 1, 1 Pat. L.J. 427.

(63) Question of notice decided without an issue thereon—Objection, if can be raised in appeal—Practice. See MORTGAGE (GENERAL), No. 26, 4 L.W. 502.

(64) Joinder of party claiming adversely to mortgagor, irregular—Claim of person so joined, dismissed—Appeal. See MORTGAGE SUIT, No. 1, 20 O.W.N. 1279 (P.C.).

(65) Allegation of *prima facie* cause of action—Dismissal of suit on surmises—Procedure. See PAUPER SUIT, No. 1, 30 Ind. Cas. 689.

(66) Exaggerated claim—If ground for dismissing the suit. See PLEADINGS, No. 5, (1916) 2 M.W.N. 214.

(67) Amendment of pleadings, when can be allowed—Plea of limitation affected by proposed amendment—Practice. See PRINCIPAL AND AGENT, No. 5, 31 M.L.J. 689.

(68) Practice of Privy Council—Use of document as evidence in Privy Council. See PRIVY COUNCIL, No. 1, 31 M.L.J. 607.

(69) See REVISION, No. 3, 31 M.L.J. 827.

(70) Powers of Courts of appeal or revision in revoking or granting sanction given or refused by a subordinate authority—Remand not proper. See SANCTION TO PROSECUTE, No. 5, 9 Bur. L.T. 128.

(71) Small Cause Court suit tried on original side—Appeal to District Judge—Jurisdiction—High Court to set aside decree. See SETTING ASIDE DECREE, No. 1, 14 A.L.J. 984.

(72) Award of larger relief than in plaint—Legality—Injunction against community. See SPECIFIC RELIEF ACT, No. 51, 35 Ind. Cas. 106.

(73) Suit for declaration of right of specific character—Failure to prove facts establishing such right—Right to claim different relief. See SPECIFIC RELIEF ACT, No. 31, 36 Ind. Cas. 11.

(74) Power to make comment upon judgment of superior Court—Duty of lower Court to treat such judgment with proper deference. See SUBORDINATION OF COURTS, No. 1, 30 Ind. Cas. 292.

Pre-emption.**(1) Resumed muafi—Co-sharer.**

The *wajib-ul-ars* of a village contained the following clause as to pre-emption:—"The custom as to the right of pre-emption is this:—When a co-sharer wants to transfer his property he at first transfers it to his near relation, and afterwards to his distant relative from among the co-sharers of the village. If these persons refuse to take it, then other sharers in the village who are not relatives are entitled to take the property."

The plaintiffs were owners of resumed *muafi*. By the constitution of the village in question, there was no right common to the owners of the *mahal* and the resumed *muafi*, the owners of the one neither having any interest in the rents, profits or produce of the other nor sharing in the responsibility for the revenue of the other. In a suit for pre-emption upon sale to the defendants who were strangers held, that the plaintiffs not being members of the coparcenary of the village were not entitled to pre-empt. *Mahadeo Prasad v. Jagardeo Gir*, 14 A.L.J. 313=38 A. 260=33 Ind. Cas. 23.

RICHARDS, C.J. and TUDBALL, J.

(2) Right given in case of transfer of any kind—Document creating a charge—Whether right accrues in such case.

The *wajib-ul-ars* of a village recorded a right of pre-emption in the case of a transfer of any kind in a certain order, and then provided that, should a co-sharer fail to redeem, the co-sharers would take the property by depositing the mortgage money; or should the co-sharer of the *arasi* take any additional sum from the creditor to whom the property was mortgaged by making a hypothecation (*makful*) of the property, the right of pre-emption would arise then also. A document was executed whereby it was agreed by the executors that they would annually pay interest on the sum borrowed, and in default of payment being made for two years the creditors would realise their due from the property mortgaged (*makhua*):

Held, that, having regard to the terms of the document, the right of pre-emption would arise only in the case of a mortgage with possession, and not in respect of a charge which the document in question purported to create. *Khurshed Ali v. Abdul Majid*, 14 A.L.J. 441=38 A. 361=35 Ind. Cas. 210.

RICHARDS, C.J. and TUDBALL, J.

(3) Karabatdar-i-Karibi—Son-in-law of vendor—Relationship—Hindu.

A person, whose relation to the vendor was that of a son-in-law, purchased property situate partially in the *mahal* of the plaintiff, the parties being Hindus. Held that the vendee was not a *Karabatdar-i-Karibi* of the vendor so as to be able to defeat a suit for pre-emption. *Mahabir Prasad v. Mahadeo Prasad*, 14 A.L.J. 447=33 Ind. Cas. 496.

RICHARDS, C.J. and TUDBALL, J.

(4) Limitation—Effect of wrong description of property sold in the deed of sale and its subsequent rectification—Mutation—Land under occupation of tenants—Physical

Pre-emption—(Continued).

possession—Mistake in the intention or purpose of the parties—Art. 10 of Act IX of 1908.

1. For purposes of limitation for pre-emption, the original date of sale is to be taken into consideration and not the one on which the parties have, by mutual consent, rectified the wrong description given, in the sale-deed of the property sold.

A distinction must be made between mistake in the intention or purpose of the parties and a mistake in rendering their intention into words.

So where, at the time of mutation, the parties to the sale agreed that the *thekhasra* Nos. different from those entered in the deed of sale were intended to be sold and mutation was accordingly effected, the starting point of limitation is the date of the sale-deed and not of the mutation.

2. The land occupied by tenants does not admit of physical possession within the meaning of Art. 10 of Act IX of 1908, and consequently the limitation for its pre-emption begins to run from the date on which the instrument of sale has been registered. *Ganga Ram v. Sardara*, 60 P.W.R. 1916=64 P.L.R. 1916=35 Ind. Cas. 278.

RATTIGAN, J.

(5) Decree for pre-emption—Price for pre-emption directed to be deposited within one month—Decree-holder's application for extension of time granted—Deposit made within extended time—Civ. Pro. Code (1908), O. XX, r. 14—S. 148, Civ. Pro. Code—Court's jurisdiction—S. 115.

On the last day fixed for the deposit of money by a decree of pre-emption, the decree-holder applied for extension of time to make the deposit and he deposited the amount within the extended time granted to him (*ex parte*) by the Court.

Held, that the Court had jurisdiction to extend the time.

The High Court declined to interfere under S. 115 of the Civ. Pro. Code. *Abu Muhammad Mian v. Babu Muckut Pertap*, 20 C.W.N. 860=1 Pat. L.J. 92=34 Ind. Cas. 88.

SHARFUDDIN and ROE, JJ.

(6) Rival pre-emptors—Joint decree in their favour—Direction that one of them should pay the price into Court on or before a particular day—Receipt filed but not certified before such date—Conditions of decree—Non-compliance—Effect.

A and B secured a joint decree for pre-emption, the rights of A being preferred to those of B. It was laid down in the decree that, on or before the 15th March, 1915, a sum of money fixed as the price should be paid by him into Court and in default his claim to stand dismissed, and that, if he does commit default, then B's claim is to come in and he would have a period within which he must pay in the money and take possession.

On the 5th March, A put in a receipt for the whole sum and asked that payment should be certified, and notices were issued to the judgment-debtors to appear on the 25th March and

Pre-emption—(Continued).

declare whether they had received the money or not. On the 31st March several of the payments were confirmed and the remaining ones were confirmed on the 12th April. In the meantime, on the 16th March B had applied for execution.

Held that A did not comply with the terms of the decree and that his decree became a piece of waste paper on the 16th March. **Abdul Fattah v. Fattah Ali**, 73 P.R. 1916=137 P.L.R. 1916=121 P.W.R. 1916=35 Ind. Cas. 365.

JOHNSTONE, C.J.

References:—21 P.R. 1889, D.

(7) *Deed of gift—Real nature of transaction—Sale—Evidence.*

Where the deed of transfer in respect of which pre-emption was sought was in terms one of gift made by the donor as some return for services rendered by the donee, and the deed stated that the value of the property gifted was Rs. 1,000, and where, on the other facts proved, the lower Courts found the transfer to be really one of sale.

Held that the lower Courts were fully justified in holding that the deed was one really of sale though disguised as a gift. **Chiragh Din v. Allah Din**, 70 P.R. 1916=118 P.W.R. 1916=129 P.L.R. 1916=35 Ind. Cas. 303.

JOHNSTONE, C.J. and RATTIGAN J.

References:—117 P.R. 1890 (F.B.), F.; 1 P.R. 1913 (Rev.), R.

(8) *Mortgage of property prior to Act IV of 1882—Mortgagor liable to pay revenue—Mortgages paying the same—Pre-emptor liable to pay the amount of revenue as part of consideration.*

A mortgage of certain property was made in 1873. Under the mortgage deed the mortgagor was liable to pay the Government revenue, and in default the mortgagee was entitled to recover the sum from the mortgagor and his other property. The mortgagor failed to pay the revenue which accordingly was paid by the mortgagee. Subsequently the property was sold to the mortgagee for the amount of the mortgage plus the amount of the revenue deposited by the mortgagee. In a suit to pre-empt this sale, *held* that the pre-emptor was bound to pay the amount of the mortgage as well as the amount deposited by the mortgagee for the revenue as condition precedent to his getting possession of the property. **Bhoj Raj v. Ram Narain**, 14 A.L.J. 717=38 A. 530=35 Ind. Cas. 915.

RICHARDS, C.J. and RAFIQ, J.

(9) *Property, partition of, after institution of suit but before decree—Plaintiff is entitled to decree—Court, if should take notice of matters which come into existence after suit—Talab-i-muasibat erroneous statement as to price in, if unvalidates—Review on ground not before taken, when allowed—Suits Valuation Act (VII of 1887). S. 11—Valuation—Appeal—Jurisdiction.*

Sanderson, C.J. and Mukerjee, J.—The right of the plaintiff to get pre-emption must exist not only at the time of the sale, but also at the time of the institution of the suit, and

Pre-emption—(Continued).

finally up to and at the date of the decree of the trial Court.

A judgment passed by the High Court on second appeal was reviewed on a ground not taken at any previous stage of the proceeding, when the ground raised a pure question of law which did not depend for its determination upon the investigation of new facts and when the alleged error was apparent on the face of the record (a).

Per Mukerjee, J.—The decree in a suit should ordinarily conform to the rights of the parties as they stood at the date of its institution. But there are cases when it is incumbent upon a Court of justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made. This principle will be applied where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties.

Per Sharfuddin and Ros, JJ.—For the performance of the *talab-i-muasibat* what is necessary is an expression by the pre-emptor in clear and explicit terms that he demands to make the purchase and it is not necessary that he should, at the time of the performance of the ceremony, make any mention of the price.

Where in performing the *talab*, the claimant, owing to mistaken information, understated the price, though, the ceremonies required by law were fully performed.

Held—that the *talab* was validly performed.

Plaintiff, suing for pre-emption, valued his suit at Rs. 4,500, the price for which, according to his information, the property had been sold to the defendant. The suit was dismissed by the Subordinate Judge but decreed on appeal by the District Judge who however found that the real value of the property was over Rs. 6,000. On second appeal it was urged that having regard to the value of property as found by the District Judge, appeal lay to the High Court and not to the District Judge, but the point was not taken in the memorandum of appeal.

Held, per **Sharfuddin and Ros, JJ.**—That this objection should be overruled, in view of S. 11 of the Suits Valuation Act, and that the decision in 38 C. 637 was distinguishable from the present case as in that case the suit was intentionally and grossly undervalued (b). **Nurl Mian v. Ambica Singh**, 20 C.W.N. 1099=24 C.L.J. 140=44 C. 47=34 Ind. Cas. 869.

SANDERSON, C.J. and MOOKERJEE, J.

References:—(a) (1892) A.C. 473 at p. 480, R. (b) 38 C. 637, D.

(10) *Pre-emption suit by Hindu—Mahomedan Law of sale, whether applicable—Sale complete, when—Ceremonies necessary before pre-emption, compliance with—S. 87, Act XII of 1887.*

Per Mullick, J.—There being no special custom pleaded, a case where pre-emption is

Pre-emption—(Continued).

claimed by a Hindu must be tried on the principles of justice, equity and good conscience under S. 37, Act XII of 1887.

As a sale is not complete till legal ownership passes, no matter whether there has been payment and delivery, the pre-emptor's title in the case of a property worth more than Rs. 100 does not accrue till after registration. It would be against equity, justice and good conscience to apply in such a case the Mahomedan Law of sale which is no longer in force and to attach to mere contract for sale an incident which the Mahomedan lawyers intended to attach only to an actual sale.

The performance of the two formalities *talabi mawasibat* and *talabi ishtishad* can be combined, but it is essential that the *talabi ishtishad* should refer expressly to the *talabi mawasibat* as having been duly made (a).

Roe, J.—The test to apply in these cases is, was the sale, in the eyes of the contracting parties and the pre-emptor, complete. If it was, it was not necessary for the pre-emptor to wait till registration before performing the ceremony of *mawasibat*. *Kheyali Prosad v. Mullik Nazarul Alum*, 20 C.W.N. 1048 = 1 Pat. L.J. 174 = 34 Ind. Cas. 210.

MULLICK and ROE, JJ.

References:—(a) 22 A. 343; 7 A. 482; 16 A. 344; 35 C. 575; 19 C.L.J. 601 = 18 C.W.N. 890, R.

- (11) *Hindus of Godhra governed by the custom of pre-emption—Suit to pre-empt a portion of the property sold.*

The Hindus in Godhra are governed by the doctrine of pre-emption. It is not competent to a pre-emptor to pre-empt only a fraction of the property in controversy. *Gokaldas Motiram Surti v. Partab Kabbal Barot*, 18 Bom. L.R. 693 = 35 Ind. Cas. 871.

BATCHELOR and SHAH, JJ.

- (12) *Tender of money on the last day of payment in the Court, application made for permission to make payment—Money tendered though not deposited on that date through mistake of Court or its officers—Next day holiday—Payment made on the next first opening day of the Court, whether such a payment within time and sufficient compliance with the terms of the decree.*

In a pre-emption decree the last day for payment into Court was 24th July, 1914, on that date the pre-emptor came to the Court and applied for permission to make payment in compliance with the decree passed in his favour. The money though tendered was not deposited on that day through a mistake of the Court or its officers, the 26th and 26th July were holidays; the money was paid on the 27th July, 1914. The vendee objected that the payment was not made by the pre-emptor within time, and such a payment was not sufficient compliance with the decree, hence it could be executed.

Held, that the tender within the specified time should be deemed as a due compliance with the terms of the decree, as the pre-emptor

Pre-emption—(Continued).

is entitled to execute it. *Prabhu v. Nihala*, 123 P.W.R. 1916 = 36 Ind. Cas. 183.

SHADI LAL, J.

References:—37 P.R. 1874; 3 A. 850, R.; 31 P.R. 1880; 69 P.R. 1881, F.

- (13) *Rival pre-emptors—Consent to sale by one set of pre-emptors—Complete waiver.*

The consent to the sale by one set of pre-emptors, is a complete waiver and lets in any rival pre-emptor who may choose to come forward. *Shib Dial v. Indar Singh*, 106 P.R. 1916 = 36 Ind. Cas. 694.

JOHNSTONE, C.J. and SCOTT-SMITH, J.

Reference:—48 P.R. 1878, R.

- (14) *Suit by person who became co-sharer after sale, maintainability of—Plaintiff cannot rely on right acquired subsequent to the accrual of cause of action—Oudh Laws Act.*

When certain persons who had no share in the *thok* in which the property sold was situated, at the date of the sale, acquired some share in it subsequently under a deed of gift and claimed a preferential right of pre-emption on the basis thereof, *held*, that a subsequent acquisition could not invest them with a retrospective right in respect of a sale effected before they acquired the share.

Held further, that a defence, which may be available to a person in possession, may not be available to a person seeking to oust him, and no man can be allowed a decree for pre-emption in preference to another who has a superior right, on the basis of a title acquired after the right to sue accrued. *Ratan v. Ram Niwaz*, 19 O.C. 110 = 36 Ind. Cas. 799.

KANHAIYA LAL, A.J.C.

- (15) *Decree for foreclosure, pre-emption in respect of—Decree for pre-emption obtained by one co-sharer without impleading others equally entitled, effect of—Transfer of property made by decree-holder during pendency of appeal—Oudh Laws Act.*

On foreclosure of a certain property one of several persons equally entitled to pre-empt the property obtained a decree for pre-emption in a suit to which others who were also equally entitled to pre-empt were not made parties. Subsequently one of these others brought a suit for pre-emption against the person who had obtained the previous decree for pre-emption without impleading the person who had obtained the original decree for foreclosure. His claim for pre-emption was decreed, but the unsuccessful party filed an appeal against it and during the pendency of the appeal the decree-holder transferred the property acquired by pre-emption to a third person who was joined as a respondent.

Held, that the first decree for pre-emption furnished a cause of action to persons equally entitled along with the decree-holder, inasmuch as the latter obtained the property by pre-emption to the exclusion of others who had an equal right to pre-empt the same.

Held further, that the omission to implead the person who had obtained the decree for

Pre-emption—(Continued).

foreclosure, in the subsequent suit for pre-emption; was not a fatal defect.

Held also, that after a decree for pre-emption has been passed and payment made in pursuance of it the right to pre-emption fructifies into a title to the property forming the subject of the claim, though that title may be subject to the result of an appeal which may be filed in the case by an unsuccessful party.

The decision in 17 O.C. 242 cannot be taken to lay down that the person who has obtained a title by virtue of a decree for pre-emption can, by his own subsequent act, prejudice the position of one to whom he may have wholly or in part made a transfer based upon that title. *Ram Sahay v. Jagdamba Singh*, 19 O. C. 153.

KANHAIYA LAL and KENDALL, A.J.CS.

- (16) *Decree absolute for foreclosure giving rise to right of pre-emption—Deed of relinquishment by mortgagee in favour of ex-mortgagors, effect of—Extinguishment of right of pre-emption by subsequent events—Cause of action for pre-emption, extinguishment of.*

Where a mortgagee, who was a stranger to the village, obtained a decree absolute for foreclosure and before the institution of the suit for pre-emption based upon the foreclosure decree executed a deed of relinquishment of the property in favour of the ex-mortgagors, *held*, that it could not extinguish the right of pre-emption which accrued on the passing of the decree absolute for foreclosure.

Held, further, that a right of pre-emption after it has once accrued cannot be defeated by anything that happens afterwards. *Manna Singh v. Bihari Singh*, 15 O.C. 183.

STUART, J.C.

- (17) *Custom—Property to be sold to co-sharer first—Co-sharer informed of sale—Refusal to purchase—Effect of.*

In a pre-emption suit, the custom alleged was that a co-sharer intending to sell should offer the property first to his co-sharers. If it was proved that the vendor went to his other co-sharers and informed them of his desire to sell, but they declined to purchase on the ground of want of means or similar ground, the vendor would be at liberty to sell to a stranger.

If, however, the co-sharer offered to purchase at a value, the vendor ought not to sell to a stranger at a lower price. *Naunihal Singh v. Ram Ratan*, 14 A.L.J. 1188=39 A. 127.

RICHARDS, C.J. and RAFIQ, J.

- (18) *Decree for pre-emption passed in plaintiff's favour—Appeal—Notification taking away right of pre-emption issued by Government during pendency of appeal—Plaintiff's right not taken away—Reference—S. 113, Civ. Pro. Code, 1908, to be read subject to O. XLVI, r. 1.*

Where pending an appeal against a decree for pre-emption passed in favour of a pre-emptor, the Local Government issued a notification taking away rights of pre-emption with respect to agricultural land within the limits of a Municipality:

Pre-emption—(Continued).

Held that the notification had not the effect of depriving the plaintiff of his right to pre-empt and did not bar him from defending the decree appealed against (a).

S. 113, Civ. Pro. Code, 1908, should be read in conjunction with O. XLVI, r. 1, which provides for reference to a High Court only in cases not open to further appeal. *Niaz Ali v. Muhammad Ramzan*, 130 P.R. 1916.

JOHNSTONE, C.J. and CHEVIS, J.

References:—(a) 10 P.R. 1913, *Dist.*; 65 P.R. 1913, R.

- (19) *Punjab Act XVI of 1887 (Tenancy), Ss. 5, 6, 8—Occupancy rights—Sale by tenant to landlord—Collaterals of vendor—No claim of pre-emption.*

The collaterals of a vendor have no right of pre-emption against the landlord-vendees, who have purchased occupancy rights from their tenant, the vendor, even though the said rights do not come under S. 5 but under Ss. 6 and 8 of the Punjab Tenancy Act (a). *Akbar Hussain v. Ali Ahmad*, 116 P.R. 1916.

JOHNSTONE, C.J. and SHADI LAL, J.

References:—(a) 31 P.R. 1896 (F.B.); 24 P.R. 1902 (F.B.); 19 P.L.R. 1907 and 73 P.R. 1911, *ref. to*; 36 P.R. 1912, *disapproved*.

- (20) *Co-sharer in the sub-division in which the share sold is situated—Co-sharer in a shamilat patti containing some land appertaining to that sub-division—Oudh Laws Act, S. 7.*

Held, that a vendee, who is not a co-sharer in the sub-division in which the share sought to be pre-empted is situated, cannot resist a suit for pre-emption brought by a co-sharer in that sub-division merely because he holds a share in a *shamilat patti* which contains some land appertaining to that sub-division. *Tirbhawan Singh v. Raghubar Dayal*, 19 O.C. 394.

KANHAIYA LAL, J.C.

- (21) *Person having preferential right of joining person having inferior right—Price paid in lump—Pre-emption decree, sale after.*

A purchase by a person having preferential right of pre-emption along with one having only an inferior right results in the former losing his right of pre-emption.

Where the purchase-money for a sale is paid in a lump sum without specification of the amounts paid by the various vendees the transaction must be regarded as indivisible though the shares to be taken by the various vendees may have been specified in the deed (a).

A pre-emptor does not lose his right of pre-emption merely by the fact that subsequent to the pre-emption decree the land was sold (b). *Harbhagat v. Kala*, 31 Ind. Cas. 635.

SCOTT-SMITH, J.

References:—(a) 6 P.R. 1914, R.; 6 P.R. 1915, D. (b) 7 P.R. 1919, R.

- (22) *Oudh Act (XVIII of 1876), S. 7, presumption under—Wajit-ul-ars—Estoppel—Suit for pre-emption of portion of property sold—Not maintainable.*

A *wajit-ul-ars* which is silent as to the existence of the custom of pre-emption in the

Pre-emption—(Continued).

village is as consistent with the existence of the custom as with its non-existence and is incapable of rebutting the presumption raised by S. 7 of the Oudh Laws Act in favour of its existence.

In a suit for pre-emption, the fact that no claim for pre-emption was made, with respect to some previous sales in the village to which the plaintiff was a party, and two suits for pre-emption brought by the plaintiff were withdrawn in consideration of some benefits received by him, are not sufficient to justify a plea of estoppel by representation or conduct :

A suit for pre-emption ought to include the entire property in respect of which a right of pre-emption is claimable. A suit in respect of only a portion of the property is not maintainable though the plaintiff offers to pay the entire consideration money specified in the sale-deed and to make a present of the remaining portion to the vendee defendant in addition. *Ata Hussain Khan v. Agha Hadi*, 33 Ind. Cas. 775.

KANHAIYA LAL, A.J.C.

References :—11 A. 108=A.W.N. (1889) 17; 13 O.O. 260=8 Ind. Cas. 272, F.

(23) *Claim by vendor's husband's brother's widow—Wajib-ul-ars—Custom.*

In a suit for pre-emption by a co-sharer on the ground that she being the widow of a brother of vendor's husband had a preferential right over the vendee who was also a co-sharer, under a clause in the *wajib-ul-ars* which gave the first right of pre-emption to *hissadar qaribi*, held that the plaintiff being merely a connection by marriage was no relation at all of the vendor and consequently had no preferential right against the vendee. *Kurla v. Jafri*, 33 Ind. Cas. 801.

RICHARDS, C.J. and TUDBALL, J.

(24) *Right to raise plea for first time in appeal—Vendee's claim to equal right with pre-emptor.*

It is not competent to a vendee to set up a plea that he has got an equal right of pre-emption with the pre-emptor and raise that plea for the first time in appeal, especially when there is no sufficient evidence to support the claim. *Shan Sundar v. Harbans Singh*, 30 Ind. Cas. 517.

JOHNSTONE and SHAH DIN, J.J.

(25) *Sale of property in certain sub-division of a village—Right of co-sharer in another sub-division to sue for pre-emption—Use of title acquired by purchaser subsequent to cause of action as defence in suit.*

A purchaser may use a title acquired by him subsequent to the cause of action as a defence against a suit for pre-emption instituted after he acquires the title.

Plaintiff, a co-sharer in a village sued for pre-emption in respect of sales executed by the owner of the property.

The plaintiff alleged that he being a co-sharer with the vendor had a right to acquire the property superior to that of the purchaser who, it was said, was a stranger. The purchaser pleaded that the land in dispute was in the particular sub-division or *patti* in which he was

Pre-emption—(Continued).

a co-sharer, by virtue of a gift made in his favour. It appeared that the deed of gift set up by the defendant was executed in his favour subsequent to the date of the sales in question. It was contended on behalf of the plaintiff that as the partition of the village was imperfect on account of the existence of a common land in the *Shamilat patti* in which all the co-sharers had their own shares, he was a co-sharer in the particular sub-division in which the land was situate. It was found by the lower Court that the fact of the existence of the common land did not make the plaintiff a co-sharer in that particular sub-division. *Held* that by the deed of gift the defendant had the interest vested in him at the time the suits were brought. The fact that the deed of gift was subsequent to the cause of action and that it was intended to defeat the plaintiff's claim for pre-emption did not affect the defendant's claim to set up his right, as he was entitled to defeat the plaintiff's claim for pre-emption by any legitimate means he could, and there was nothing contrary to law in accepting a gift of property. *Durga Singh v. Gaya Singh*, 36 Ind. Cas. 55.

LINDSAY, J.C.

References :—11 O.O. 290; 26 A. 389=A.W.N. (1904) 68=1 A.L.J. 209, F.

(26) *Pre-emptor's duty to pay price set out in sale deed—Proof of Mala fides.*

In a pre-emption suit the pre-emptor is bound to pay the price which is set out in the sale deed in question unless he can establish that there is any *mala fides* on the part either of the vendor or the purchaser in the transaction.

Where at the time of the sale money was due by the vendor to the vendee on a compromise decree not obtained by fraud the pre-emptor will have to pay the amount so due, although at the time of the suit the amount is not legally recoverable. *Bharat Singh v. Suraj Bakhsh Singh*, 36 Ind. Cas. 739.

LINDSAY, J.C.

(27) *Custom—Instances in adjoining mohallas—Degree of proof required—Lahore City, Taksali Gats Basar. Jhanda Mal v. Sardar Begam*, 27 Ind. Cas. 778=168 P.W.R. 1916. See Final Part, 1915, Col. 1149.

(28) *Clause in a sale-deed prohibiting transfer to any person other than the vendee, effect of. Gori Bala Debi v. Chandika Singh*, 18 O. C. 104=30 Ind. Cas. 285. See Final Part, 1915, Col. 1150.

(29) *Exchange, right of pre-emption in the case of—Transfer of Property Act, S. 118—Equity of redemption whether a "thing"—Transfer of Property Act, S. 84—"Price," meaning of. Lachhman Prasad v. Mir Fida Husan*, 18 O.O. 109=30 Ind. Cas. 232. See Final Part, 1915, Col. 1151.

(30) *Custom—Evidence, nature of—Wajib ul-ars. Muhammad Mabub Ali Khan v. Raghubar Dayal*, 13 A.L.J. 951=38 A. 27=30 Ind. Cas. 947. See Final Part, 1915, Col. 1151.

(31) *Oudh Laws Act—Pre-emption, heritability of the right of—Pre-emption, right to claim*

Pre-emption—(Concluded).

—*Pre-emption, a personal right—Right of pre-emption, ownership of land, basis of—Inheriting property, effect of, on right of pre-emption.* *Raghunandan v. Jagannath*, 18 O.C. 266=32 Ind. Cas. 424. See Final Part, 1915, Col. 1153.

(32) See OUDH ACT XVIII OF 1876 (LAWS), No. 10, 34 Ind. Cas. 684.

(33) See OUDH ACT XVIII OF 1876 (LAWS), No. 6, 36 Ind. Cas. 668.

(34) Hindu widow's estate in a proprietary share—Sale by Hindu widow without legal necessity—Effect—Right of. See OUDH ACT XVIII OF 1876 (LAWS), No. 9-a, 32 Ind. Cas. 225.

(35) See PUN. ACT I OF 1913 (PRE-EMPTION), No. 2, 124 P.R. 1916.

(36) See AMENDMENT OF DECREE, No. 1, 169 P.W.R. 1916.

(37) Compensation for pre-emptor remaining out of possession of pre-empted property—Interest. See CIV. PRO. CODE (1908), No. 287, 170 P.W.R. 1916.

(38) Sale of share in undivided immoveable property—Simultaneous bid by co-sharer—Right of. See CIV. PRO. CODE, 1908, No. 503, 36 Ind. Cas. 654.

(39) Opposition by vendee to pre-emptor's claim—Decision as to. See COSTS, No. 8, 30 Ind. Cas. 517.

(40) Pre-emption case—Return of plaint for want of jurisdiction—Re-presentation—Exclusion of time. See LIMITATION ACT (1908), No. 26, 18 P.W.R. 1916.

(41) Hiba-bil-awaz—Effect on right of pre-emption. See MAHOMEDAN LAW (DOWER), No. 1, 18 O.C. 367.

(42) Decree obtained by prior mortgagees against subsequent mortgagees on ground of subsequent mortgage being sale—Prior mortgagee's suit against mortgagor personally for recovery of mortgage money not maintainable. See TRANSFER OF PROPERTY ACT, No. 92, 35 Ind. Cas. 845.

Pre-emption Act.

See PUN. ACT II OF 1905.

See PUN. ACT I OF 1913.

Preliminary Decree.

(1) *Civ. Pro. Code (Act V of 1908), S. 2, cl. (2), explanation, O. XX, rr. 12 to 18—Objections to jurisdiction—Civ. Pro. Code, S. 21—Suit for the determination of any right to or interest in immoveable property.*

If a decision on a preliminary issue merely entitles the plaintiff to go on with the suit it is not a preliminary decree as defined in S. 2, cl. (3) of the Code of Civil Procedure. Unless the decision amounts to a preliminary decree of the nature contemplated in O. XX, rr. 12 to 18 it is not a preliminary decree as it does not decide any of the matters in controversy in the suit.

Preliminary Decree—(Concluded).

Under S. 21 of the Code no objection as to place of suing can be allowed in appeal or revision unless such objection was taken in the Court of first instance at the earliest possible opportunity, and unless there has been a consequent failure of justice.

The nature of a suit is determined by the relief asked for in the plaint. A vendor suing for specific performance is not suing for land, or for the determination of any right to or interest in immoveable property. There is a difference between a vendor suing for specific performance and purchaser so suing. *A. G. Madari v. R. Misser*, 9 Bur. L.T. 119=36 Ind. Cas. 431.

TWOMEY and ORMOND, JJ.

(2) Final decree—Combined appeal against both—Legality. See CIV. PRO. CODE (1908), No. 186, 33 Ind. Cas. 137.

(3) Suit for money based on accounts—Necessity for passing. See CIV. PRO. CODE (1908), No. 413, 36 Ind. Cas. 210.

(4) Transfers of preliminary and final decree for foreclosure to different persons—Substitution of names. See TRANSFER OF PROPERTY, No. 1, 9 Bur. L.T. 121.

Preliminary Enquiry.

Necessity of—Penal Code, S. 225-B. See CRIM. PRO. CODE, No. 7, 21 O.W.N. 125.

Prescription.

(1) Enfranchisement of Inam—Acquisition of title by prescription. See INAM, No. 3, (1916) M.W.N. 473.

(2) Equity of redemption—Acquisition by prescription—Duty to pay taxes. See TRANSFER OF PROPERTY ACT, No. 93, 19 M.L.T. 210.

Presidency Banks Act.

See ACT XI OF 1876.

Presidency Small Cause Courts Act.

See ACT XV OF 1882.

Presidency Towns Insolvency Act.

See ACT III OF 1909.

Presumption.

See BURDEN OF PROOF.

See EVIDENCE.

(1) Tenancy, real nature of, how determined—Occupancy riyat holding at a rent not charged for 40 years, if riyat at fixed rate. See BEN. ACT VIII OF 1885 (TENANCY), No. 5, 24 C.L.J. 363.

(2) See OUDH ACT XVIII OF 1876 (LAWS), No. 6, 36 Ind. Cas. 668.

(3) Limited access of public to a private place—Presumption of dedication of road to public. See PUN. ACT III OF 1911 (MUNICIPALITY), No. 1, 109 P.R. 1916.

(4) Vacant space—User by public of dedication. See PUN. ACT III OF 1911 (MUNICIPALITY), No. 2, 108 P.R. 1916.

(5 & 6) Advancement, of, if can be raised in India. See ADVANCEMENT, PRESUMPTION OF, No. 1, 4 L.W. 193.

Presumption—(Continued).

(7) See **ADVERSE POSSESSION**, No. 5, 19 O. C. 374.

(8) Possession by co-owner—As to continuance of possession lawful in its inception. See **ADVERSE POSSESSION**, No. 8, 36 Ind. Cas. 100.

(9) See **BENAMI TRANSACTION**, No. 5-a, 32 Ind. Cas. 365.

(10) Ancestral property—Of separation—Burden of proof. See **BUDDHIST LAW—JOINT FAMILY**, No. 2, 9 Bur. L.T. 164.

(11) Record of rights—Entry of occupancy right. See **BURDEN OF PROOF**, No. 3, 34 Ind. Cas. 606.

(12) Right to take water—Long user of lawful origin—Difference between Indian and English Law. See **EASEMENTS ACT**, No. 1, 4 L.W. 128.

(13) Document 30 years old, copy of—Hand-writing—As to stamp. See **EVIDENCE ACT**, No. 49, 31 Ind. Cas. 579.

(14) Secondary evidence of old document, discretion to admit, when original not forthcoming. See **EVIDENCE ACT**, No. 34, 35 Ind. Cas. 328.

(15) Highway—Ownership of soil. See **HIGHWAY**, No. 1, 31 Ind. Cas. 664.

(16) Promissory note—Presumption as to consideration. See **HINDU LAW—ALIENATION**, No. 24, 34 Ind. Cas. 617.

(17) See **HINDU LAW—JOINT FAMILY**, No. 31, 32 Ind. Cas. 12.

(18) Ancient documents, discretion of Court in presuming genuineness of. See **HINDU LAW—JOINT FAMILY**, No. 7, 19 O.C. 92.

(19) Ancient grant in favour of one member of the family. See **HINDU LAW—JOINT FAMILY**, No. 27, 34 Ind. Cas. 827.

(20) As to the time of separation, where separation admitted—Evidence Act, S. 90. See **HINDU LAW—JOINT FAMILY**, No. 7, 19 O.C. 92.

(21) Property acquired by a member without aid of ancestral or joint family funds, nature of. See **HINDU LAW—JOINT FAMILY**, No. 18, 31 Ind. Cas. 18.

(22) Possession by tenant of lands adjacent to his own holding—Unconscionable bargain—Undue influence. See **LANDLORD AND TENANT**, No. 33, 1 Pat. L.J. 604.

(23) Interest, rate of. See **LIMITATION ACT** (1908), No. 131, 148 P.W.R. 1916.

(24) Dedication—What it involves—Proof thereof—Limited dedication—Possibility—Express or implied dedication. See **MAHOMEDAN LAW—WAKF**, No. 11, 33 Ind. Cas. 91.

(25) Grant by way of maintenance—As to duration. See **MAINTENANCE**, No. 1, 35 Ind. Cas. 764.

(26) Promissory note by a young boy just emerged from minority with large expectations—Burden of proof re-passing of consideration. See **NEGOTIABLE INSTRUMENTS ACT** (1881), No. 23, 31 Ind. Cas. 739.

Presumption—(Concluded).

(27) As to claim by plaintiff being for his benefit. See **PLAINTIFF**, No. 1, 30 Ind. Cas. 517.

(28) Presumption of possession following title when arises—Evidence unworthy of credit on both sides—Effect—Art. 142, Limitation Act (1908). See **POSSESSION**, No. 5, 1 Pat. L.J. 146.

(29) Suits for partition by younger sons compromised—, from. See **PRIMOGENITURE**, No. 1, 1 Pat. L.J. 509.

(30) Grant of land for services of a Huddar—Right to resume land when service not required—Right depending on the terms of the grant and character of services—Burden of proof. See **SERVICE TENURE**, No. 1, 18 Bom. L.R. 695.

(31) Lost deed alleged to be insufficiently stamped—That documents accepted by Court are properly stamped. See **STAMP**, No. 1, 18 Bom. L.R. 904.

(32) Gratuitous transfer. See **TRANSFER OF PROPERTY ACT**, No. 51, 9 Bur. L.T. 157.

(33) Of monthly tenancy. See **TRANSFER OF PROPERTY ACT**, No. 135, 9 Bur. L.T. 80.

Primogeniture.

See **HINDU LAW—IMPARTIBLE ESTATE**.

(1) *Suits for partition by younger sons compromised, presumption from.*

One of the tests in cases where the custom of primogeniture is claimed, is whether the right of the eldest son was challenged in the Court and whether the litigation invariably ended in a compromise under which the younger sons obtained a share of the estate very much in excess of the maintenance to which, had the custom existed, they would have been entitled. If the younger sons did so succeed in defeating the eldest son, it would be an indication that there was no custom (a).

The facts that the right of the younger sons was disputed in the Courts, and they invariably failed to establish that they were entitled to a share by partition, and they then compromised their claim by obtaining a mere grant by way of maintenance, that would be some good evidence of the custom of primogeniture by which the eldest son would be entitled to the whole inheritance (b).

• Evidence showing that the right claimed by custom was more or less contested and the contest abandoned by some one who, if the custom had not existed, would have been entitled to succeed would be sufficient evidence to establish custom. **Chowdhury Balvadr Samant Singh v. Bimbadhar Roy**, 1 Pat. L.J. 509.

MULLICK and ATKINSON, J.J.

References:—(a) 36 O. 593, *F.* (b) 36 C. 590; 16 A. 222, *F.*

(2) Rule of—Application to collateral succession—S. 22, Oudh Estates Act. See **LIMITATION ACT** (1908), No. 246, 18 O.C. 289.

Primogeniture—(Concluded).

(3) See MAHOMEDAN LAW—GIFT, No. 2, 32 Ind. Cas. 516.

(4) Talukdar—Presumption of custom as to, in non-talukdari property arising from inclusion of estate in List 2. See MAHOMEDAN LAW—INHERITANCE, No. 1, 20 M.L.T. 362.

Principal and Agent.

(1) *Fraud by agent, principal's liability for—Act done within scope of agent's authority but not for his benefit.*

Under the law of England, a principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent.

The principle being based upon justice, equity and good conscience, is applicable also in this country. *Sherjan Khan v. Allmuddi*, 20 C.W.N. 268=23 C.L.J. 225=43 C. 511=34 Ind. Cas. 698.

MOOKERJEE and ROE, JJ.

Reference:—(1912) App. Cas. 716, Cons.

(3) *Business of money-lenders and financiers—Agent's authority to guarantee advances to constituents by others—Pledging security for principal—Construction of power—Necessary implications arising from nature of business—Nature and extent of authority, practice among money-lenders, as evidence of—Benefit from the transaction, if essential—Onus.*

Where an agent of a firm carrying on a general money lending business, who had express authority "to borrow money from any bank or banks, firm or firms, persons or persons, either with or without pledge of securities for moneys advanced to various persons," guaranteed a loan made to a constituent of the firm by a third party:

Held, in a suit by the latter against the firm, that the firm was bound by the act of the agent.

That the authority of the agent to enter into the transaction was to be found in the document itself by necessary implication from the nature of the business, with the general management of which he was entrusted (a).

That the authority to borrow implied an authority to pledge the credit of the firm for the purpose of obtaining or securing advances from others to constituents.

Held, further, that, if authority is established, the mere fact that the principal did not receive any benefit does not rid him of his liability. *The Bank of Bengal v. Ramanathan Chetty*, 20 C.W.N. 329=(1916) M.W.N. 160=19 M.L.T. 176=30 M.L.J. 232=8 L.W. 210=14 A.L.J. 217=23 O.L.J. 348=18 Bom. L.R. 387=32 Ind. Cas. 419=43 C. 527=9 Bur. L.T. 1 (P.C.).

VISCOUNT HALDANE, LORD WRENBURY, SIR JOHN EDGE and MR. AMBER ALI.

Reference:—(a) (1893) A.O. 170, 177, F.

(3) *Nattukottai Chetties—Agency, expiry of—Salary chit, meaning of—Intention and conduct of parties to be considered—Agent continuing after the period fixed in the chit—Fresh agency, if created.*

Principal and Agent—(Continued).

A salary chit is a business document, and it only means that the agency shall not cease before the expiry of the period mentioned therein, but that it shall last for three years certain after which date it may or may not be continued; and it does not follow that there is a fresh agency created after the said three years.

The fact that the agent remained in service much longer than the three years' period and that his principal then permitted him to go on leave and subsequently to resume his duties as agent support the conclusion that there was only one agency which did not terminate on the expiry of three years but continued till the death of the agent. *Ramanathan Chetty v. Kathiresan Chetty*, 31 M.L.J. 686=4 L.W. 457=(1916) 2 M.W.N. 360=36 Ind. Cas. 804.

AYLING and SRINIVASA AYYANGAR, JJ.

(4) *Agency, termination of—Question of fact—Salary chit, meaning of—Evidence to be taken—Relevant considerations in deciding the question, what are—Practice among Nattukottai Chetties.*

The question when an agency is terminated is not a pure question of law but is a question of fact to be determined upon evidence.

It cannot be said that an agency terminates *ipso facto* on the expiry of the term fixed in the salary chit, since the chit can only mean that the parties expected the agency to close at the end of the three years mentioned therein (a).

In deciding the said question the practice among Nattukottai Chetties in the matter, and the various terms of the engagement between the parties obtaining in similar business transactions are all relevant considerations. *Nagappa Chettiar v. Chidambaram Chettiar*, 31 M.L.J. 687=4 L.W. 455=(1916) 2 M.W.N. 361=36 Ind. Cas. 812.

AYLING and SRINIVASA AYYANGAR, JJ.

Reference:—(a) 28 M.L.J. 140, *Expl.*

(5) *Agency, termination of—Question of fact—Certain items of credit or debit handed over by retiring agent—Agency, if put an end to—Civ. Pro. Code (V of 1908), O. VI, r. 17—Amendment of pleadings, when can be allowed—Plea of limitation affected by proposed amendment—Practice.*

The question when an agency terminates is a question of fact in each case, and the circumstance that certain items of credit or debit were handed over at the foreign place of business by the retiring agent to the successor does necessarily put an end to the agency of the predecessor (a).

If a cause of action is sought to be added by way of amendment, and if a fresh suit on that cause of action would be barred at the date of the amendment, then the Courts would, ordinarily, but not always, not allow such an amendment, so as to prejudice the defendant by depriving him of the plea of limitation which he would be otherwise entitled to.

Where the plaintiff sought to amend the plaint by setting up a letter mentioned in the defendant's written statement as an

Principal and Agent—(Continued).

acknowledgment of liability and thereby to avert a possible plea of limitation.

Held that, since the acknowledgment in question had existed at the time of the institution of the suit, and since no new cause of action was sought to be added, but the amendment was sought only for showing that the original cause of action as laid was not barred by limitation, the amendment prayed for should have been granted. *Muthia Chettiar v. Chidambaram Chetti*, 31 M.L.J. 688=4 L.W., 456=(1916) 2 M.W.N. 362.

AYLING and SRINIVASA AITYANGAR, JJ.

Reference:—(a) 19 Q.B.D. 394, D.

(6) *Suit for account by agent against principal is maintainable.*

An agent cannot bring a suit for accounts against his principal but only for the balance due upon an account. The agent alone is liable to render accounts and the principal is not. *Gopikisan v. Padamraj*, 12 N.L.R. 174.

MITTRA, OFFG. A.J.C.

(7) *Practice of Nattukottai Chetties—Salary Chit—Stipulation by agent to get it back on bringing cash and rendering accounts—Agency terminated before rendering accounts and before taking back salary chit—Suit for accounts—Limitation—Arts. 89, 115, 120, Limitation Act (1908)—Agency when terminated—Ss. 201, 218, Contract Act. Venkatachallam Chetti v. Narayanan Chetti*, 23 M.L.J. 140=26 Ind. Cas. 740=39 M. 376. See Final Part, 1915, Col. 1167.

(8) *Accounts, suit for—Principal and agent—Registered agreement hypothecating immoveable property—Limitation Act (1908), Sch. I, Arts. 89, 132. Sures Kanta Banerjee Chowdhury v. Nawab Ali Sikdar*, 21 C.L.J. 462=29 Ind. Cas. 848=20 C.W.N. 356. See Final Part, 1915, Col. 1168.

(9) *Accounts, suit for, against agent—Stipulation to render accounts yearly—Limitation—Limitation Act (1908), Sch. I, Arts. 89, 115, 132—Death of principal—Agent continuing in service of heir—Old agency if subsists—Contract Act, Ss. 209, 253—Demand of accounts—Agent failing to comply, if refusal—Agent not responding to demand for explanation of account papers submitted, if refusal—Obligation to explain papers. Madhusudan Sen v. Rakhal Chandra Das Basak*, 19 C.W.N. 1070=23 C.L.J. 552=23 C. 248=30 Ind. Cas. 697. See Final Part, 1915, Col. 1160.

(10) *Agent without authority to borrow—Agent borrowing and principal benefiting—Liability of principal. Suppayya Pattar v. Dawood Haji Ahmad Sait*, (1915) M.W.N. 761=39 Ind. Cas. 763. See Final Part, 1915, Col. 1160.

(11) *Agent—Non-liability for error of judgment—Principal's liability to indemnify—Implied term of contract—Refusal to indemnify—Agent rescinding contract—Justification—Contract Act, Ss. 39, 205 Firm of Rajaram Nandlal v. Firm of Abdul Rahim*, 9 S.L.R. 77=31 Ind. Cas. 450. See Final Part, 1915, Col. 1162.

Principal and Agent—(Concluded).

(12) *Account, suit for—Proprietor appointed by a co-proprietor as common manager for payment of debts on the estate, whether an agent of latter and, on his death, of his sons—Limitation. See ACCOUNTS, No. 4, 20 M.L.T. 480.*

(13) *Decree against principal and agent—Principal withdrawing from contest—Agent's right to appeal. See APPEAL (GENERAL), No. 7, 26 P.R. 1916.*

(14) *Broker liable as principal—Custom and usage of Calcutta gunny market—Evidence of custom—Admissibility—Award by Bengal Chamber of Commerce—Jurisdiction. See BROKER, No. 2, 20 C.W.N. 365.*

(15) *Position of brokers—Suit by broker for commission—Limitation. See BROKER, No. 1, 14 A.L.J. 873.*

(16) *Liability of principal to pay money borrowed by agent under power of attorney—Act done beyond scope of authority—Rights and liabilities of third persons dealing with agent. See CONTRACT ACT, No. 143, 36 Ind. Cas. 968.*

(17) *Mortgage decree obtained by principal—Execution sale—Purchase by agent on his own account—Rights of principal. See EXECUTION SALE, No. 2, 30 M.L.J. 497.*

(18) *See LIMITATION, No. 6, 30 Ind. Cas. 691.*

(19) *Suit by Principal against agent for neglect or misconduct—When neglect or misconduct becomes known to plaintiff—Fraud of defendant keeping plaintiff in ignorance of his right to sue. See LIMITATION ACT (1908), No. 159, 9 Bur. L.T. 130.*

(20) *See POWER OF ATTORNEY, No. 1, 9 Bur. L.T. 166.*

(21) *Station master entering into a special contract beyond the scope of his ordinary authority—Railway company not bound. See RAILWAY, No. 3, 14 A.L.J. 601.*

Principal and Surety.

(1) *Principal minor on the date of debt—Non-liability of former—Plea urged by legal representatives of principal debtor and also by surety—Liability of surety. See CONTRACT ACT, No. 122, 54 P.R. 1916.*

(2) *Debt barred by limitation against principal, whether surety liable. See HINDU LAW—JOINT FAMILY, No. 15, 1 Pat. L.J. 497.*

Priority.

(1) *Application for attachment before judgment—Summons to defendant to furnish security—Money paid into Court—Subsequent insolvency of defendant—Charge. See CIV. PRO. CODE (1908), No. 622, 39 M. 903.*

(2) *Dispute as to, with regard to funds in receiver's hands—Competent Court to decide. See CIV. PRO. CODE (1908), No. 462, 1 Pat. L. J. 449.*

(3) *Gross and culpable negligence of vendor (first mortgagee)—In leaving title-deeds with vendee (mortgagor)—Whether prior mortgag-*

Priority—(Concluded).

postponed thereby in favour of subsequent mortgage by deposit of title-deeds. See MORTGAGE (GENERAL), No. 29, 43 C. 1052.

(4) Prior unregistered mortgage—Subsequent registered mortgage. See MORTGAGE (GENERAL), No. 38, 30 Ind. Cas. 388.

Private Pathway.

Private pathways whether vest in Municipality—Right of control by Municipalities—Difference between roads vested in Municipalities and other roads. See BEN. ACT III OF 1884 (MUNICIPAL), No. 1, 43 C. 130.

Privileged Communications.

(1) Report of Company's agent for being laid before Company's solicitor whether privileged. See COMPANY, No. 2, 8 Bur. L.T. 274.

(2) Conversation between one of several defendants and the plaintiff's pleader about compromise of suit if admissible in evidence. See EVIDENCE ACT, No. 9, 20 C.W.N. 1217.

(3) Note of evidence to be given by witness—Refusal to produce it if should prejudice party—Note whether privileged. See WILL, No. 10, 20 C.W.N. 617.

Privileges.

Suits to enforce—Sanction when necessary. See CIV. PRO. CODE (1908), No. 13, 3 L.W. 512.

Privy of Contract.

(1) When arises. See CONTRACT, No. 5, (1916) M.W.N. 206.

(2) Absence of—Direction to purchaser to pay vendor's debt—Right of creditor to enforce such undertaking. See CONTRACT ACT, No. 62, 36 Ind. Cas. 792.

Privy of Estate.

Mortgagor who has mortgaged before suit cannot represent the estate—Decree not binding on mortgagee not a party. See RES JUDICATA, No. 14, 18 Bom. L.R. 757.

Privy Council.

See APPEAL TO PRIVY COUNCIL.

Practice of—Use of document as evidence in Privy Council.

A document in order that it may be used before the Privy Council must be endorsed by the Judge as proved against or admitted by the person against whom it is used. *Mirza Sadik Husain Khan v. Nawab Saiyed Hashim Ali Khan*, 31 M.L.J. 607=14 A.L.J. 1248=(1916) 2 M.W.N. 577=21 C.W.N. 130=18 Bom. L.R. 1037=19 O.C. 192=21 M.L.T. 40=38 A. 627=36 Ind. Cas. 104 (P.C.).

LORD ATKINSON and LORD PARKER OF WADDINGTON, SIR JOHN EDGE and MR. AMEER ALI.

Probate.

See ACT X OF 1885.

See ACT V OF 1881.

Probate—(Continued).

See ADMINISTRATION.

See EXECUTOR.

See LETTERS OF ADMINISTRATION.

See WILL.

(1) *Application for revocation—When to be made—Reversioner, if can apply—Acquiescence—Delay—Compromise—Family settlement—Will, thirty years old, proof of.*

Although there may not be a fixed time within which an application for revocation of a probate may be made and although there may not be acquiescence, a person may be debarred by long delay in making such an application.

A reversioner can apply during the lifetime of the widow for a revocation of the will.

The rule that a will more than thirty years old may be read in evidence without proof of its execution, is inapplicable to proof of a will in the probate Court.

There is a distinction between a case where the acquiescence alleged occurs while the act acquiesced in is in progress, and another, where the acquiescence takes place after the act has been completed. In the former case, the acquiescence is quiescence under such circumstances as that assent may be reasonably inferred from it. In the latter case, when the act is completed without any knowledge or without any assent on the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him, and mere delay to take legal proceedings to redress the injury cannot, by itself, constitute a bar to such proceedings, unless the delay on his part, after he acquired full knowledge, had affected or altered the position of his opponent (a).

A compromise amounting to a *bona fide* settlement of disputes binds the reversioners quite as much as a decree on a contest. This rule is subject to the qualification that the compromise was made *bona fide* for the benefit of the estate and not for the personal advantage of the limited owner (b).

A family settlement presupposes that there are *bona fide* claims on either side and an honest settlement after full disclosure of facts on either side.

Where one party secretly and fraudulently obtained probate of a will and the other party wanted to have it revoked, the former agreed to pay a larger annuity, and obtained an admission of the genuineness of the will which might be used against the reversioners;

Held, that, under the circumstances, the principle of family settlement did not apply. *Shyam Lal v. Ramewari*, 23 C.L.J. 82=33 Ind. Cas. 273.

N. R. CHATTERJEE and MULLICK, JJ.

References:—(a) 21 O.L.J. 557, F. (b) 21 C. L.J. 157 (163), F.

(2) *Specific Relief Act, S. 42—Probate, application for—Caveat—Probate granted upon finding that will genuine and caveator had no locus standi to oppose—Suit by caveator for declaration that he has sufficient interest to apply for revocation of*

Probate—(Continued).

probate, if lies—Probate Court's decision on matter within its jurisdiction if reversible by another Court—Strict fulfilment of statutory conditions, when declaratory decree prayed for, necessary—Res judicata—Decisions of Probate Court on matters other than genuineness of will if conclusive—Rule of res judicata, not a technical rule.

On B's death leaving two widows, but no male issue, R applied for probate or what he alleged was B's will. The widows did not oppose the application but the present plaintiffs amongst others lodged caveats. The matter was thereupon heard as a suit with R as plaintiff and the caveators (including the present plaintiffs) as defendants, and that Court held that the present plaintiffs had no right to oppose the application and that the will propounded was genuine. The plaintiffs then brought this suit against R and others for a declaration that they were the nearest reversioners according to Hindu Law of B and as such entitled to apply to the Probate Court to get the probate to R revoked.

Held, that the declaration could not be made under S. 42 of the Specific Relief Act, as, having regard to the decision that the will was genuine, the plaintiffs were not entitled to "a legal character or to a right as to property."

That the will having been affirmed in a Court exercising appropriate jurisdiction, the propriety of that decision could not in the circumstances of the case be impugned by a Court exercising any other jurisdiction.

The Court's power to make a declaration without more is derived from S. 42 of the Specific Relief Act, and regard must be had to its precise terms.

The application of the rule of *res judicata* by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law. *Sheoparan Singh v. Ramandan Prashad Narayan Singh*, 20 C.W.N. 738=14 A.L.J. 466=23 C.L.J. 621=18 Bom L.R. 397=43 C. 694=31 M.L.J. 77=20 M.L.T. 1=(1916); *M. W.N.* 419=3 L.W. 544=33 Ind. Cas. 914 (P.C.).

LORD CHANCELLOR, VISCOUNT HALDANE, SIR JOHN EDGE, MR. AMEER ALI and SIR LAWRENCE JENKINS.

- (3) *Application for probate of a Will—Petition of compromise between propounder and objector dividing testator's property—Probate case decided on such compromise without proof of Will, whether legal—Civ. Pro. Code (1908), O. XXIII, r. 3—S. 83, Probate and Administration Act (V of 1881).*

There can be no dismissal of a probate case in accordance with the terms of a petition of compromise between the propounder and objector. The main issue in such a case is whether or not the Will has been proved and the only effect of a compromise is to reduce a contentious proceeding into one which is not contentious, but this does not absolve the Court from the task of either granting probate, or refusing it. If a compromise has been made

Probate—(Concluded).

and the objector withdraws from the contest, the Court will grant probate in common form, but the Court cannot dismiss the case altogether and embody the terms of the compromise as if the decree was one capable of execution by him.

S. 83 of the Probate and Administration Act read with O. XXIII, r. 3, Civ. Pro. Code, merely means that in a probate case the Civ. Pro. Code so far as possible determines the procedure of the Court. These sections nowhere say that it is competent to the Court to allow the parties to divide the testator's property without proving the Will. *Mussammat Janakbati Thakurain v. Bahu Gajanan Thakur*, 20 C.W.N. 986=1 Pat. L.J. 377.

MULLICK and KINGSFORD, JJ.

References :—14 C.W.N. 1068; 13 C.L.J. 91, R.

- (4) *Will—Probate—Executor who has not renounced must, when cited in Court, take out probate—Letters of administration can issue, if he fails, to be a competent applicant.*

An executor called upon by citation to accept or renounce is clearly compellable, if he accepts, to take out probate within a limited time. If he does not so, letters of administration with a copy of the will annexed may be granted to any competent applicant. *Kawasji v. Bal Dinbai*, 18 Bom. L.R. 766=40 B. 666=36 Ind. Cas. 373.

BEAMAN and HEATON, JJ.

- (5) *Caveat—Court-fee.* See COURT FEES ACT, No. 30, 20 C.W.N. 787.

- (6) *Probate of will, effect of.* See EVIDENCE ACT, No. 103, 4 L.W. 349.

- (7) *Letters of administration—Grant, order of—Minor heir not made party—Revocation proceeding—Guardian ad litem appointment of—Contentious suit—Minor not being cited nor being properly represented, effect of.* See LETTERS OF ADMINISTRATION, No. 1, 23 C. L.J. 79.

Probate and Administration Act.

See ACT V OF 1881.

Probate Proceedings.

- (1) *Will—Probate—Adoption—Title.*

A Probate Court cannot enquire into the title of the testator in the properties covered in his will. The question whether or not a certain person was adopted by the testator is not a matter which could be decided in a Probate proceeding. *Mahasundar Kuer v. Ram Ratan Prasad Sahl*, 35 Ind. Cas. 416.

ATKINSON and KINGSFORD, JJ.

Reference :—20 B. 210, D.

- (2) *Right of creditor to come in such proceedings.* See WILL, No. 16, 30 Ind. Cas. 538.

Procedure.

See PRACTICE AND PROCEDURE.

Procession.

- (1) *Ultra vires—Government Resolution—Prohibition of procession throughout a District for all time—Vyasantol procession*

Procession—(Concluded).

—*District Police Act (Bom. Act IV of 1890).*
Ss. 42, 44—Public road—Right of the public to use public roads.

The Government of Bombay issued a Resolution whereby it was directed that permission should not in future be given to hold *Vyasantol* processions in the Belgaum District. A suit having been brought to challenge the validity of the Resolution :—

Held, that the Resolution was *ultra vires* of Government, as it fell neither under S. 44 nor under S. 42 of the District Police Act, 1890.

S. 44 deals not with the prohibition of religious ceremonies, but with the maintaining of public order at religious ceremonies which are not prohibited.

S. 42 enables the Magistrate to issue lawful orders only whenever and for such time as it shall appear necessary and the orders are to operate in such town or village or the vicinity thereof as may be directed; in other words, the powers of prohibition conferred upon the Magistrate are by the statute expressly limited both in time and in place, the limitation of place being to a particular town or village or the vicinity thereof.

All members of the public and every sect have a right to use the streets in a lawful manner, and it lies on those who would restrain them in its exercise to show some law or custom having the force of law depriving them of the privilege. *Dundappa Mallappa Sigandhi v. Secretary of State*, 18 Bom. L.R. 450.

BACHELOR and SHAH, JJ.

(2) *Mandamus*—Commissioner of Police—Refusal to issue license to conduct, though right established by Civil Court—Apprehension of breach of the peace. See *MAD. ACT III OF 1888 (CITY POLICE)*, No. 1. 31 M.L.J. 426.

Process-server.

(1) Examination of, before passing *ex parte* decree. See *CIV. PRO. CODE (1908)*, No. 351, 31 Ind. Cas. 479.

(2) Assault on. See *CRIM. PRO. CODE*, No. 8, 19 O.C. 91.

Professional Tax.

Suit to recover Katiari dues—Jurisdiction of Small Cause Court. See *BEN. ACT VIII of 1886 (TENANCY)*, No. 91-d, 36 Ind. Cas. 600.

Pro-forma Defendant.

Decree against, in—Ejectment suit wherein no relief claimed against him. See *EJECTMENT*, No. 9, 31 Ind. Cas. 861.

Promissory Note.

(1) *Pro-note executed by mother of minor as his guardian for money borrowed for purposes binding on minor—Pro-note not signed by mother as guardian—Liability of minor or his estate—Ss. 28, 30, Negotiable Instruments Act—Applicability of Hindu Law. Padma Krishna Chettiar alias Krishna Iyer v. Nagamammi Ammal*, 18 M.L.T. 216=30 Ind. Cas. 574=39 M. 915. See Final Part, 1915, Col. 1165.

Promissory Note—(Continued).

(2) *Failure of consideration of—Payee of a promissory note endorsing it after maturity, effect of. Aljaz Husain Syed v. Mirza Mohammad Sajjad*, 18 O.C. 272=32 Ind. Cas. 432. See Final Part, 1915, Col. 1168.

(3) Suit on a—Agreement to abide by oath—Evidence recorded prior to agreement—Agreement proving abortive—Suit, if can be decided on evidence taken—Practice. See *ACT X OF 1878 (OATHS)*, No. 2, 4 L.W. 258.

(4) Payable on demand to person or bearer or order—If illegal and void—Right of creditor to get a decree apart from the note—Negotiable Instruments Act, Ss. 1 and 19. See *ACT II OF 1910 (PAPER CURRENCY)*, No. 1, (1916) 2 M. W.N. 210.

(5) Execution in one place and assignment in another—Suit by assignee in Court within whose jurisdiction assignment is made—Maintainability. See *CIV. PRO. CODE (1908)*, No. 61, 31 M.L.J. 816.

(6) Jurisdiction—Promissory note—Place of execution different from place of delivery—Institution of suit at latter place—Validity. See *CIV. PRO. CODE (1908)*, No. 62, 2 P.R. 1916.

(7) Endorsement—Presumption of consideration—Oral evidence to prove consideration for endorsement. See *EVIDENCE ACT*, No. 62, 32 Ind. Cas. 233.

(8) Suit on—Oral evidence to show agreement for different rate of interest from that provided in pro-note—Proof of repugnant or inconsistent terms. See *EVIDENCE ACT*, No. 61, 36 Ind. Cas. 957.

(9) Presumption as to consideration. See *HINDU LAW—ALIENATION*, No. 24, 34 Ind. Cas. 617.

(10) Executed by the manager—Suit by transferee—Other members of the family if liable—Liability whether on the note or on original debt. See *HINDU LAW (DEBTS)*, No. 8, 3 L.W. 463.

(11) By some members for family purpose—All members liable. See *HINDU LAW—JOINT FAMILY*, No. 20, 31 Ind. Cas. 317.

(12) Collateral agreement fixing time for payment—Starting point of limitation. See *LIMITATION ACT (1908)*, No. 149, 3 L.W. 38.

(13) Suit on, if confined to the maker. See *LIMITATION ACT (1908)*, No. 80, 3 L.W. 231.

(14) By a young boy just emerged from minority with large expectations—Burden of proof re-passing of consideration. See *NEGOTIABLE INSTRUMENTS ACT*, No. 28, 31 Ind. Cas. 739.

(15) Suit by holder in due course—Discharge of maker—Payment in due course—Plea of payment to payee before endorsement—Validity of defence—Equities between maker and payee if applicable to endorsee. See *NEGOTIABLE INSTRUMENTS ACT*, No. 5, 4 L.W. 34=(1916) 2 M.W.N. 107.

Promissory Note—(Concluded).

(16) Suit on — Pro-note not endorsed to plaintiff — Suit whether maintainable. See NEGOTIABLE INSTRUMENTS ACT, No. 4, 3 L.W. 171.

(17) No stipulation as to interest—Contemporaneous written agreement—Provision for interest—Validity. See NEGOTIABLE INSTRUMENTS ACT, No. 20, 12 N.L.R. 9.

(18) Chit given for an existing liability—Want of stamp—Inadmissibility of the document in evidence—Right to recover on the original cause of action. See STAMP ACT (1899), No. 1, 34 Ind. Cas. 417.

(19) Instrument when does not amount to a —Insufficiency of stamp—Admissibility in evidence. See STAMP ACT (1899), No. 11, 18 Bom. L.R. 124.

(20) Entry in account book—Promise to pay—Nature of document—Object of promissory note—Original consideration—Suit thereon when maintainable—Execution of the note outside British India—Suit in British India—Suit if maintainable without stamp. See STAMP ACT (1899), No. 3, 9 S.L.R. 150.

Proof.

(1) Pleadings—Written statement — Specific denial—In absence of denial, facts alleged treated as admitted—Practice—Of letter. See CIV. PRO. CODE (1908), No. 368, 18 Bom. L.R. 946.

(2) Fraud, allegations of — Specific charge and strict necessity of. See CONTRACT ACT, No. 2, 24 O.L.J. 335.

(3) Age—Certificate by a Medical man to private patient—Former judgment regarding age—Whether relevant — Value — Minority—Party pleading the same—Burden of proof. See EVIDENCE ACT, No. 7, 33 Ind. Cas. 142.

(4) Document proved to have been executed in the presence of one attesting witness who was examined—Whether execution valid. See EVIDENCE ACT, No. 40, 14 A.L.J. 1041.

(5) Fraudulent motive—Pleadings and proof. See FRAUD, No. 5, 36 Ind. Cas. 955.

(6) Dedication—What it involves—, thereof—Limited dedication—Possibility—Express or implied dedication—Presumption. See MAHOMEDAN LAW (WAKF.) No. 11, 33 Ind. Cas. 91.

(7) Matathipathi, succession to—Usage, proof of. See MUTT, No. 1, 34 Ind. Cas. 875.

(8) Trespass—What constitutes. See TRESPASS, No. 2, 1 Pat. L.J. 533.

Property Protection (Succession).

See ACT XIX OF 1841.

Proprietary Estates (Village Service) Act.

See MAD. ACT II OF 1894.

Proprietary Rights.

(1) *Proprietary rights without buildings sold —Expropriatory tenancy—Out buildings, nature of.*

Proprietary Rights—(Concluded).

The question whether or not certain buildings are appurtenances to the holding of a particular tenant, in the sense that the tenant cannot be ejected therefrom so long as his tenancy subsists must be regarded as a mixed question of fact and of law.

By a deed of sale the defendants purported to transfer to the plaintiff the whole of their proprietary rights in a village and in the same deed of sale they expressly specified the *dora* and buildings, appertaining thereto as included in the property transferred to the plaintiff. The plaintiff, after considerable difficulty, seemed to have obtained possession over the buildings purported to be conveyed to him. Plaintiff's attempt to obtain possession over certain out buildings were resisted by the defendants. Thereupon the plaintiff brought a suit for possession, wherein the defendants pleaded *inter alia* that these outbuildings were made by them for the storage of agricultural implements and for the shelter of their cattle and that they were, therefore, appurtenances to the tenant holding which the defendants still possessed in the village. Held that the transfer, in respect of these buildings and of the land on which they stood, was not limited in any way by the operation of the statute which created the ex-proprietary holding and that the defendants had no right to occupy these outbuildings and to claim to treat them as appurtenances to their holdings. *Umrao Singh v. Chheda Lal*, 35 Ind. Cas. 262.

PIGGOT and WALSH, JJ.

(2) Oudh Settlements—Effect of—Proprietary rights, proof of. See SUMMARY SETTLEMENT, No. 1, 34 Ind. Cas. 768.

Protected Gaontia.

See GAONTIA, No. 1, 1 Pat. L.J. 293.

Protection Order.

(1) Pendency of insolvency proceedings—Leave of Court for application to arrest insolvent—Effect of refusal of discharge on. See ACT III OF 1909. (PRESIDENCY TOWNS INSOLVENCY), No. 8, 9 Bur. L.T. 252.

Protection of Property (Succession) Act.

See ACT XIX OF 1841.

Provident Fund.

Provident Fund money — Remittance by money order—Post office whether agent—Attachment by decree-holder while money in custody of post office—Employee applying for adjudication as insolvent—No order of adjudication—Money not capable of being kept in Court. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 37, 14 A.L.J. 236.

Provincial Insolvency Act.

See ACT III OF 1907.

Provincial Small Cause Courts Act.

See ACT IX OF 1887.

Provincial Small Cause Courts (Amendment).

Act.

See ACT VI OF 1914.

Public.

(1) Limited access of, to a private place—Presumption of dedication of road to public. See PUN. ACT III OF 1911 (MUNICIPALITY), No. 1, 109 P.R. 1916.

(2) Vacant space—User by—Presumption of dedication. See PUN. ACT III OF 1911 (MUNICIPALITY), No. 2, 108 P.R. 1916.

Public Body.

(1) Corporation or, having statutory duty to perform—Power of Court to compel its performance. See MANDAMUS, No. 1, 31 M. L.J. 634.

(2) See SPECIFIC RELIEF ACT, No. 46, 31 M.L.J. 634.

Public Charitable Trust.

See CIV. PRO. CODE (1908), No. 166, 31 M. L.J. 280.

Public Demands Recovery Act.

See BEN. ACT I OF 1895.

Public Drain.

If becomes public way when filled up. See TRESPASS, No. 1, 20 C.W.N. 773.

Public Institutions.

Committee's power to collect subscription.
—Committee, obligation of, to general public to accept subscription offered.

Held, that, although a committee is entitled to collect subscriptions for the purpose of maintaining a public institution, they are under no obligation whatever to the general public to accept any subscriptions which may be offered to them. *Abhoy Pado Bose v. The Managing Committee of the Queen's Anglo Sanskrit School, Lucknow*, 19 O.C. 15=34 Ind. Cas. 263.

LINDSAY, J.C.

Public Officer.

See SPECIFIC RELIEF ACT, No. 46, 31 M.L. J. 634.

Public Policy.

(1) Acquisition of property by Kanungo—Not opposed to. See CONTRACT ACT, No. 20, 14 A.L.J. 969.

(2) Agreement opposed to public policy—Assignment of mortgage taken by patwari benami—Not void. See CONTRACT ACT, No. 19, 14 A.L.J. 962.

(3) Contract—Uncertainty—Agreement by a Gayawal to pay part of his earnings from certain ceremonies to an Achariya—Maintainability of a suit on the agreement. See RIGHT OF SUIT, No. 2, 1 Pat. L.J. 539.

Public Streets.

(1) Private pathways whether vest in Municipality—Right of control by Municipalities—Difference between roads vested in Municipalities and other roads. See BEN. ACT III OF 1884 (MUNICIPAL), No. 1, 43 C. 190.

Public Streets—(Concluded).

(2) Drain part of. See MAD. ACT III OF 1904 (CITY MUNICIPALITY), No. 1, 36 Ind. Cas. 688.

(3) Remedy of persons dissatisfied with any act of Municipal Committee—Power of Committee to direct removal of verandah projecting on payment of compensation. See PUN. ACT III OF 1911 (MUNICIPALITY), No. 2, 104 P.R. 1916.

(4) Right of the public to use public roads. See PROCESSIONS, No. 1, 18 Bom. L.R. 460.

Public Thoroughfare.

Public and private nuisances—Right of suit—English and Indian Law—Special damage—Obstruction of—Right to hold procession. See NUISANCE, No. 1, 12 N.L.R. 130.

Public Trust.

(1) See CIV. PRO. CODE (1882), No. 31, 36 Ind. Cas. 880.

(2) Cause of action as to—Practice of District Courts to enquire first whether subject-matter of trust is public—Public trust, if may be declared, when suit dismissed for want of cause of action. See CIV. PRO. CODE (1908), No. 177, 20 C.W.N. 1354.

(3) Suit *vs*—Consent of Advocate-General—Right to worship idol. See CIV. PRO. CODE (1908), No. 179, 35 Ind. Cas. 846.

Punjab Acts.

See ACTS—PUNJAB ACTS.

Purchase Money.

Refund of—Right of suit by auction-purchaser—Act XIV of 1882, S. 315. See CIV. PRO. CODE (1908), No. 521, 14 A.L.J. 1216.

Putni.

Sale of, in execution of decree for arrears of rent—Purchaser if liable for arrears previous to confirmation of sale.

The plaintiffs purchased a *putni taluq* at a sale held in execution of a decree for arrears of rent due thereon. Some of the *putnidars* applied to set aside the sale, and, while the proceedings for setting aside the sale were pending, the zemindar brought a suit against the recorded *putnidars* for arrears of rent subsequent to the period covered by the decree in execution of which the sale was held at which the plaintiffs purchased the taluq. The plaintiffs were made parties to this suit which was decreed and in execution of the decree the *putni* was put up for sale, and the plaintiffs whose purchase at the previous sale had been by that time finally confirmed deposited the decretal amount and saved the *putni* from sale.

Held, that, in the absence of anything to denote the contrary, a sale of a tenure held in execution of a decree for its own arrears of rent passes it free from liability for previous arrears,

Putni—(Concluded).

and the plaintiffs were not liable for the arrears of rent for the period prior to the date of confirmation of sale at which they purchased the putni. *Mathura Mohan Saha v. Nabin Chandra Dutt*, 20 C.W.N. 749=24 O.L.J. 34=34 Ind. Cas. 180.

N.R. CHATTERJEE and RICHARDSON, JJ.

Putnidar.

(1) *Chowkidari Chakran* land resumed and settled with zemindar—Suit by, for possession of those lands—Cause of action—Ejection of tenants settled by zemindar. See BEN. ACT VI OF 1870 (VILLAGE CHOWKIDAR), N.J. 1, 33 Ind. Cas. 593.

(2) See ADVERSE POSSESSION, No. 4, 35 Ind. Cas. 60=21 O.W.N. 199.

(3) Agreeing to pay into the Collectorate the amount of revenue payable by the landlords on their account—Suit for apportionment by some of the co-sharer landlords. See TRANSFER OF PROPERTY ACT, No. 30, 34 Ind. Cas. 409.

Putrika Putra.

(1) See HINDU LAW (ADOPTION), No. 14, 1 Pat. L.J. 581.

Question of Fact.

(1) *Agency, termination of.*

The question when an agency is terminated is not a pure question of law but is a question of fact to be determined upon evidence. *Nagappa Chettiar v. Chidambaram Chettiar*, 31 M.L.J. 697=4 L.W. 455=(1916) 2 M.W.N. 361=36 Ind. Cas. 812.

AYLING and SRINIVASA IYENGAR, JJ.

(2) *Agency, termination of.*

The question when an agency terminates is a question of fact in each case. *Muthia Chettiar v. Chidambaram Chetty*, 31 M.L.J. 688=4 L.W. 456=(1916) 2 M.W.N. 362.

AYLING and SRINIVASA IYENGAR, JJ.

(3) Whether question of "intention" with which a transfer of property has been made is one of law or fact. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 4, 102 P.R. 1916.

(4) Acquiescence and necessity. See ALIENATION, No. 1, 107 P.R. 1916.

(5) Finding that a certain amount of the consideration money was returned after Registration is a. See APPEAL (SECOND APPEAL), No. 6, 115 P.W.R. 1916.

(6) See CHOWKIDARI CHAKRAN LANDS, No. 1, 32 Ind. Cas. 546.

(7) See SHAMILAT, No. 2, 36 Ind. Cas. 601=3 P.R. 1917.

Question of Law.

(1) *Commissioner — Taking of accounts — Power to decide questions of law—Court's jurisdiction to decide the questions—High Court Rules (Original Side), rr. 397, 399.*

The Commissioner on the Original Side of the High Court is entitled to decide questions of law which may arise while taking the accounts. It is not open to any of the parties

Question of Law—(Concluded).

to the reference to ask the Judge to give his opinion on questions of law which have arisen in the taking of the accounts. The parties can only file exceptions to his report when made. *Laxmibai v. Hussainbhai*, 18 Bom. L.R. 798=36 Ind. Cas. 618.

MACLEOD, J.

(2) Whether question of "intention" with which a transfer of property has been made is one of law or fact—Revision. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 4, 102 P.R. 1916.

(3) Appeal to Privy Council—Substantial, to be involved. See APPEAL TO PRIVY COUNCIL, No. 2, 30 Ind. Cas. 239.

(4) See CIV. PRO. CODE (1908), No. 224, 30 Ind. Cas. 372.

(5) Application for leave to appeal to Privy Council—Involved in appeal, nature of. See CIV. PRO. CODE (1908), No. 219, 19 O.C. 131.

(6) *Res judicata*—Wrong decision in prior suit on—Bar of subsequent suit—Estoppel. See CIV. PRO. CODE (1908), No. 24, 36 Ind. Cas. 268.

(7) See RES JUDICATA, No. 13, 31 M.L.J. 513.

(8) Erroneous decision on. See RES JUDICATA, No. 27, 31 Ind. Cas. 269.

Railway.

(1) *Railway Company—Risk-note—Wilful neglect—Sale of goods—Liability.*

Certain perishable goods were consigned to the plaintiffs to be carried by the B.B. and O.I. Railway to a station on the G.I.P. Railway. The bags containing the goods were duly carried to a station where they were put into an empty waggon belonging to the G.I.P. Railway. The bags should have been taken out or the waggon detached from the train at Wardha junction, but instead of this they were carried on to Nagpur, and there they remained unnoticed by the authorities. On discovery they were despatched from Nagpur, and reached their destination where they were found in a stinking condition. They were sold by public auction and fetched Rs. 30. No previous notice of the sale was given by the Railway authorities to the plaintiffs or their agents or the person in possession of the railway receipt. The goods were carried under what was called a risk-note Form H. Under this note the consignors undertook to hold the Railway administration "free from all responsibility...except for the loss of the complete consignment due either to the wilful neglect of the Railway Administration or..."

Held that neither the non-transhipment of the goods nor their sale without notice was equivalent to wilful neglect on the part of the Railway Administration. *Jhunnai Lal v. The Bombay-Baroda and Central India Railway Company*, 14 A.L.J. 996.

CHAMIER, J.

Railway—(Concluded).

- (2) *Goods — Carriage of — Liability under Risk note Form B — Wilful neglect, meaning—Neglect on the part of railway—Plaintiff bound to prove.*

When goods have been carried under a special contract, limiting the responsibility of the railway, embodied in a risk note Form B, the plaintiff has to allege, and prove, not merely that the railway or its servants have committed a breach of the ordinary contract of bailment, but that they have been guilty of wilful neglect, and that he has suffered loss as a consequence of such neglect.

A person is said to be guilty of wilful neglect when he intentionally, and of set purpose, does something which ought either to be done in a different manner, or not at all, or omits to do something which ought to be done. Loss is said to be due to wilful neglect when such neglect is either the sole effective cause of the loss, or is so connected with it as to be materially contributing thereto. **The Firm of Doulomal Kushaldas v. Secretary of State**, 9 S.L.R. 177 = 32 Ind. Cas. 551.

PRATT, J.C., and CROUCH, A.J.C.

- (3) *Contract—Principal and agent—Railway Company and Station Master—Agent entering into a special contract beyond the scope of his ordinary authority—Principal not bound.*

The plaintiff in good faith relying upon information supplied to him by the Station Master of a certain Railway Station as to the rate of freight to be charged on certain goods consigned to the goods for carriage by the Railway. The rate quoted was a special concession rate which did not apply to the plaintiff's consignment. At destination the under-charge was discovered and delivery was refused except on payment of the proper freight. The plaintiff refused to pay and sued the Railway Company for damages for non-delivery.

Held, that the contract made with the plaintiff was by a person who had no authority on behalf of the defendant Company to enter into a special contract, namely, a contract to carry goods on concession rates which did not apply to the case, and that the Railway Company was not liable for the breach. **Govind Ram v. G.I.P. Railway**, 14 A.L.J. 601 = 35 Ind. Cas. 208.

BANERJI, J.

- (4) *Promise to charge at waggon rate—Charge at pound rate—Legality.* See CONTRACT, No. 10, 14 A.L.J. 494.

Railway Company.

- (1) *Liability — Risk note Form H, consignment under—Wilful neglect.*

The plaintiffs delivered certain bags of the potatoes to the B. B. and C. I. Railway and there delivered to the consignors or to their order. The goods were carried under what is called risk note Form H. The bags were duly carried to the Junction station of the two Railways where they were put into an empty waggon belonging to the G.I.P. Railway. They

Railway Company—(Concluded).

should have been taken out of the waggon and transhipped at another station. But this was not done and the bags were carried on to some other station where they remained unnoticed for some time. Thereafter they were sent to their destination. On examination they were found by the Railway authorities to be in a stinking condition. So they were sold by public auction. No previous notice was given to the plaintiffs or their agents or to any person in possession of the Railway receipt by the Railway authorities. In a suit by the plaintiffs, held that the Railway authorities were not guilty of wilful neglect within the meaning of the risk note. It would be a misuse of language to describe the action of the Railway Company in selling the goods without notice as wilful neglect. **Jhunn Lal v. B. B. & C.I. Railway**, 35 Ind. Cas. 265.

CHAMBER, J.

Railway Receipt.

(1) *Mercantile document of title to goods—Pledge of railway receipt—Right of pledgee—S. 16 (3), Provincial Insolvency Act—Scope—Insolvent's right to get possession of the goods from the carriers—Local custom—S. 137, Transfer of Property Act.* **Fakeerappa v. Thippanna**, 38 M. 661 = 30 Ind. Cas. 950. See Final Part, 1915, Col. 1174.

(2) If "document of title"—Assignment of railway receipt by way of pledge—Right of vendor of stoppage in transitu if determines. See CONTRACT ACT, No. 106, 20 C.W.N. 1182.

Railways Act (1890).

- (1) *Ss. 3 (6), 77, 140—Railway administered by Government—Suit by consignee for price of goods consigned and mislaid by railway—Notice to Traffic Manager and to Collector for Secretary of State, if sufficient—Limitation—Limitation Act (1908), Sch. I, Arts. 30, 31, 115.*

In the case of a railway administered by Government, notice under S. 77 of the Railways Act is (in view of the definition of the words "Railway Administration" in S. 3 (6) of the Act) effective, if served on Government, and S. 140 does not mean that the "Manager" is the only person on whom notice can be served, but that if notice is served on the manager, it must be served on him in the manner provided in S. 140 (a).

Per **D. Chatterjee, J.**—*Semle*—In the absence of evidence showing that the "Agent" of a railway administered by Government is the Manager, or that the "Traffic Manager" is not the Manager, and regard being had to the rule printed and published in the Fare and Time Table of the Railway that "references regarding delay in transit to or loss of goods, parcels, luggage or other articles or claims for compensation and refunds should be addressed to the Traffic Manager," notice to the Traffic Manager may be considered sufficient under S. 140 of the Act.

In a suit by consignors of goods which were not alleged to have been lost, but were found to

Railways Act (1890)—(Concluded).

have gone astray after they were delivered to the Railway, for recovery of their price with compensation, the defendant did not plead or prove any loss and on the other hand alleged that the goods had not been delivered at all, nor was there evidence when the goods were to be delivered.

Held, per curiam, that neither Art 30 nor Art. 31 applied, and (per *D. Chatterjee, J.*), that the suit was governed by Art. 115, Limitation Act (b). **Radha Sham Basak v. The Secretary of State**, 20 C.W.N. 790 = 23 C.L.J. 547 = 44 C. 16 = 34 Ind. Cas. 130.

D. CHATTERJEE and BEACHCROFT, JJ.

References:—(a) 24 C. 306; 28 A. 552; 16 C.W.N. 356; 22 M. 137; 35 C. 194, *Considered*. (b) 7 B. 478; 12 C. 477, *R.*

(2) *S. 72 (2) (a)—Risk note, how to be signed in order to bind consignor.*

The provision of S. 72, cl. (2), requiring risk notes to be signed by or on behalf of the person sending, or delivering goods to a Railway administration, should be exactly carried out.

Where the person who delivered the goods signed not his own name but the name of the owner of goods, there was not a sufficient compliance with the requirements of S. 72, cl. (2).

Holmwood, J.—The person who signs the risk note must write his own name either by his own hand or by the hand of an agent who must be disclosed and have authority. **Mahabharsha Bankapore v. The Secretary of State**, 20 C.W.N. 685 = 32 Ind. Cas. 393.

HOLMWOOD and MULLICK, JJ.

(3) *S. 77. See No 1, supra.*

(4) *S. 75—Passenger's luggage—Loss of—Insurance East Indian Railway v. M. K. Roy*, 13 A.L.J. 658 = 37 A. 463 = 30 Ind. Cas. 400. See Final Part, 1916, Col. 73.

(5) *Ss. 77, 140—Notice on Claims—Superintendent, if notice on Agent—Suit for compensation for loss of goods consigned—Limitation—Limitation Act (1908), Sch. I, Art. 30.*

In the absence of evidence to prove that the Claims Superintendent was authorised by the agent to receive notices on his behalf, *held* that a notice of claim served on the former was not served in compliance with the provisions of S. 140 of the Railways Act.

The law requires that the notice should be on the agent, and whether a particular officer is authorised by the Agent to receive such notice on his behalf is a question of fact that must be decided on evidence (a).

Where the consignor sued a Railway Company for compensation for loss of goods alleging the same to have been due to the wilful negligence or theft by its servants.

Held (semble).—That the suit was governed by Art. 30 of the 1st Schedule to the Limitation Act. **The East Indian Ry. Co. v. Ram Autar**, 20 C.W.N. 696.

D. CHATTERJEE and BEACHCROFT, JJ.

References:—(a) 13 C.W.N. 24, D.; 16 C.W.N. 356; 17 C.W.N. 1134; 19 C.W.N. 62, R.

(6) *S. 140. See Nos. 1 and 5, supra.*

Rajbansis.

Law applicable to. See **BÜDDHIST LAW (GENERAL)**, No. 1, 8 L.B.R. 301.

Rajinama.

Kabulayat—Unalienated lands—Khatedar—Sale by a Khatedar after rajinama—Suit by vendor to recover possession from new khatedar—Transfer of Property Act (IV of 1882), S. 123—Registration Act (XVI of 1908), S. 90—Land Revenue Code (Bombay Act V of 1879), S. 74.

C, a registered *khatedar* of unalienated lands subject to the provisions of the Land Revenue Code, executed a *rajinama* relinquishing the *khata* in favour of D, and, on the same day, D executed a *kabulayat* to the Mamlatdar undertaking to pay the land revenue and applied to have his name entered in the Government records as the registered *khatedar* of those lands. Some years later C sold the very lands to the plaintiff, who sued to recover possession from D, alleging that there having been gift of the lands by C to D it could not operate in absence of a registered document under S. 123 of the Transfer of Property Act:

Held, that the *rajinama* by C was an extinguishment of his interest in the lands and the effect of the *kabulayat* was that D came in by agreement with Government as an occupant in his own right; that, therefore, C had no interest in the lands capable of transfer at the date of the sale; and that the plaintiff got nothing by his sale-deed. **Motibhai Jijibhai v. Dasaibhai Gokalbhai**, 18 Bom. L.R. 976 = 41 B. 170.

SCOTT, C.J. and HEATON, J.

Rajput Mussalman.

Custom permitting widow to take life-estate in husband's entire property. See **MAHOMEDAN LAW (CUSTOM)**, No. 1, 33 Ind. Cas. 114.

Rateable Distribution.

(1) See CIV. PRO. CODE (1908), No. 519, 10 S.L.R. 53.

(2) Execution sale—Auctioneer-nominee of parties—Purchase-money received by auctioneer whether "receipt of assets." See CIV. PRO. CODE (1908), No. 154, 35 Ind. Cas. 850.

(3) See CIV. PRO. CODE (1908), No. 626-a, 32 Ind. Cas. 914.

'Rea' land 'Personal' Actions.

English Law as to, if applicable to India. See **CO-OWNERS**, No. 3, 3 L.W. 542.

Reasonable and Probable Cause.

Burden of proving malice and absence of—Malicious prosecution, suit for. See **DAMAGES, SUIT FOR**, No. 1, 20 M.L.T. 303.

Receiver.

(1) *Guardian of defendant's adopted boy—Not sufficient ground for removal—Onus of proof in an application to remove a person from an appointment.*

The mere fact that a receiver appointed by the Court is the guardian of the adopted boy of the defendants is not sufficient ground for his removal from the appointment.

Receiver—(Continued).

In an application to remove a person already appointed, the *onus* is on the applicant to show that the continuance of the appointee will prejudice the interests of the institution.

Whether a power to appoint includes a power to dismiss. *Rukmani Ammal v. The Advocate General of Madras*, (1916) M.W.N. 10=31 Ind. Cas. 908.

SESHAGIRI AIYAR and NAIR, JJ.

(2) *Receiver, removal of—Order, refusing removal—Appeal, if lies—Joint receivers—Retirement of one, effect of.*

No appeal lies against an order refusing to remove a receiver who has already been appointed.

Where two persons were appointed joint receivers to an estate, the retirement of one of them would not make the order appointing the receivers come to an end, and the estate would not be without a receiver and without the protection for which a receiver is, in fact, appointed. *The Eastern Mortgage and Agency Company, Ltd. v. Premananda Saha*, 23 C.L.J. 217=20 C.W.N. 789=34 Ind. Cas. 789.

WOODROFFE and COXE, JJ.

(3) *Mortgagee, suit by—Court's duty—Hindu widow—Reversioner—Provisional appointment.*

When a mortgagee applies in his suit for appointment of a receiver, the primary question, for consideration is, what steps should be taken to protect the mortgagee.

Under the circumstances of the case, the receiver was directed to take possession only if the mortgagor fails to carry out the undertaking to deposit the Government revenue instalment by instalment, at least 7 days before the date fixed for the payment thereof. *Gobind Rani Das v. Brinda Rani Das*, 23 C.L.J. 440=34 Ind. Cas. 405.

MOOKERJEE and N.R. CHATTERJEE, JJ.

(4) *Appointment of—Principle—Civ. Pro. Code (1908), O. XL, r. 1—'Just and convenient'—Discretion.*

The words 'just and convenient' in O. XL, r. 1, Civ. Pro. Code, mean that the Court should appoint a receiver for the protection of property or the prevention of injury, according to legal principle, and not that the Court can make such appointment because it thinks convenient to do so. They confer no arbitrary and non-regulated discretion on the Court (a).

It is no ground for the appointment of a receiver that allowances payable to beneficiaries under the deed of *wak/nama* were not paid from the time the defendant took possession of the properties as *mutwali*, in the absence of any allegation of waste or mismanagement. If it is found that the estate is in danger, because no longer properly managed, or that difficulties have arisen in connection with litigation about the properties comprised in the estate, or that there is good ground to apprehend that the defendant may misapply trust funds, the Court may properly appoint a receiver. *Hobibullah v. Abtlakallah*, 23 C.L.J. 567=34 Ind. Cas. 693.

Receiver—(Continued).

MOOKERJEE and N.R. CHATTERJEE, JJ.

References:—5 C.L.J. 270=34 C. 305 (315); (1878) 9 Ch. D. 89 (99); (1880) 16 Ch. D. 143 (148), R.

(5) *Guardian of an incapacitated defendant, if can be appointed Receiver—Disqualification, ground for—Appellate Court, interference by, with appointments of receiver made by lower Court.*

There is no inflexible rule that a person who is guardian of an incapacitated defendant in a suit is disqualified to be a Receiver and the Court has to consider the whole circumstances of the particular case in making such appointments.

The appellate Court will not lightly interfere with such appointments unless a general principle can be shown to have been infringed. *A. S. Aiyar Nadar v. Tenammal*, 4 L.W. 285= (1916) 2 M.W.N. 256=35 Ind. Cas. 939.

OLDFIELD and SADASIVA AIYAR, JJ.

(6) *Money in the hands of—Possession of receiver is possession of Court.*

Money in the hands of the receiver must be considered to be money in the custody of the Court the receiver being an officer of the Court.

Quere—Whether the Receiver appointed by the High Court in a suit pending in the Subordinate Judge's Court should be treated as a Receiver appointed by that Court and not by the Subordinate Judge. *Rani Debendra Bala Das v. Babu Chandra Sekhar Prasad Singh*, 1 Pat. L.J. 449=35 Ind. Cas. 589.

CHAMIER, C.J. and SHARFUDDIN, J.

(7) *Appointment for the purpose of collecting rents—Termination of the suit in which appointment was made by decree—Suit for rent instituted after decree and pending an appeal—Maintainability—Authority of Receiver.*

Where, in a suit against an *inamdar*, a receiver was appointed for the collection of rents due to the *inamdar*, and the receiver filed after the date of decree passed on that suit and during the pendency of an appeal against the said decree, a suit to recover rents due to the *inamdar*.

Held that neither the termination of the suit in a decree nor the pendency of an appeal against the decree will put an end to the authority of the Receiver to realise the rents for the collection of which he was appointed receiver and that the suit for rent instituted by him was sustainable. *Maulkam Pillai v. Kuppa Goundan*, 33 Ind. Cas. 69.

SRINIVASA AIYANGAR, J.

(8) *Receiver empowered by Court to sell and convey property in partition suit, including infant's share—Code of Civil Procedure (1908), O. XL, r. 1, cl. (d)—Trustees Act (XXV of 1866), ss. 8, 20, 32.* *Basir Ali v. Hafiz Nazir Ali*, 19 C.W.N. 817=43 C. 124=30 Ind. Cas. 406. See Final Part, 1916, Col. 1175.

(9) *Mortgagee in possession—Grounds to appoint.* *Yenkataram v. Official Receiver*, (1915) M.W.N. 864=32 Ind. Cas. 691. See Final Part, 1915, Col. 1176.

Receiver—(Concluded).

(10) See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 28, 31 Ind. Cas. 884.

(11) Application to the Court for directing the receiver to execute a conveyance—No previous application to the Receiver—Order directing the Receiver to execute without jurisdiction. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 27, 20 M.L.T. 486.

(12) *Ad interim*—Receiver when to be appointed. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 10, 3 L.W. 260.

(13) Pendency of proceedings to appoint common manager under Bengal Tenancy Act—Court's power to appoint *interim* receiver—Order to be based on proper evidence. See BEN. ACT VIII OF 1885 (TENANCY), No. 46, 34 Ind. Cas. 83.

(14) Appointed to realise arrears of rent—If landlord. See MAD. ACT I OF 1903 (ESTATES LAND), No. 7-b, 36 Ind. Cas. 82.

(15) Order refusing to appoint—Appealable order. See APPEAL (GENERAL), No. 15, 33 Ind. Cas. 735.

(16) Right to future maintenance—Whether attachable—Receiver whether can be appointed in execution for realizing such maintenance. See CIV. PRO. CODE (1909), No. 137, 30 M.L.J. 361.

(17) O. XL, r. 1—Civ. Pro. Code—Powers of Receiver—General powers of management of an estate whether include power to appoint Karnam—Effect of S. 15, Madras Act II of 1894—Receiver or Court whether 'proprietor.' See CIV. PRO. CODE (1908), No. 631, 30 M.L.J. 456.

(18) If may be appointed in proceedings to appoint a common manager—*Ex parte* order appointing Receiver if necessarily bad—Remedy of aggrieved party. See CIV. PRO. CODE (1908), No. 636, 20 C.W.N. 1009.

(19) Winding up of company—Application by fully paid up shareholder—Effect of appointment of—Acquiescence to jurisdiction. See COMPANIES ACT (VII OF 1913), No. 5, 36 Ind. Cas. 980.

(20) See COURT FEES ACT, No. 3, 36 Ind. Cas. 831.

(21) Notice to quit given by one of two joint Receivers if valid—Duty of joint Receivers. See EJECTMENT, No. 3, 23 C.L.J. 463.

(22) Mutation proceedings—Property in possession of a *prima facie* right. See HINDU LAW (ADOPTION), No. 15, 34 Ind. Cas. 496.

(23) Appointment of Receiver to realise assets and distribute among creditors—Suit by Receiver for recovery of debt due to insolvent—Maintainability. See INSOLVENCY, No. 2, 95 P.W.R. 1916.

(24) Suit for declaration of title to properties in possession of. See SPECIFIC RELIEF ACT, No. 30, 35 Ind. Cas. 17.

Recess.

Computation of time—Suit filed in wrong Court—Whether plaintiff entitled to add time

Recess—(Concluded).

during recess of wrong Court. See LIMITATION ACT (1908), No. 6, 14 A.L.J. 310.

Recital.

(1) Of boundaries in documents of title—Transaction between third parties—Admissibility of such 'recital.' See EVIDENCE ACT, No. 15, 36 Ind. Cas. 619.

(2) Statement in a sale deed as to ownership of another land given as boundary—Subsequent suit between the purchaser and another about such land—Relevancy. See EVIDENCE ACT, No. 10, 34 Ind. Cas. 534.

(3) In deed, effect of—Operative portion. See HINDU LAW (ADOPTION), No. 14, 1 Pat. L.J. 581.

(4) In deed—Weight to be attached to them as against third parties. See HINDU LAW (WIDOW), No. 14, 20 M.L.T. 335.

(5) In mortgage bond—Effect. See MORTGAGE (GENERAL), No. 32, 1 Pat. L.J. 563.

Record of Rights.

(1) Entries in—Value of—Punjab Tenancy Act, Ss. 104, 103.

It is not until the Record of Rights is finally published that a presumption of its correctness arises, and even then it is only an inconclusive presumption that can be rebutted by other evidence in the case. *Imrit Mahton v. Bahadur Singh*, 34 Ind. Cas. 867.

ATKINSON, J.

References:—27 Ind. Cas. 229=18 C.W.N. 896, F.

(2) See BEN. ACT VIII OF 1885 (TENANCY), No. 48, 34 Ind. Cas. 32.

(3) Evidentiary value. See BEN. ACT VIII OF 1885 (TENANCY), No. 47, 35 Ind. Cas. 424.

(4) Wrong entry in Record of Rights—Suit for declaration—Whether governed by Bengal Tenancy Act—Holding at fixed rates—Evidence of long payment at unchanged rate—Admissibility—Presumption. See BEN. ACT VIII OF 1885 (TENANCY), No. 30, 1 Pat. L.J. 67.

(5) Plaintiff shown as tenant liable to pay rent in Record of Rights—Suit for declaration that he was a *lakhtaraj* tenant not liable to pay rent—Nature of suit—Limitation. See BEN. ACT VIII OF 1885 (TENANCY), No. 59, 1 Pat. L.J. 73.

(6) Entry of occupancy right—Presumption. See BURDEN OF PROOF, No. 3, 34 Ind. Cas. 506.

(7) Dispute as to nature of tenancy—Production of, in appellate Court—Opportunity to opposite party to rebut presumption from production of such document. See CIV. PRO. CODE (1908), No. 666-a, 36 Ind. Cas. 955.

(8) Effect of entries in—Actual claim made on strength of the entry—Limitation. See LIMITATION ACT (1908), No. 201, 23 O.L.J. 561.

Record of Rights—(Concluded).

(9) Entry in, on the strength of such agreement—Power of High Court to enquire into basis of entry. See MORTGAGE (GENERAL), No. 32, 1 Pat. L.J. 563.

(10) Effect of entry in. See RENT, No. 4, 1 Pat. L.J. 521.

Recovery (Public Demands) Act.

* See BEN. ACT I OF 1935.

Recovery (Rent) Act.

See MAD. ACT VIII OF 1865.

Recovery (Revenue) Act.

See MAD. ACT II OF 1864.

Rectification.

(1) Of register—Power of Court—Director's power to refuse to register a share-holder—Court's power to interfere with the discretion—Appeal to High Court. See COMPANIES ACT (1913), No. 3, 18 Bom. L.R. 982.

(2) Mutual mistake in registered document—Suit for rectification if necessary—Mistake if can be proved by oral evidence. See EVIDENCE ACT, No. 72, 3 L.W. 551.

Recurring Right.

Limitation Act (IX of 1908), Art. 131—Demand and refusal—Mere omission to exercise right does not start limitation. See INAM, No. 4, 19 Bom. L.R. 950.

Redemption.

Agreement creating right of, whether requires registration. See REGISTRATION ACT (1908), No. 14, 9 Bur. L.T. 67.

Reductio ad absurdum.

Defective judgment and decree. See CIV. PRO. CODE (1908), No. 287, 170 P.W.R. 1916.

Reference.

(1) *To Judge on Deputy Registrar's order—Civ. Pro. Code (Act V of 1908), O. LII, r. 2—Limitation Act (IX of 1908)—Decree against executor-legatee in his personal capacity—Attachment of money due to judgment-debtor as executor—Civ. Pro. Code, O. II, r. 3.*

The Limitation Act does not apply to references to a Judge on an order by a Deputy Registrar of the Chief Court of Lower Burma, such reference not being an appeal, nor one of the applications set out in the third division of the schedule to the Limitation Act.

Money in the hands of an executor, administrator or heir as such cannot be attached in execution of a decree against such executor, administrator or heir personally, and it makes no difference that the executor is also a legatee and the money in his hands as executor is due to him personally as legatee. It would be opposed to the principle of O. II, r. 5, to allow the attachment but the right, title and interest of the legatee can be attached, and the executor can be restrained from receiving in his personal capacity any portion of the money in his hands as executor. *Hill v. Greenberg*, 9 Bur. L.T. 226.

YOUNG, J.

Reference—(Concluded).

(2) To Chief Court when competent. See CIV. PRO. CODE (1908), No. 289, 73 P.L.R. 1916.

(3) By District Judge of case tried by Small Cause Court—Validity—Interference of High Court. See CIV. PRO. CODE (1908), No. 696, 20 C.W.N. 1110.

(4) Whether can be made when appeal lies—S. 113, Civ. Pro. Code, subject to O. XLVI, r. 1. See PRE-EMPTION, No. 13, 130 P.R. 1916.

Reference to Full Bench.

Judges of Division Bench differing on a question of Law—Course to be adopted—Reference to Full Bench illegal—Reference to one or more of the Judges other than composing the Bench. See PUN. ACT III OF 1914 (COURTS), No. 5, 109 P.W.R. 1916.

Reference to High Court.

Proper mode of making. See ACT III OF 1909 (PRESIDENCY TOWNS INSOLVENCY), No. 7, 39 M. 689.

Refund.

(1) *Money refunded under illegal order, to be brought back into Court.*

The money which has been paid out of Court under an illegal order made without jurisdiction, must be brought back into Court. *Surendra Nath Goswami v. Banglabadan Goswami*, 24 C.L.J. 533=36 Ind. Cas. 457.

MOOKERJEE and CUMING, JJ.

(2) Of purchase money—Right of suit by auction-purchaser—Act XIV of 1882, S. 315, See CIV. PRO. CODE (1908), No. 521, 14 A.L.J. 1216.

(3) Attachment of debt payable outside jurisdiction—Attachment, effect of—Money paid under an illegal order, where to be refunded. See EXECUTION OF DECREE, No. 17, 24 C.L.J. 533.

(4) Mortgage with possession—Suit for, of money advanced by mortgages—Fraud. See LIMITATION ACT (1908), No. 168, 106 P.L.R. 1916.

(5) Suit for specific performance with an alternative claim for, of purchase-money—Limitation Act (IX of 1908), Sch. I, Arts. 62, 97. See VENDOR AND PURCHASER, No. 6, 32 Ind. Cas. 49.

(6) Unenforceable contract of sale, vendor being a lunatic—Right of purchaser—Refund of money paid. See CONTRACT ACT, No. 67, 32 Ind. Cas. 804.

Register.

(1) Rectification of—Power of Court—Director's power to refuse to register a share-holder—Court's power to interfere with the discretion—Limitation Act—Appeal to High Court. See COMPANIES ACT (1913), No. 3, 19 Bom. L.R. 982.

(2) Birth—Admissibility in evidence. See EVIDENCE ACT, No. 22, 10 S.L.R. 98.

Register—(Concluded).

(3) Choukidar's register, value of, as to date of birth or death. See HINDU LAW (REVERSIONER), No. 3, 19 O.C. 221.

Registration.

(1) Agreement to pay enhanced rent—Not registered—Effect. See U. P. ACT II OF 1901 (AGRA TENANCY), No. 28, 14 A.L.J. 57.

(2) Compromise decrees how far operates as *res judicata*—Compromise decrees relating to properties outside the scope of the suit—Effect—Registration whether necessary. See COMPROMISE, No. 2, 1 Pat. L.J. 209.

(3) Compromise not embodied in decree—Agreement to exchange lands—Registration whether necessary. See COMPROMISE, No. 1, (1916) M.W.N. 276.

(4) Registered partition deed silent as to some items of property—Oral evidence, if admissible to explain those items. See EVIDENCE ACT, No. 57, 4 L.W. 329.

(5) Mutation proceedings, of petitions of compromise filed in—Revenue Court, mutation proceedings in. See FAMILY ARRANGEMENT, No. 1, 19 O.C. 75.

(6) Society formed for the purpose of spreading Sanskrit learning—Society not registered—Gift of property to such society prior to, void. See GIFT, No. 1, 14 A.L.J. 1038.

(7) Application for succession certificate as heir—Right as legatee not set up—Genuineness of will not gone into. See LIMITATION ACT (1908), No. 165, 32 Ind. Cas. 99.

(8) Prior unregistered mortgage—Subsequent registered mortgage—Priority. See MORTGAGE (GENERAL), No. 39, 30 Ind. Cas. 388.

(9) Registrar—Admission on re-signing of blank sheets only. See MORTGAGE (GENERAL), No. 49, 35 Ind. Cas. 56.

(10) Search in, office—Constructive notice. See MORTGAGE (GENERAL), No. 29, 43 C. 1052.

(11) Mortgage deed, when comes into operation—Attachment before—Effect. See REGISTRATION ACT (1908), No. 36, 32 Ind. Cas. 431.

(12) Contract to lease—Plea of inadmissibility for want of registration—Validity—Admission of genuineness in pleadings—Effect—Suit for specific performance—Maintainability. See SPECIFIC PERFORMANCE, No. 5, 20 M.L.T. 44.

(13) Unregistered deed of sale—Subsequent sale of same property by registered deed—Suit by first vendee for, of his deed and for declaration that the subsequent transaction was void, whether suit for specific performance. See SPECIFIC RELIEF ACT, No. 14, 4 Pat. L.J. 455.

(14) Execution and, of lease deed—Passing of title—Intention of parties. See TITLE, No. 3, 30 Ind. Cas. 210.

(15) Letter accompanying deposit of title-deeds, giving a personal remedy to the mortgagee, if simple mortgage requiring to be

Registration—(Concluded).

stamped and registered as such. See TRANSFER OF PROPERTY ACT, No. 82, 31 M.L.J. 347.

(16) Sale-deed of property in possession of tenants—Interest conveyed is 'reversion' in the property—Sale-deed should be registered. See TRANSFER OF PROPERTY ACT, No. 53, 18 Bom. L.R. 8.

(17) Widow's interests—Transfer of—Price over Rs. 100—Necessary. See TRANSFER OF PROPERTY ACT, No. 59, 34 Ind. Cas. 748.

(18) Mortgage by conditional sale—Option to purchase. See TRANSFER OF PROPERTY ACT, No. 79, 9 Bur. L.T. 177.

(19) Distinction between creation of an easement and a transfer of an easement. See TRANSFER OF PROPERTY ACT, No. 22, 9 Bur. L.T. 222.

(20) Deed of gift—Requirements of—Donor's death after execution—Compulsory Registration at the donee's instance—Gift, if complete and valid. See TRANSFER OF PROPERTY ACT, No. 147, 31 M.L.J. 690.

Registration Act (1877).

(1) S. 17 (b)—Documents evidencing partition—Registration—Unregistered document—Admissibility for collateral purpose.

Where certain documents referred to one and the same partition and were parts of one whole which was a non-testamentary document extinguishing the rights of plaintiff in certain immoveable property exceeding Rs. 100 in value and acknowledging receipt of other property in lieu of his relinquishment, held, these documents, not being registered, were inadmissible in evidence to prove the partition and could not be looked at in this case for possession of the immoveable property they purported to dispose of. *Jat Mal v. Bell Ram*, 35 P.R. 1916=52 P.W.R. 1916=33 Ind. Cas. 948.

CHEVIS and LE-ROSSIGNOL, JJ.

References:—17 M.L.J. 469; 3 M.L.T. 187, R.; 6 M.L.T. 192; 25 W.R. 211, D.

(2) S. 17 (n)—Receipt releasing liability to pay compound interest as written in mortgage bond—Effect—Registration whether necessary—Admissibility in evidence—S. 92, Evidence Act. *Kallash Chandra Nath v. Sheikh Chhenu*, 42 C. 546=30 Ind. Cas. 804. See Final Part, 1915, Col. 1182.

(3) S. 48—Hypothec—Oral charge on moveable property—Validity—Subsequent written unregistered mortgage—Priority. See MORTGAGE (GENERAL), No. 6, 32 P.R. 1916.

(4) S. 48—Validity of equitable mortgage in places where Transfer of Property Act does not obtain—Priority of such mortgage over subsequent registered mortgage with or without notice. See MORTGAGE (EQUITABLE), No. 1, 31 P.R. 1916.

Registration Act (1908).

(1) U.P. Board of Revenue—No power of reference under the. See U.P. ACT II OF 1903 (BUNDELKHAND ALIENATION OF LAND), No. 3, 14 A.L.J. 422.

Registration Act (1908)—(Continued).

- (2) S. 2 (6)—*Immoveable property*—"Standing timber"—"Standing trees"—*Trees of grove*—*Finding as to question of fact not disputed.*

The word "timber" is used in the English Law to denote trees the wood of which can be used in the building and repairing of houses according to the custom of the locality in which the trees are situated. The term "standing timber" is used in the same sense and when a party purchases the same he must be impliedly considered to purchase the same for industrial uses. It also implies an intention sooner or later to sever the trees from the soil. Otherwise the terms "standing timber" and "standing trees" would be convertible.

Where a mortgagee took a usufructuary mortgage of a tenant's right in a grove consisting merely of fruit bearing trees, as a usufructuary mortgagee he has no right to sever the trees from the ground since he would ordinarily depend for the security of his money on the value of the trees as standing trees and would obtain his interest from their produce. In the absence of evidence to show that the grove holder or the mortgagee contemplated the prospect of severance of trees and use of their wood for industrial purposes, the trees of the grove could not be considered as standing timber. So a mortgage of the above kind held to be a transfer of immoveable property within the meaning of the Registration Act (a).

A Court cannot question a finding of an admitted fact. **Ramman Lal v. Ram Gopal**, 35 Ind. Cas. 713.

STUART and MUHAMMAD ALI, A.J.Cs.

References:—(a) 9 Ind. Cas. 478, Diss.; A.W.N. (1887) 59, *Expl.*; 18 O.C. 122; 2 O.L.J. 285, F.

- (3) S. 2 (6)—*Creation of easement if must be in writing registered.* See EASEMENTS, No. 1, 20 C.W.N. 1158.

- (4) S. 2 (6) and (9)—*Execution of document transferring standing tree—Nature of property moveable or immoveable.*

Where there is a transaction regarding trees in connection with which an instrument of transfer has been executed, the character of the transaction has to be looked at in order to determine whether or not the trees referred to are standing timber and therefore, moveable property or whether they are deemed to be immoveable property. If there is no intention that the trees should be severed and used as timber, the transaction would be treated as one relating to immoveable property. Therefore, a mortgage of a tree without any intention that the tree should be severed from the land and used as timber, can be validly registered under S. 28 of the Registration Act in the office of the Sub-Registrar within whose jurisdiction the tree is situated. **Muhammad Ahmad Shah v. Muhammad Taqi**, 30 Ind. Cas. 281.

LINDSAY, J.C.

References:—9 Ind. Cas. 478, Diss.; 6 M.H.C. R. 71; 28 Ind. Cas. 180—2 O.L.J. 97—18 O.C. 122, R.

Registration Act (1908)—(Continued).

- (5) S. 17—*Evidence Act, S. 92*—*Collateral agreement.*

Where the defendants undertook to get a loan of three lakhs of rupees for the plaintiffs on commission and the plaintiffs leased to the defendants a considerable piece of property out of their kamatam lands at a favourable rental of Rs. 500 when it was found that it could yield a rental of Rs. 1,200, and at the same date the plaintiffs were given by the defendants a document (Exhibit 8) in which the following clause appeared: "If the said loan (of three lakhs) could not be given to you for any reason, I shall have the said pattah and muchilika (that is the lease of even date) cancelled and execute a deed of release in your favour," and the loan was never arranged and the plaintiffs brought the present suit for cancellation of the lease and for the execution of the deed of surrender to them, and the defendants objected that Exhibit 8 was inadmissible as not being registered and varying the terms of the registered lease deed, under S. 17, Registration Act, and S. 92 of the Evidence Act. Held that the document was admissible in evidence as embodying a collateral and distinct agreement. It was exempt under the terms of sub-S. 5, cl. 2 of S. 17 of the Registration Act, and hence did not require registration. It is also outside the operation of S. 92 of the Evidence Act whether it be regarded as itself the contract or as evidence of an oral agreement to the same effect.

Srinivasa Aiyangar, J.—Whether S. 92 of the Evidence Act can have any application to the document Exhibit 8, being in writing and not merely a memorandum of a previously concluded oral agreement. **Yenkata Jagannadha Raju v. Radakrishnaiah**, (1916) M.W.N. 129—30 M.L.J. 302—32 Ind. Cas. 941.

COUTTS-TROTTER and SRINIVASA AIYANGAR, JJ.

- (6) S. 17—*Lease of coal mine—Half share in lease and certain moveable property, etc., assigned by unregistered document for Rs. 12,500—Admissibility in evidence in regard to moveable property—Admissibility for collateral purposes.*

Defendant No. 2 obtained from Government a lease of a coal mine for a period of 15 years. Finding himself in financial difficulties, he made certain representations to the plaintiff concerning the quality of the coal, facilities for working the mine, and the value of certain moveable property, including plant, etc., etc. The plaintiff, while reserving to himself the right to repudiate the bargain in the event of some of the representations proving incorrect, agreed to become joint lessee with the defendant No. 2. They then executed a lease by which defendant No. 2 assigned to the plaintiff a half share in the lease obtained from Government in lieu of an advance of Rs. 12,500 which the plaintiff advanced, and also conveyed to him the moveable property, including plant, etc., for the same consideration. It was further agreed that, if the representations of the defendant No. 2 proved incorrect, the assignee could terminate the arrangement and would be

Registration Act (1908)—(Continued).

entitled to recover the sum of Rs. 12,500 with interest, and that, if repayment was not made, he could both sell the moveable property and continue as joint lessee until the advance was recovered, and even dispose of his share in the lease of the mine in order to recoup himself.

This lease was not registered. Subsequently, in execution of decree against defendant No. 2, defendant No. 1 attached a part of the moveable property conveyed to the plaintiff. Plaintiff thereupon instituted the present suit for a declaration that the property in question is not liable to attachment or sale.

Held, under the circumstances, that the whole transaction must be regarded as one and indivisible, and there was no separate or distinct transaction concerning the moveable property in the unregistered agreement, (a) and it was not admissible in evidence even as regards the moveable property.

Where a document, which as a whole requires registration, contains separable parts which do not require registration, those parts may be admitted in evidence to prove transactions which *ex hypothesi* do not affect immoveable property of the value of Rs. 100 or upwards. But the question whether any particular document is so separable is one which depends on the terms of the document.

There is a clear difference between the use of a document for a collateral purpose and its use to establish directly title in a part of the property conveyed (b). **G. Bevan Petman v. Ganesh Das**, 49 P.R. 1916=149 P.L.R. 1916=144 P.W.R. 1916=34 Ind. Cas. 542.

SHADI LAL and LESLIE JONES, JJ.

References:—(a) 68 P.R. 1886, F.; 15 M. 336 (341), R. (b) 4 Bom. L.R. 883; 9 Bom. L.R. 393, D.

(7) S. 17—*Compromise mentioning lease filed in Court—Unregistered perpetual lease deed—Evidentiary value of.*

Where a *sulehnama* written and filed in Court in a prior suit for ejectment, mentioned a patta but did not call it an *istimrari* (perpetual) lease, and where the terms of the lease were not entered in the *sulehnama*, held in a subsequent suit for ejectment, that the lease was inadmissible in evidence as it was not registered. **Harpal Singh v. Kandhiya Bux Misir**, 31 Ind. Cas. 449.

HOLMS, S. M.

(8) S. 17—*Number of documents constituting lease—Legality—Tank bed land if can be leased for cultivation.*

There is no foundation for the proposition that if a person acquires the rights of a lessee under a number of instruments none of which would constitute a lease, all of them should be lumped together and the whole transaction rejected as invalid in law under S. 17 of the Registration Act (a).

A grant of tank bed land by a zamindar for cultivation is not illegal. **Chitravelu Servai v. Samanna Iyer**, 35 Ind. Cas. 108.

BENSON and SUNDARA AIYAR, JJ.

References:—(a) 7 C. 703; 7 C. 717; 17 M. 456, D.

Registration Act (1908)—(Continued).

(9) S. 17—*Petition of compromise presented to Court—Whether registration necessary.* **Robert Skinner v. Mrs. James Skinner**, 91 P.R. 1915=31 Ind. Cas. 537. See Final Part, 1915, Col. 1184.

(10) S. 17—*Document embodying agreement between brothers limiting the right of their widows to receive maintenance and excluding them from claiming life-estate in their immoveable properties—Failure to register—Inadmissibility in evidence.* See **CUSTOMS (PUNJAB)—INHERITANCE AND SUCCESSION**, No. 4, 8 P.R. 1916.

(11) S. 17. See **FAMILY ARRANGEMENT**, No. 1, 19 O.C. 75.

(12) S. 17—*Wakf—Subsequent trusteeship appointing a co-mutwalli—Registration if necessary—Aligarh college a beneficiary—Sub-Registrar a trustee of that college—Authority to register—R. 174 of the Registration Rules (U. P.)—Effect.* See **MAHOMEDAN LAW (WAKF)**, No. 2, 14 A.L.J. 554.

(13) S. 17. See **TRANSFER OF PROPERTY ACT**, No. 69, 35 Ind. Cas. 373.

(13-a) S. 17. See No. 39, *infra*.

(14) S. 17 (1) (b)—*Sale and resale—Immoveable property—Agreement creating right of redemption requires registration.*

Where the effect of an agreement set up is to create a right of redemption of immoveable property worth over Rs. 100, whether absolutely or for a time, the writing falls within the meaning of S. 17 (1) (b) of the Registration Act and, therefore, requires registration. **Ma. Thin v. H. M. Yassin**, 9 Bur. L.T. 67=31 Ind. Cas. 890=32 Ind. Cas. 694.

PARLETT, J.

References:—27 M. 348; A.W.N. (1906) 180, R.

(15) S. 17 (1) (b) (c)—*Construction of deed—Agreement to sell or sale-deed—Agreement to sell not compulsorily registrable—Receipt of earnest money—Proof—Evidence Act, S. 91.*

A document which begins by saying "I have absolutely sold the land," but the real meaning of which is expressed in the subsequent words—"I will take the remaining money at the time of the completion of the sale-deed. I shall get the sale-deed completed after going to the spot," is really only a promise to sell by means of a regular deed, plus an acknowledgment of receipt of an earnest money. Such a document does not come under S. 17 (1) (b), Registration Act, and consequently is not compulsorily registrable (a).

A receipt for the Rs. 600 earnest money included in the above mentioned document would require registration under S. 17 (1) (c), of the Registration Act. The fact that such receipt would require registration and was not registered would not affect the agreement to sell as the two parts of the document are separable, and oral evidence of the payment of the earnest money would be admissible under S. 91 of the Evidence Act (b). **Sharaf Ali Khan v. Jagannad Singh**, 98 P.R. 1916.

Registration Act (1908)—(Continued).

JOHNSTONE, C.J., and SCOTT-SMITH, J.

References:—(a) 184 P.R. 1889 (F.B.) R.
(b) 73 P.L.R. 1910; 4 B. 126 (F.B.) R.

(16) S. 17 (1) (b)—*Lease for one year—Necessity for registration*

A lease for a year with a fixed rent does not fall within the meaning of S. 17 (1) (b) of the Registration Act, as it does not amount to a lease from year to year or one reserving a yearly rent, and does not therefore require registration. **Maung Aung Hmin v. Moulandy Serval**, 36 Ind. Cas. 378.

MAUNG KIN, J.

References:—3 A. 405 = A.W.N. (1886) 170; 14 B. 320, R.

(17) S. 17 (2) (a)—*Civ. Pro. Code (1908), O. XXIII, r. 3—Compromise of suit—Razinama, if requires registration—Evidence, admissibility of razinama in. Musammat Jee v. Jaimal Singh*, 90 P.W.R. 1915 = 29 Ind. Cas. 311 = 1 P.L.R. 1916, See Final Part, 1915, Col. 1185.

(18) Ss. 17, 49—*Unregistered deed of sale—Admission of sale by vendor—Inadmissibility of sale deed in evidence—Mutation proceedings admissible to prove alienation irrespective of the sale-deed.*

In the present case T, one of the four brothers sold his whole holding under an unregistered deed of sale to B, one of his brothers, but the Revenue authorities found that the sale was in reality to all three brothers of T, and accordingly effected mutation of T's holding in favour of his three brothers in equal shares. B took possession of nearly whole of this land. R, got decree for his $\frac{1}{3}$ share on the strength of the mutation and the deed of sale was not admitted in evidence.

Held, that an unregistered deed of sale of immovable property of the value of Rs. 100 or more is not admissible in evidence to affect the interest of a third person in that property who is no party to the deed even if the vendor himself admits the *factum* of the sale. **Ram Singh v. Batan Singh**, 110 P.W.R. 1916 = 36 Ind. Cas. 374.

BROADWAY, J.

(19) Ss. 17 and 49—*Deed of partition of moveables and immoveables—Registration necessary.*

Where a partition deed ran "As we have in the presence of the under-mentioned panohaytars divided, into equal moieties, the cash, moveables, and immoveables, Court-decrees, etc., of which we are now possessed valued at Rs. 80,000, our connection shall hereafter be only by relationship but we shall have no monetary connection in respect of those properties."

Held, that the deed had the effect of causing immovable properties, theretofore held by the co-parceners as joint-tenants, to be held by them, thenceforward, as tenants-in-common, and was therefore compulsorily registrable under S. 17, Registration Act, and in the absence of registration the deed could not affect immovable property comprised therein or be received as evidence of any transaction affecting it.

Registration Act (1908)—(Continued).

Held further, that the deed was not admissible to prove a partition of moveables even, as the deed formed one indivisible transaction and it was not the intention of the parties that the moveables should be partitioned apart from the immoveables. **Pothl Nalkin v. Naganna Naiker**, 19 M.L.T. 50 = 3 L.W. 115 = 30 M.L.J. 62 = (1916) M.W.N. 79 = 32 Ind. Cas. 486.

WALLIS, C.J., SADASIVA AIYAR and SESHAGIRI IYER, JJ.

Reference:—15 M. 336, D.

(20) Ss. 17 and 49—*Petition for transfer of registry—Recital of a prior gift—Registration, if essential—Admissibility in evidence*, Two ladies R and A presented a petition to a Collector on 10th October 1895, praying that the registry of a certain Mitta should be transferred in the name of one D. The petition recited that the villages had been given as *Stridhanam* to D, on 8th October 1895, and concluded as follows: "The said D shall hold and enjoy them (the villages) with the right of alienation thereof by way of gift, mortgage, sale, etc."

Held by the Full Bench that the petition containing the above recitals was not a document declaring the rights of the parties within the meaning of S. 17, Registration Act, and did not require registration, and that consequently it was not rendered inadmissible by S. 49, Registration Act, for proving the nature of the subsequent possession of D (a).

Per **Santharan Nair and Coutts-Trotter, JJ.**—A Hindu, who was childless, by his last will and testament, devised a greater portion of his properties in favour of the sons of his eldest brother and made a bequest of certain immovable properties to his wife. The Will recited that the bequest to the wife was "on account of her maintenance and other absolute use" and that she was "at liberty to enjoy the same with powers of alienation by sale, etc."

Held that the estate conferred was one of absolute interest and not merely a life interest for maintenance.

Per **Coutts-Trotter, J.**—According to Indian Law unexecuted or draft wills may, in some cases, be properly given effect to as valid testamentary dispositions.

A transfer of registry in the Collector's register is some evidence of a transfer of ownership.

Exclusion of evidence under statutory provisions should be confined strictly to the exclusion laid down in the statute. **Jeevarathnamal v. Varada Pillai**, 3 L.W. 1 = (1916) M.W.N. 17 = 19 M.L.T. 52 = 32 Ind. Cas. 111 (F.B.).

WALLIS, C.J., ABDUR RAHIM and SESHAGIRI AIYAR, JJ.

Reference:—(a) 5 B. 232, F.

(21) Ss. 17 and 49—*Transfer of Property Act, S. 107—Agreement to lease for more than a year constituted by correspondence contained in several letters—Registration, if compulsory.*

Having regard to the fact that, whenever the legislature desired to exclude documents creating particular rights, it has specifically

Registration Act (1908)—(Continued).

mentioned them as will be apparent from the several clauses to sub S. (2), the policy indicated by S. 17 of the Registration Act is that all documents other than those excepted in sub-S. (2), creating rights in immoveable property, as distinguished from documents merely entitling parties to obtain a document creating such rights, should be registered.

For an agreement to lease immoveable property to be compulsorily registrable, it is not necessary that the right should have been created by a single instrument. The term 'documents' appearing in the phrase 'the following documents' in S. 17 of the Registration Act is wide enough to cover more than one letter creating a lease.

Where an agreement to lease is evidenced by more than one letter, the whole correspondence or at any rate the letters containing the offer and the acceptance must be registered. *Messrs. Morgan and Son v. Fernandez*, 3 L.W. 370=19 M.L.T. 377=(1916) M.W.N. 373=30 M.L.J. 519=33 Ind. Cas. 439.

AYLING and NAPIER, JJ.

References:—Appeal No. 201 of 1908, *Not F.*; 17 M. 456, D.

(22) Ss. 17, 49—*Settlement of disputes in mutation proceedings—Petition to Revenue Court—Admissibility in evidence—Family settlements—Registration.*

A separated Hindu died leaving him surviving a widow and a daughter. He had effected two usufructuary mortgages over his property. After his death his widow was recorded in respect of his property. She also created another mortgage. Upon her death disputes arose between her daughter and one of the reversioners in regard to the entry of names before the Revenue Court. A settlement was there come to according to which the daughter gave up all claims to the property in favour of the contesting reversioner and the latter agreed to pay off the encumbrances existing on the property and executed two simple bonds in favour of a third party nominally, but in reality in favour of the daughter. A petition was presented to the Revenue Officer intimating to him the fact of the compromise arrived at between the parties and praying for the entry of the reversioner's name in accordance therewith. Mutation was made in terms thereof. The reversioner, however, did not discharge the debts. Thereupon the daughter brought a suit for possession. Neither the compromise nor the petition to the Revenue Court having been registered, it was objected that the documents were not admissible:

Held, that the plaintiff's suit should be decreed.

Held by Richards, C.J., that a document which purports or operates to create or extinguish some right to or interest in immoveable property of the value of Rs. 100 or upwards, even if it is a document connected with a family settlement, is compulsorily registrable. *Jagrans v. Blaheshare Dube*, 14 A.L.J. 449=38 A. 366 (F.B.)=35 Ind. Cas. 701.

RICHARDS, C.J., TUDBALL and RAFIQ, JJ.

Registration Act (1908)—(Continued).

(23) Ss. 17 and 49—*Document requiring registration not registered—Admissibility for collateral purpose—Letter setting out terms of equitable mortgage and authorizing the receiving of title deeds from another—Necessity for registration.*

A letter setting out the terms of a contract of equitable mortgage and authorizing the addressee to receive the title deeds from a third party is a document which creates a charge and thus affects immoveable property and is compulsorily registrable (a).

An unregistered document which is compulsorily registrable is not admissible even for a collateral purpose (e.g.) to prove a covenant for the payment of compound interest. *Swami Chetty v. Ethirajulu Naidu*, 3 L.W. 585=(1916) 2 M.W.N. 84=34 Ind. Cas. 553.

WALLIS, C.J. and PHILLIPS J.

Reference:—(a) 11 Beng. L.R. 405, D.

(24) Ss. 17 and 49—*Unregistered lease, terms of, whether admissible for proving fair rent for use and occupation. Annamalai Chetty v. Poosari Suppa Thevan*, 2 L.W. 1016=(1916) M.W.N. 5=31 Ind. Cas. 279. See Final Part, 1915, Col. 1186.

(25) Ss. 17 and 49—*Book containing a formal declaration of division of status of members of a joint Hindu family unregistered—Admissibility in evidence for proving divided status of the family. Ayyakutti Mankondan v. Perlasami Koundan*, 2 L.W. 1184=30 M.L.J. 404=31 Ind. Cas. 615. See Final Part, 1915, Col. 1186.

(26) Ss. 17, 49—*Unregistered lease—Admissibility in evidence to prove tenancy or terms. See LANDLORD AND TENANT*, No. 10, 3 L.W. 408.

(27) Ss. 17 and 49—*Unregistered sale-deed of land of less than Rs. 100 in value—Admissibility in evidence. See TRANSFER OF PROPERTY ACT*, No. 55, (1916) 2 M.W.N. 136.

(28) Ss. 17, cl. (b), 49. See *TRANSFER OF PROPERTY ACT*, No. 82, 31 M.L.J. 347.

(29) Ss. 25, 34, 72, 76 and 77—*Document presented for registration on the last day—Advice by the Sub-Registrar to present it next day—Refusal by the Registrar to excuse the delay—Communication of the order by the Sub-Registrar—Whether "refusal to admit document to registration" under S. 72, cl. (1)—Suit for a decree directing registration—Maintainability Jurisdiction.*

The respondent presented a document to a Sub-Registrar for compulsory registration on the last day of the period fixed by law for presentation, and the Sub-Registrar being too busy to find time to receive the document and issue summons to the executant, advised the respondent to present the document next day with an application to the Registrar under S. 25, cl. (2) of the Registration Act for excusing the delay in not having presented it earlier. The Registrar, on the application being forwarded to him, did not excuse the delay and the Sub-Registrar passed a final order refusing to register the document. Thereupon an

Registration Act (1908)—(Continued).

appeal was preferred to the Registrar which was dismissed.

Held per Seshagiri Iyer, J.—The order of the Sub-Registrar was an order "refusing to admit a document to registration" within the meaning of S. 72, cl. (1) of the Registration Act and there was an appeal to the Registrar against that order and the dismissal of such an appeal furnished a ground for a suit under S. 77.

Held also that, even otherwise, the appeal might be regarded as an original application to the Registrar to excuse the delay, and the dismissal of the appeal was in effect refusing "to direct the Sub-Registrar to register the document" within the meaning of S. 76, cl. (b) and such a refusal furnished a cause of action for a suit under S. 77.

Per Bakewell, J.—The order of the Sub-Registrar was not an order "refusing to admit a document to registration" within the meaning of S. 72, cl. (1) and no suit lay under S. 77.

Even if the action of the Sub-Registrar be taken as equivalent to an acceptance of a document for registration and a refusal to admit it to registration under S. 34, and the application for enlargement be regarded as made under that section and not S. 25, the Registrar having, in refusing further time, exercised discretion expressly given by statute, the Court had no jurisdiction to interfere. **Gangadara Mudali v. Sambasiva Mudali**, 19 M.L.T. 397 = (1916) 2 M.W.N. 38 = 34 Ind. Cas. 769.

SESHAGIRI IYER and BAKWELL, JJ.

(29-a) S. 327 See No. 45, *infra*.

(30) Ss. 32 and 33—*Presentation of documents for registration by an agent of executant or claimant.*

Although a person who can present the document for registration is present and acquiesces in the presentation yet if he is not the person who presents the document for registration, and it is presented by a person who has no authority to present it, the registration is invalid (a)

When a document is presented by an agent it is for the principal to prove that such agent held a power of attorney duly authenticated by the registrar within whose district the principal resides, or that the power of attorney was otherwise recognizable under S. 33 of the Registration Act. **A.M.V. Chetty Firm v. Subaya**, 9 Bur. L.T. 197.

ORMOND and TWOMEY, JJ.

Reference :—(a) 19 C.W.N. 382, F.

(31) Ss. 32, 34, 35, 72 and 75, scope of. See **TRANSFER OF PROPERTY ACT**, No. 147, 31 M.L.J. 690.

(32) Ss. 32, 35—*Document—Presentation by minor for registration—Minor claiming under the document—Registration—Validity—Deed of gift—Attestation by two witnesses—One witness described as 'scribe'—Effect—Validity of attestation.*

Where in a deed of gift, under the title 'witness or witnesses,' two names one above the other appear and the one below has opposite to it the words 'the scribe,' held that both the names were names of witnesses and

Registration Act (1908)—(Continued).

that the second witness was described as the scribe because he happened to have written the document.

The presentation of an instrument for registration made by a minor who claims under the instrument presented is not invalid and the instrument if registered on such presentation is not rendered void (a). (*Vide* Ss. 32, 35, Registration Act, 1905). **N.A.P.K. Chetty Firm v. Ma On Shwe**, 33 Ind. Cas. 93.

MAUNG KIN, J.

Reference :—(a) 5 A. 599, R.

(32-a) S. 33. See No. 30, *supra*.

(32-b) S. 34. See Nos. 29, 31, *supra* and 45, *infra*.

(33) S. 35—*Registration of deed of gift—Death of donor—Execution admitted by donee—Registration if proper.*

The donee under a deed of gift is an "assign" of the executant within the meaning of S. 35 of the Registration Act and may, when the donor is dead, admit the execution of the deed before the Registering Officer. **Akhoy Chandra Majhi v. Manmatha Nath Chatterjee**, 20 O.W.N. 1345.

FLETCHER and TEUNON, JJ.

(34) S. 35—*Interlineation at end of deed—Denial of execution by executant.* **Yeerappa Chettiar v. Visvanatha Aiyar**, (1915) M.W.N. 543 = 30 Ind. Cas. 507. See Final Part, 1915, Col. 1187.

(34-a) S. 35. See Nos. 31, 32, *supra* and 45, *infra*.

(35) S. 35 (3). See **MORTGAGE—GENERAL**, No. 49, 35 Ind. Cas. 56.

(35-a) S. 38. See No. 45, *infra*.

(36) Ss. 47, 50—*Mortgage deed, when comes into operation—Attachment before registration—Effect.*

Where after the execution of a mortgage and before it is registered a person holding an unregistered mortgage sues upon his mortgage and obtains an order of attachment against the property on which he holds a prior but unregistered mortgage, he does not thereby acquire priority over the registered mortgage, as a registered document operates from the date of its execution and not from the date of registration. **Yeerakutty Koundan v. Ramaswami Asari**, 32 Ind. Cas. 431.

ABDUR RAHIM and AYLING, JJ.

(37) S. 48—*Oral gift—Possession with mortgage—Subsequent registered instrument—Priority.*

Where property which was orally gifted in this case was in the possession of mortgagees and possession could not be and was not delivered to the donee, held that a subsequent transfer by a registered instrument must prevail over the oral gift under S. 49, Registration Act. **Dost Muhammad Khan v. Dost Muhammad Khan**, 30 P.R. 1916 = 34 Ind. Cas. 920.

JOHNSTONE, C.J. and CHEVIS, J.

References :—10 P.R. 1900, R.; 9 M. 267; P. L.R. 1900, p. 131, D.

Registration Act (1908)—(Concluded).

(38) S. 48—Oral sale without possession—Subsequent sale by registered deed—Notice of first sale—Priority. See *SALE*, No. 8, 1 P.W. R. 1916 (N.W.F.P.).

(38-a) S. 49. See Nos. 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, *supra*.

(38-b) S. 50. See No. 36, *supra*.

(39) Ss. 50 (1), 17—No priority of registered sale-deed over a contract for sale previous to such deed. See *SALE*, No. 2, 14 A.L.J. 111.

(40) S. 57 (5). See *EVIDENCE ACT*, No. 31, 36 Ind. Cas. 673.

(41) S. 60—Proof of execution of document—Effect of endorsement of Registrar. See *DOCUMENTS*, No. 1, 19 O.C. 23.

(42) S. 60 (2). See *EVIDENCE ACT*, No. 43, 18 O.C. 372.

(43) S. 61 (2). See *LIMITATION ACT* (1908) No. 199, 14 A.L.J. 382.

(43-a) S. 72. See Nos. 29, 31, *supra*.

(43-b) S. 73. See No. 45, *infra*.

(43-c) S. 75. See No. 31, *supra*.

(43-d) S. 76. See No. 29, *supra*.

(44) S. 77—Scope of suit under—Court not concerned with validity of document.

In a suit under S. 77, *Registration Act*, 1908, the only questions that can be considered are:—Whether the document was executed and whether it was presented for registration within the time as provided for in that Act. The Court is not concerned with the validity of the document. If the document was executed by the defendants, the plaintiff would be entitled to a decree even if it was not freely executed and even if it was not a *bona fide* document. *Jogendra Nath Datta Chowdhury v. Haridas Chong*, 35 Ind. Cas. 778.

NEWBOULD, J.

Reference:—14 C.W.N. 12, F.

(44-a) S. 77. See No. 29, *supra*.

(45) Ss. 77, 32, 34, 35, 38, 73—Suit to compel registration—Document executed by one on behalf of another—Person actually signing—Proper person to be made defendant—Duty to assist registration—'Person executing the document'—Meaning of the phrase *Motilal v. Ganga Bai*, 11 N.L.R. 177=31 Ind. Cas. 867. See Final Part, 1915, Col. 1189.

(46) S. 90. See *RAJINAMA*, No. 1, 18 Bom. L.R. 976.

Regulation.

- 1.—IMPERIAL
- 2.—BENGAL.
- 3.—BOMBAY.
- 4.—MADRAS.

—1.—Imperial Regulation.**Regulation (1781) (Administration of Justice).**

(1) Ss. 46, 84. See *LEGAL PRACTITIONERS*, No. 1, 24 C.L.J. 382.

(2) S. 84. See No. 1, *supra*.

Regulation—(Continued).**—1.—Imperial Regulation—(Concluded).****Regulation XXVII of 1814 (Yakils).**

Preamble, Ss. 3—5, 10—14, 18, 20—22, 30, 35, 37. See *LEGAL PRACTITIONERS*, No. 1, 24 C.L.J. 382.

—2.—Bengal Regulation.**Regulation II of 1793 (Bengal Land Revenue).**

(1) See *BEN. ACT VIII OF 1876* (ESTATES PARTITION), No. 2, 1 Pat. L.J. 491.

Regulation VII of 1793 (Bengal Yakils).

See *LEGAL PRACTITIONERS*, No. 1, 24 C.L.J. 382.

Regulation V of 1799 (Bengal Wills and Intestacy).

S. 5—Order if can be made, when no regular suit has been brought by the claimants.

When no regular suit has been brought by the persons who claim the property dealt with by the Court, an order under S. 5 of Reg. V of 1799 is *ultra vires*. *Balla Koer v. Bandram Sahu*, 20 C.W.N. 823.

STEPHEN and MULLICK, JJ.

Regulation XXXI of 1803 (Ben. Regulation).

S. 6—Sale-deed reserving condition that vendee would pay revenue for land sold as well as for land not sold—Validity of covenant. See *SALE*, No. 6, 14 A.L.J. 266.

Regulation II of 1805 (Bengal).

S. 2 (2). See *BEN. REGULATION I OF 1886* (ASSAM LAND AND REVENUE), No. 2, 20 C.W.N. 576.

Regulation XVII of 1806 (Bengal Land Redemption and Foreclosure).

(1) *Mortgage by conditional sale—Mortgagor a minor—Service of notices on de facto guardian though not described as such—Validity*. *Jowala Singh v. Tulsa Ram*, 78 P.R. 1915=173 P.W.R. 1915=31 Ind. Cas. 212. See Final Part, 1915, Col. 1190.

(2) S. 7—Scope of the term "legal representative," in S. 7—Right of purchaser of equity of redemption to make deposit—Meaning of 'amount due' in proviso to S. 7—Sufficiency of deposit—Part-owner of equity of redemption—Right to redeem whole mortgage. *Fazl-ud-din v. Kharak Singh*, 83 P.R. 1915=141 P.W.R. 1915=31 Ind. Cas. 230. See Final Part, 1915, Col. 1191.

(3) Ss. 7, 8—Foreclosure—Demand—Failure to frame an issue on the plea raised by defendant—Plaintiff not bound to produce evidence to silence the plea.

Held, that, although it is compulsory for the mortgagee to prove that he made a demand upon the mortgagor for the mortgage-money before applying for issue of a notice under S. 8 of Reg. XVII of 1806, the former is not bound to do so where no issue has been framed on the subject, and therefore his claim for possession

Regulation—(Continued).**—2.—Bengal Regulation—(Continued).****Regulation XVII of 1806 (Bengal Land Redemption and Foreclosure—(Concluded)).**

of the mortgaged property as owner cannot be dismissed without giving him an opportunity of proving that the demand had been made. **Glan Chand v Chanan Shah**, 2 P.W.R. 1916 = 39 P.L.R. 1916 = 32 Ind. Cas. 809

JOHNSTONE, C.J.

(4) S. 8. See No. 3, *supra*.

Regulation XXIX of 1814 (Bengal Ghatwali Lands).

Powers of Deputy Commissioner under. See **GHATWALI TENURE**, No. 1, 1 Pat. L.J. 197.

Regulation VIII of 1819 (Putni).

S. 8 — Sale of putni—Non-publication of notice for period fixed by law—Removal of notice from board in Collector's Court—Invalidity of sale.

Where notice for sale of a putni was affixed to the notice board in the Collector's Court and was removed, sometime after they were affixed. *Held* that the sale conducted was invalid as there was no publication for the period required immediately proceeding the sale of putni. **Chand Mahatab Bahadur v Mamezedar Rahiman**, 36 Ind. Cas. 917.

FLETCHER and TEUNON, JJ.

References:—17 C. 474 = 8 Ind. Dec. (N S.) 855, R.

Regulation III of 1822 (Bengal Board of Revenue).

(1) See BEN. ACT VIII OF 1876 (ESTATES PARTITION), No. 2, 1 Pat. L.J. 491.

Regulation XI of 1825 (Bengal Alluvion and Diluvion).

(1) S. 4—Whether the section applies to accretions from bed of private river.

S. 4 of Reg. XI of 1825 is not limited in its application to a river the bed of which is not the property of the Crown. **Puri Dass v Khanu Behera**, 1 Pat. L.J. 536.

MULLICK and ATKINSON, JJ.

References:—14 W.R. 254; 11 C.L.J. 148, F.; 14 W.R. (P.C.) 11, R.

Regulation X of 1829 (Bengal).

Ss. 3, 17 and Sch. A, Arts. 3, 20. See **STAMP**, No. 1, 18 Bom. L.R. 904.

Regulation I of 1886 (Assam Land and Revenue).

(1) Ss. 6, 71, scope of—Ejectment—User for agricultural purpose—True test—Occupancy right, acquisition of by 12 years' possession, effect of. **Brajabasi Koer v. Ram Sankar Das**, 29 Ind. Cas. 834 = 23 C.L.J. 638. See Final Part, 1915, Col. 1197.

(2) S. 28, Provisos 2 and 4—Land revenue, assessment with, of land claimed as lakheraj—Government's right to assess if may be barred by limitation.—Reg. II (Bengal) of 1805, S. 2, sub-S. (2).

Regulation—(Continued).**—2.—Bengal Regulation—(Continued).****Regulation I of 1886 (Assam Land and Revenue—(Continued)).**

* Where the right of Government to assess certain lands claimed as *lakheraj* with land revenue appeared to have accrued either in 1793 or 1842, the case being governed by sub-S. 2 of S. 2 of (Bengal) Regulation II of 1805 until it was repealed, so far as regards Assam, by S. 28 of Assam Regulation I of 1886.

Held—that, at the end of 60 years, calculated from either of the above dates, Government's right to assess the land with land revenue was time-barred.

Per **D. Chatterjee, J.**—The proposition that the right to assess revenue is a Sovereign right and cannot be lost can have no application when there is a period of limitation provided by statute such as is contained in Reg. II of 1805.

Per **Beachcroft, J.**—Government can divest itself of the right to assess revenue and can make such regulations for the guidance of its officers as will have the same practical result as a renunciation of the right to assess revenue.

Proviso 4 to S. 28 of the Assam Regulation I of 1886 would seem intended to reproduce the rule of 60 years' limitation provided by S. 2 of Regulation II of 1805. Its effect is to save the land from assessment if the owner can prove 60 years' possession without payment of revenue, unless Government can prove that at some time within the 60 years, there was a cessation of the assessee's right to so hold it, and this is not affected by proviso 2 to the same section.

Per **D. Chatterjee, J.**—The proviso excepts a particular class of lands from the operation of the enacting part of the section and no question of giving retrospective operation to the enactment arose in the case (a).

Cl. 2 of the proviso would authorize the assessment of lands excepted from the Permanent Settlement if they were not saved by any of the other excepting clauses of the proviso, and cl. 4 saved the lands in suit from assessment. **Ananda Kumar Bhattachari v. The Secretary of State**, 20 C.W.N. 576 = 23 C.L.J. 506 = 32 Ind. Cas. 774 = 43 C. 973.

D. CHATTERJEE and BEACHCROFT, JJ.

References:—(1846) 12 Q.B. 120, 127, R.

(3) Ss. 35, 36, 39, 154 (1)—Suit, maintainability of—Registration of name refused—Declaration of title—Decree for possession. **Askar Mian v. Sahedali Bara Bhuyian**, 22 C.L.J. 328 = 31 Ind. Cas. 424. See Final Part, 1915, Col. 1197.

(4) S. 36. See No. 3, *supra*.

(5) S. 39. See No. 3, *supra*.

(6) Ss. 63, 70, 71—Purchaser, rights of—Sale on account of arrear of Land Revenue—Unrecorded proprietor of the estate—Tit acquired by adverse possession.

Regulation—(Continued).**—2.—Bengal Regulation—(Concluded).****Regulation I of 1886 (Assam Land and Revenue)—(Concluded).**

On a sale held under S. 70 of the Assam Land and Revenue Regulation on account of an arrear, a person, who has acquired a good title by adverse possession against the original proprietor at the time of sale, is a defaulter and cannot assert a good title as against the purchaser, an unrecorded proprietor of the estate.

What is sold is the estate and the purchaser is entitled to take that estate as against the defaulting proprietors. **Aftar Ali v. Brojendra Kishore Roy Chowdhury**, 24 C L.J. 60.

MOOKERJEE and RICHARDSON, JJ.

(7) S. 70. See No. 6, *supra*.

(8) Ss. 70, 80, 85—*Limitation—Sale for arrears—Person in adverse possession for less than statutory period, if a defaulter—Symbolical delivery of possession to purchaser, effect of, against such person—Sale certificate, if conclusive—Confirmation of sale, date of—Sale, when final—Limitation Act (1908), Sch. I, Art. 144.*

A person who had no interest in an estate was in adverse possession of lands really included in the estate which was sold under S. 70 of the Assam Land and Revenue Regulation; he claimed those lands as situated within a neighbouring estate owned by him; his adverse possession had not at the time of sale continued for the statutory period so as to ripen into ownership:

Held, that he was not a defaulting proprietor at the date of the sale and, as he was a stranger to the proceedings for delivery of possession, the symbolical delivery could not avail against him.

What is stated in the sale certificate as the date of confirmation of sale cannot operate in law as the date when the sale became final under S. 80 of the Assam Land and Revenue Regulation. **Jitendra Kumar Pal Chowdhury v. Mohendra Chandar Sarma**, 24 C L.J. 62.

MOOKERJEE and WALMSLEY, JJ.

(9) S. 71. See Nos. 1, 6 *supra*.

(10) S. 80. See No. 8, *supra*.

(11) S. 85. See No. 8, *supra*.

(12) S. 154. See No. 3, *supra*.

Regulation XIV of 1910 (Bengal)..

S. 4. See GHATWALI TENURE, No. 1, 1 Pat. L.J. 197.

—3.—Bombay Regulation.**Regulation IV of 1827 (Bombay Civil Courts).**

Cl. 26—Rule of pre-emption—Applicability to Khandesh District. See MAHQMEDAN LAW (PRE-EMPTION), No. 1, 18 Bom. L.R. 81.

Regulation VII of 1900 (Aden Settlement).

Cl. 13—Rules made by Resident at Aden for assessing rating values—Rateable values arrived at in appeal to Resident's Court and noted in assessment lists were final—Rule taking away jurisdiction of Civil

Regulation—(Continued).**—3.—Bombay Regulation—(Concluded).****Regulation VII of 1900 (Aden Settlement)—(Concluded).**

Court to examine propriety of values fixed—Rule ultra vires.

The Resident at Aden has been authorized by Cl. 13 of the Aden Settlement Regulation, 1900, to make rules, with the previous sanction of the Local Government, to provide for certain specified matters which included "the assessment and collection of any toll, cess, tax or other impost imposed under the Regulation." The rules so made provided *inter alia* for the preparation of an assessment list containing 'the annual letting value or other valuation on which the property is assessed,' for complaints to the Executive Committee where any property was for the first time being entered in the list or in which the entered rateable value had been increased, and for appeals against any rateable value to the Judge of the Resident's Court. Rule 12 provided that after appeals, if any, were decided and the results noted in the assessment list, 'all rateable values so entered in the list shall be final.' The lower Courts held that the rule made the decision of the Judge of the Resident's Court in a rating appeal final, in the sense that the person aggrieved could not institute a civil suit to call the valuation into question.

Held, that the r. 12, as read by the lower Courts, amounted to 'the creation of a jurisdiction which the legislature withheld;' and was therefore *ultra vires*. **Abdullah Lalji v. The Executive Committee, Aden**, 18 Bom. L. R. 296=40 B. 446=34 Ind. Cas. 141.

SCOTT, C.J. and HEATON, J.

—4.—Madras Regulation.**Regulation XXV of 1802 (Madras Permanent Settlement).**

(1) S. 4—*Inams—Jodi payable by Inamdar to Zemindar, whether excluded in fixing the peishchush—Resumption and levy of full assessment by Government, if takes away the liability to pay Jodi—'Favourable quit rent,' what is. Adappa Bapanna v. Raja Gopala Rao Bahadur*, 2 L.W. 1212=31 Ind. Cas. 813. See Final Part, 1915, Col. 1150

(2) Ss. 4, 12 and 13—*Sunnad granted to zamindar—Permanent Settlement of revenue—Certain inams not specially reserved—Right of Government to resume or assess such lands to public revenue—Grant—Construction—Grant whether ultra vires—Res judicata—Decision on two grounds—Both res judicata—Question of law erroneously decided—How far res judicata.*

After the East India Company had obtained assignments from the Nawab of the Carnatic of the revenues of certain estates, they granted separate sunnads to the holders of the Estates. The assignment contained a provision restraining the company from raising the Peishchush of the Poligars. In pursuance of the assignment,

Regulation—(Continued).**—4.—Madras Regulation—(Continued).****Regulation XXV of 1802 (Madras Permanent Settlements)—(Concluded).**

a *sunnad* was granted to the zamindar of Venkatasagiri fixing permanently the *Peishcush* payable by him. This amount was arrived at by adding to the established *Peishcush* the equivalent for the military service but exclusive of the revenue for salt, sayer and abkari, and "exclusive of all lands and rasmums heretofore appropriated to the cost of the Police establishment." The *sunnad* recited that it contained an abstract of the rights and obligations of the zamindar. The inam lands in question in the suit forming part of the zamindari were not excluded as they were Police lands. Government now attempted to levy a fresh assessment in respect of them. Government had already filed a suit in 1818 in the Provincial Court of Nellore for establishing this right and had failed. The present suit was by the zamindar against the Government for a declaration that Government is not entitled to resume or assess such inams and for an injunction restraining them from holding any investigation and dealing with them under the inam rules.

Held, on a construction of the *sunnad* and considering the circumstances under which it was granted, that the Government is not entitled to resume or assess the inams in question which were included in the grant to the zamindar, and the zamindar was entitled to hold them so long as he fulfilled the special obligations imposed upon him by *sunnad*.

Reg. XXV of 1802 which purports to have been passed on 13th July 1802 must be taken to have come into operation that very date.

When Government had acquiesced in plaintiff's rights for over 80 years, the Court would be very slow in coming to the conclusion that Government never intended to grant those rights.

Reg. XXV of 1802 does not debar Government from exercising its sovereign rights to make a grant of *Lakshiraj* lands, Ss. 12 and 13 are applicable only when inams have been specially reserved under S. 4 (a).

Where a suit had been decided on two grounds, both of them will operate as *res judicata* (b).

The decision of a competent Court on such a question as the right of Government to resume inams in zamindaris, even if erroneous, is binding upon them and will operate as *res judicata* (c). **The Secretary of State v. Rajah of Venkatagiri**, 31 M.L.J. 97 = (1916) 2 M.W.N. 96 = 30 M.L.T. 284 = 4 L.W. 139 = 35 Ind. Cas. 366.

WALLIS, C.J. and PHILLIPS, J.

References :—(a) 9 M. 14, D. (b) 24 C. 900 (P.C.); 4 M.L.T. 90, F. (c) 11 C.L.J. 461; 15 C.L.J. 684, F.

(3) S. 12. See No. 2, *supra*.

(4) S. 13. See No. 2, *supra*.

Regulation—(Concluded).**—5.—Madras Regulation—(Concluded).****Regulation VII of 1817 (Madras Endowments and Escheats).**

Nature of powers possessed by Board of Revenue under—Board whether can divest itself of its powers of superintendence. See CIV. PRO. CODE (1908), No. 163, 3 L.W. 43.

Re-hearing.

(1) *Illegal ex parte order, always open to revocation at instance of party affected.*

Where an *ex parte* order, has been made to the prejudice of a litigant who has not been afforded an opportunity to be heard the order is subject to the implication that it may be revoked at the instance of the party affected thereby and the Court has inherent power to give such directions as the justice of the case may require. **Syam Mandal v. Sati Nath Banerjee**, 24 C.L.J. 523.

MOOKERJEE and CUMING, JJ.

(2) Application for review or—Deposit of amount less than decretal amount—Effect. See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 2, 33 Ind. Cas. 133.

(3) Appeal—Omission to specify date of hearing in notice of appeal—*Ex parte* decree—Right of. See CIV. PRO. CODE (1908), No. 649, 36 Ind. Cas. 624.

(4) Decree *ex parte*—Application for, rejected—No appeal preferred—Appeal against decree. See CIV. PRO. CODE (1908), No. 390, 14 A.L.J. 1226.

(5) Agent's Court—Applicability of the provisions of the Civ. Pro. Code regarding, and review—Agency rules—Rules 10, 18 and 20. See JURISDICTION OF CIVIL COURTS, No. 3, 31 M.L.J. 319.

Rejection of Pleint.

See BEN. ACT VIII OF 1885 (TENANCY), No. 61, 35 Ind. Cas. 76 = 21 C.W.N. 209.

Release.

(1) *What is—Settled account.*

A release in the eye of a Court of Equity is nothing more than a record by deed of a settled account, and unless the settled account is unimpeachable, the fact of the parties having signed a release will not assist those who depend upon it for a defence (a). **Ramaswami Aiyer v. Gnanamani Nachiar**, 31 M.L.J. 851 = 5 L.W. 279 = 1917 M.W.N. 121.

ABDUR RAHIM, OFFG. C.J. and PHILLIPS, J.

Reference :—(a) (1894) 1 Ch. 73, F.

(2) *By de facto* Guardian—Validity. See MAHOMEDAN LAW (GUARDIANSHIP), No. 3, 3 L.W. 379.

(3) In favour of reversioners—Acceleration of vesting of estate. See HINDU LAW—WIDOW, No. 22, 30 Ind. Cas. 234.

(4) Settled accounts—When can be re-opened, effect of. See SETTLED ACCOUNTS, No. 1, 31 M.L.J. 861.

Religious Endowments.

- (1) *Nature and constitution of mutts—Position of junior Pandarasannadhi—Power of senior to remove him—Grounds for removal—Compromise decree recognising plaintiff as junior Pandarasannadhi—Validity and effect—Immorality of holders of religious offices—Whether entails forfeiture of their offices—S. 367, Civ. Pro. Code (1882)—Suit by legal representative to establish his position—Duty of plaintiff.*

Per Wallis, C.J.—The nomination and ordination of a junior Pandarasannadhi is the customary manner of providing for the line of succession in mutts, but the senior Pandarasannadhi has no power of arbitrary dismissal, though he may dismiss the junior for good cause.

The position of the junior Pandarasannadhi during the lifetime of the elder would appear to be that of a co-adjutor with the right of succession, a right of which he cannot be deprived except for grave cause. When an office is held at pleasure, the incumbent may be removed even on charges of misconduct without any opportunity of being heard, because he is removable at pleasure without any misconduct at all, but in all other cases "the objection for want of notice can never be got over."

In this case, the Matadhipathi of the Dharmapuram Adhinam ordained a junior Pandarasannadhi and later on purported to remove the latter without giving him any notice or any opportunity to answer the charges against him. *Held*, the dismissal was void and inoperative.

On such removal the junior filed a suit questioning the dismissal, and a compromise was entered into recognizing the plaintiff as junior. *Held*, the consent decree was binding on the parties until it was set aside, just as much as if it had been passed after contest.

Per Seshagiri Aiyar, J.—(1) The head of the Mutt is entitled to appoint a junior Pandarasannadhi. (2) this junior has a recognized status, (3) he is entitled to succeed to the headship, if he survives the appointer, (4) for good cause shown he can be removed, (5) the tenure of his position is not dependent upon the good will of the appointer, and (6) it is not open to the head of the Mutt to dismiss him arbitrarily.

These Mutts are not voluntary brotherhoods and the heads of these Mutts have not got plenary powers to expel a member including the junior Pandarasannadhi.

If the head of the Mutt or the junior is proved to be living an immoral life, he is liable to be removed. There can be no condonation of such an offence as in the case of breach of trust by trustees. When a clear case is made out that a religious ascetic who ought to set an example of sexual purity is leading an immoral life, the Courts will find no difficulty in dismissing him from office. But it does not follow that suspected immorality entails forfeiture.

The Matadhipathi in this case sued for a declaration that the defendant who was appointed a junior was not the lawful Pandarasannadhi,

Religious Endowments—(Continued).

and died pending the suit. A person nominated by him as successor before his death applied to continue the suit as his legal representative, but he was directed to bring a fresh suit to establish that he was the legal representative of the deceased Pandarasannadhi. *Held*, that the plaintiff as legal representative must show that he has stepped into the shoes of the deceased with all the attributes which he claimed, and it was open to the defendant to prove that the deceased had no rights to transmit.

The import of the words in O XXII, r. 3 (1), Civ. Pro. Code, "Where a sole plaintiff dies and the right to sue survives" shows that the applicant should be in a position to lay claim to the right which was agitated in the suit. Conversely the defendant can show that the person who seeks to continue the litigation had not acquired the right claimed, because that right was vested in himself.

Although the force of a consent decree is derived from the *consensus ad idem* of the parties, it having received additional validity by being accepted by the Court, it cannot be set aside by the consent of the parties as any other contract could have been, but can only be vacated by the Court by a proper proceeding in that behalf. *Thiruvambala Desikar Gnanasambanda Pandaram v. Chinna Pandaram alias Manikkavasaka Desikar*, 30 M.L.J. 274 = 4 L.W. 306 = (1916) 2 M.W.N. 43 = 40 M. 177 = 34 Ind. Cas. 57.

WALLIS, C.J. and SESHAGIRI AIYAR, J.

- (2) *Religious trust—Mahant, whether can alienate trust property without authority—Legal necessity—Dispute inter partes adjudicated upon in earlier suit—Pecuniary value of subsequent suit beyond jurisdiction of Court trying previous suit—Finding, whether res judicata—Judgment, admissibility of—S. 11, Civ. Pro. Code (1908).*

A trust was created by the Nai community for the maintenance of a Samadh and a Shiwala, and other houses and shops were subsequently built in one enclosure so that the entire enclosure constituted one tenement. The Mahant alienated certain shops. The plaintiffs, as representatives of the Nai community, sued for a declaration that the alienation, being without authority and without consideration and valid necessity, was void. It was found that succession to the entire property was from guru to Chela.

Held, (1) that the trust was a religious trust, and that the property alienated being a part and parcel of the institution, the plaintiffs, as representatives of the author of the trust, were entitled to restrain the trustee from making an improper disposal thereof;

(2) that the building of a house not being such a necessary purpose as would justify an alienation of trust property, the alienation was not binding on the plaintiffs.

Held also that, where the pecuniary value of a suit is beyond the jurisdiction of a Court which adjudicated upon the dispute between

Religious Endowments—(Continued).

the same parties sometime before, any finding then arrived at cannot be treated as *res judicata* in the subsequent suit, though the judgment of that Court is admissible in evidence. **Har Parphad v Shadu**, 31 P.W.R. 1916=32 Ind. Cas. 504.

* **RATTIGAN and SHADI LAF, JJ.**

- (3) *Temple and its lands originally subject to the Devasthanam Committee of one taluq—Lands assigned to another taluq in another district, Revenue re-distribution—The Committee to appoint Darmakartha of such temple—The former Committee—Religious Endowments Act, Ss. 7, 9, 10 and 12.*

The lands in question in this suit, which belonged to a temple, originally belonged to one taluq and subject to the Devasthanam Committee of that taluq. There was a re-distribution of taluqs in 1894 for revenue purposes, and in that re-distribution the lands fell within the limits of another taluq in another district. This re-distribution was only for revenue purposes.

Held, that the Devasthanam Committee having jurisdiction over the temple and power to appoint a Darmakartha of such temple is the Committee of the taluq to which it originally belonged. **K. Rangappa v Karnam Bimappa**, 31 M.L.J. 360=39 M. 949=36 Ind. Cas. 284.

ABDUR RAHIM and AYLING, JJ.

- (4) *Hindu law—Religious order—Sudra—Yati—Sanyasi—Byragee Mahant—Inheritance—Customary finding re-appeal (Second appeal)—Evidence.*

A Sudra cannot become a *yati* or *sanyasi* according to the Smritis.

If a person once renounces the world and adopts a religious order like that of a *byragee mahant* he would not by reverting to worldly affairs in his new life cease to be a *byragee mahant* and if a well defined usage or custom governs the succession in the new order, there is nothing in Hindu Law to prevent the said usage or custom binding him and his property (a).

The finding of the lower appellate Court as to the existence of a custom or usage by which a *chela* succeeds to a *byragee mahant* cannot be questioned in second appeal on the ground that the evidence to establish the same is not sufficient. **Lochan Bholmali v. Adhar Chandra Mahanter**, 35 Ind. Cas. 630.

CHATTERJEE and NEWBOULD, JJ.

References:—1 W.R. 209; 10 W.R. 172; 15 W.R. 197; 40 O. 545, R.

- (5) *Dedication—Founder spending portion of income of certain property for upkeep of temple—Inference of dedication of corpus.*

The mere fact that the founder of a temple was spending a portion of the income of certain property to the upkeep of the temple is insufficient to establish that the corpus of the property was dedicated to its use. **Farmehri Das v. Giridhari Lal**, 30 Ind. Cas. 240.

LINDSAY, J.C. and KANHAIYA LAL, A.J.C.

Religious Endowments—(Concluded).

References:—2 O. 341 (P.C.)=4 I.A. 52; 17 Ind. Cas. 303; 16 O.C. 76, R.

- (6) *Property dedicated to an idol—Shebait, right of suit—No necessity to make the idol a party.*

The possession and management of property dedicated to an idol belong to the *shebait* and he can bring whatever suits are necessary for the protection of the property, there being no necessity to make the idol a party. **Dinabandhu Nandi v. Chamlraddi Mijl**, 34 Ind. Cas. 548.

CHATTERJEE and RICHARDSON, JJ.

Reference:—32 C. 129 (P.C.), R.

- (7) *Joint property belonging to a shrine—Plaintiffs and defendant mujawars—Suit for joint possession of portion of the property—Applicability of hotchpot rule—Right of co-sharers. Muhammad Hayat v. Muhammad Ali*, 94 P.R. 1915=31 Ind. Cas. 489. See Final Part, 1915, Col. 1203.

- (8) *Dedication of land—Purchase by a community—Conveyance of property to pujari of temple for management—Right of community to assert right against pujari's heir claiming property as his own—Proper form of decree. See CIV. PRO. CODE (1908), No. 303, 36 Ind. Cas. 976.*

- (9) *Properties held by adoptive father as shebait, adopted son if may claim to hold as shebait jointly with after-born son—Pitrikrityas, and debakrittyas—Proof that property has been endowed as debutter—Permanent image, if essential to valid dedication—Income of dedicated property exceeding expenses, if conclusive that debsheba only a charge on the property. See HINDU LAW (ADOPTION), No. 8, 20 C.W.N. 901.*

- (10) See **MUTT**, No. 1, 34 Ind. Cas. 875.

- (11) *Temple trustees—Dismissal when proper. See TRUST*, No. 1, (1916) M.W.N. 181.

Religious Endowments Act (XX of 1863).

- (1) *Temple Committee—Suit for declaration of supervisorship and for production and inspection of accounts—Limitation—Limitation Act, Arts. 120, 124, 121 and 144—Right to declaration of control lost—Right to production of accounts.*

A suit by a Temple Committee for a declaration that a certain temple is subject to their control and for a decree directing the trustees of the temple to produce the temple accounts is not a suit for possession of a hereditary office or of any immoveable property and is not governed by either Arts. 124 or 144 of the Limitation Act (a).

Such a suit is one coming under Art. 120 and the suit for declaration is barred where the right of control has been resisted for over six years. The right to the production of the account being incidental to the right of control, it cannot be enforced when the right of control or supervisorship is lost and that even though

Religious Endowments Act (XX of 1863)
—(Continued).

the right to call for the accounts is a periodically recurring right under S. 13 of the Religious Endowments Act (b). **Charapattda Siddalinga Swamulu v. Sondur Ramachandraracharlu**, 4 L.W. 186=31 M.L.J. 857=35 Ind. Cas. 646.

AYLING and NAPIER, JJ.

References:—(a) 6 A. 1 (P.C.), D. (b) 26 M. 410, D.

(2) Scope of—Temple subject to the Devasthanam Committee—Scheme if can be framed by the Court—Statutory body if becomes *functus officio* by reason of constitutional changes—Hindu temple—One of the trusteeships hereditary—Power to appoint additional trustees—Nature of powers possessed by Board of Revenue under Reg. VII of 1817—Visitation jurisdiction. See CIV. PRO. CODE (1908), No. 163, 3 L.W. 43.

(3) S. 7—*Suit by two out of three members of a committee—Bad for non-joinder of parties—Succession to office of darago—Custom.*

Where two out of three of the members constituting a committee appointed under S. 7 of the Religious Endowments Act, 1863, bring a suit for the removal of the person or persons acting as the trustee or trustees of the endowment. *Held* such a suit was not maintainable. Such an action would be bad for defective joinder of parties.

Such a committee is a corporation; the members do not claim any individual right. What they assert is a joint right exercisable by them all in a corporate capacity. And as long as they jointly constitute a corporate body each and every member of the corporation must be joined as plaintiffs to entitle them to succeed.

A committee appointed under S. 7 of the Religious Endowments Act is a corporation having a legal entity and is analogous in all respects to every other corporation (a).

If one member of the corporation is dead, then the survivors can act until the new member may be appointed.

Unless there was legal evidence to establish a custom that the office was transmissible to the *eldest male descendant* of the last surviving *daraga*, the ordinary law would apply and the office would be transmissible to the succeeding heirs of the last surviving *daraga*. **Syed Muhammad Hasan v. Kazi Nazar Muhammad**, 1 Pat. L.J. 437.

MULLICK and ATKINSON, JJ.

References:—(a) 39 C. 304; 22 M. 481, F.

(4) Ss. 8 and 10—*Devasthanam Committee, vacancy in—Appointment by District Judge—Evidence not taken—Order, if legal—Revisability—Nature of proceedings—Qualifications laid down in S. 8, if apply to vacancies subsequent—Improper appointments, how set aside—Civ. Pro. Code (1908), S. 141 and Civil Rules of Practice (Mofussil), r. 94, applicability of, to proceedings under S. 10 of Religious Endowments Act. Subbier v. Abboy Naidu*, 29 M.L.J. 671=2 L.

Religious Endowments Act, (IX of 1863)
—(Concluded).

W. 1099=18 M.L.T. 469=31 Ind. Cas. 502. See Final Part, 1915, Col. 15.

(5) S. 10. See No. 4, *supra*.

(6) Ss. 14, 18—*Devasthanam Committee—Alienation of offerings to the deity in favour of Archakas—Suit to declare the invalidity of the alienation—Suit against committee and Archakas by two worshippers—Trustees not a party—No sanction of the Court or Advocate General—Maintainability—Civ. Pro. Code, S. 92, O. I, r. 8.*

A suit brought by two worshippers of a temple on behalf of themselves and the other worshippers of the temple with the permission of the Court under O. I, r. 8, Civ. Pro. Code, against members of the Devasthanam Committee and the Archakas and Stanchas, the trustee not being a party, for a declaration that perpetual alienation, made in favour of the Archakas by the Devasthanam Committee, of money offerings made by the worshippers is invalid and not binding on the temple, and a direction that the trustee or manager duly appointed should retain the right of collecting the offerings in question, is maintainable though brought neither on the relation of the Advocate-General nor with the sanction prescribed by S. 18 of the Religious Endowments Act.

Suits in which relief is asked for against strangers to the trust, whether alienees from the trustees or trespassers, are outside the purview of S. 92 of the Civ. Pro. Code. **Kalyana Venkataramanu Aliyengar v. Kasturi Ranga Aliyengar**, 31 M.L.J. 777=20 M.L.T. 490=40 M. 212=5 L.W. 625.

ABDUR RAHIM, OFFG. C.J., SESHAGIRI AIYAR and PHILLIPS, JJ.

(7) Ss. 14, 18—*Suits to enforce privileges—Sanction when necessary for institution. See Civ. PRO. CODE (1908), No. 13, 3 L.W. 12.*

(8) Ss. 14 and 18. See CIV. PRO. CODE (1908), No. 167, (1916) 2 M.W.N. 351.

(9) S. 18—*Wakf—Scheme suit—Removal of trustees. See CIV. PRO. CODE (1882), No. 31, 35 Ind. Cas. 880.*

(10) S. 18. See Nos. 6, 7, 8, *supra*.

Religious Offices.

(1) *Alienation—Religious office—Bungas attached to Golden Temple at Amritsar—Manager, office of, nature of—Alienation of office, if valid.*

Held, that the bungas attached to the Golden Temple at Amritsar are partly religious and partly charitable institutions, and the office of manager partakes of the nature of a religious office which cannot be alienated for the manager's personal gain (a). **Mehr Singh v. Sochet Singh**, 151 P.W.R. 1916=35 Ind. Cas. 620.

SCOTT-SMITH, J.

References:—(a) 17 C. 3=16 I.A. 137=5 Sar. P.O.J. 350; 81 P.R. 1902; 17 C. 557; 36 C. 975=13 C.W.N. 1084=3 Ind. Cas. 76, D.

Religious Offices—(Concluded).

1 C. 226 at p. 235=25 S.W.R. 285=3 I.A. 7=9 Gar. P.O.J. 573; 5 M. 89; 106 P.R. 1892; 26 M. 31, F.

(2) Hereditary religious offices—Right of females to inherit and perform duties by proxy—*Cnus.* See **HINDU LAW**, (RELIGIOUS OFFICES), No. 1, 30 M.L.J. 222.

Religious Purposes.

Gifts for—Dedication to thakur—Absence of registered deed—Validity of gift. See **TRANSFER OF PROPERTY ACT**, No. 149, 36 Ind. Cas. 989.

Religious Trust.

See **CIV. PRO. CODE** (1882), No. 31, 35 Ind. Cas. 880.

Relinquishment.

(1) See **U. P. ACT II OF 1901 (AGRA TENANCY)**, No. 32-a, 36 Ind. Cas. 1007.

(2) Of an interest—Validity. See **EVIDENCE**, No. 1, (1916) M.W.N. 9.

(3) Tenancy relinquished in favour of creditor—Mutation of names. See **EVIDENCE ACT**, No. 60, 35 Ind. Cas. 108.

(4) Unaccompanied by surrender of possession, effect of. See **EX-PROPRIETARY RIGHT**, No. 2, 30 Ind. Cas. 792.

(5) Hindu Law—By widow—Acceleration—Consent of nearest reversioner to alienation by widow—Evidence of necessity. See **HINDU LAW (WIDOW)**, No. 17, 14 A.L.J. 972.

Remand.

(1) *Remand order by appellate Court without retaining case on file—Whole case if open before Court to which case remanded—Limitation of scope of appeal remanded by High Court.*

In strict law a remand made by an appellate Court without retaining the appeal in its own file necessarily re-opens the whole case and the Court of Appeal to which the case is remanded is bound to hear the appeal upon the judgment of the Court of first instance and on nothing else.

But the High Court, in the exercise of its powers of supervision under the Charter, rightly assumes in certain cases authority to limit the scope of certain appeals remanded to the lower Court without keeping them on its own file. But whenever this is done, it is absolutely essential that the High Court should lay down clearly without any possibility of mistake that it did intend to limit the scope of the appeal to certain specified questions. **Kartik Chandra Das v. Batya Nidhi Ghosal**, 20 C.W.N. 584=32 Ind. Cas. 240.

HOLMWOOD and MULICK, JJ.

(2) *Issues remanded to first appellate Court—Power of latter Court to send it to Court of first instance to take additional evidence—Duty to record finding—Civ. Pro. Code, O. XLI, rr. 28, 25.*

Remand—(Continued).

When issues are remanded by the Court of second appeal to the lower appellate Court for trial, the lower appellate Court resumes its functions as the Court of first appeal. Though it is the only Court which can record a finding on the issues remanded, yet it may, under O. XLI, rr. 28, Civ. Pro. Code, require the additional evidence to be taken before the original Court. **Motising v. Sobhemal**, 9 S.L. R. 148=32 Ind. Cas. 634.

PRATT, J.C. and BOYD, A.J.C.

References:—8 S.L.R. 120; 14 A. 23, R.

(3) *Remand order—Order of appeal Court directing Court of first instance to remit findings on issues not tried—Decision on other issues in the remand order if binds Judge or his successor at final hearing—Decision if preliminary decrees or interlocutory order—Civ. Pro. Code (1908), O. XLI, rr. 23, 25.* **Hira Lal Pal v. Etbar Mandal**, 20 C.W.N. 43=32 Ind. Cas. 866. See Final Part, 1915, Col. 1206.

(4) *Order of—Appeal—Whether maintainable.* See **BEN. ACT VIII OF 1885 (TENANCY)**, No. 69, 34 Ind. Cas. 301.

(5) See **U. P. ACT II OF 1901 (AGRA TENANCY)**, No. 52, 35 Ind. Cas. 105.

(6) *Order of, by the Agent—If open to revision by the High Court.* See **AGENCY RULES**, No. 4, (1916) 2 M.W.N. 269.

(7) *Remand for decision on merits—Not a final order—No appeal to Privy Council.* See **APPEAL TO PRIVY COUNCIL**, No. 1, 19 O.C. 36.

(8) See **CIV. PRO. CODE** (1908), No. 673, 34 Ind. Cas. 185.

(9) See **CIV. PRO. CODE** (1908), No. 41, 35 Ind. Cas. 571.

(10) See **CIV. PRO. CODE** (1908), No. 660, 35 Ind. Cas. 239.

(11) *Order of—Suit of Small Cause nature—Appeal from order.* See **CIV. PRO. CODE** (1908), No. 198, 36 Ind. Cas. 396.

(12) *Suit to set aside adoption—Fraud not proved—Undue influence found to have been exercised—Remand by appellate Court for framing new issues and fresh decision—Remand order whether valid.* See **CIV. PRO. CODE** (1908), No. 654, 15 Bom. L.R. 27.

(13) *Appellate Court if may remand cases otherwise than under O. XLI, rr. 23 and 25—Addition of parties on appeal and amendment of plaint if justify remand.* See **CIV. PRO. CODE** (1908), No. 210, 20 C.W.N. 547.

(14) *Remand on preliminary point—Lower appellate Court—Powers of reversal and remand.* See **CIV. PRO. CODE** (1908), No. 211, 43 C. 148.

(15) *Powers of High Court as to remand.* See **CIV. PRO. CODE** (1908), No. 369, 20 C.W.N. 1192.

(16) *Appellate Court's powers of remand.* See **CIV. PRO. CODE** (1908), No. 655, 12 N. L. R. 126.

(17) *Wider powers under new Code—Not confined to disposal on parliamentary issue,*

Remand—(Concluded).

See CIV. PRO. CODE (1908), No. 209-a, 36 Ind. Cas. 819.

(18) Case decided finally by Chief Court without remand. See CUSTOMS (PUNJAB—ALIENATION), No. 1, 16 P.W.R. 1916.

(19) Remand technically permissible but useless, not allowed. See CUSTOMS (PUNJAB—ALIENATION), No. 3, 17 P.W.R. 1916.

(20) Finding of fact—Lower appellate Court to which remand is made—No power to set aside such finding. See LIMITATION ACT (1908), No. 105, 31 M.L.J. 457.

(21) Powers of Courts of appeal or revision in revoking or granting sanction given or refused by a subordinate authority—Remand not proper. See SANCTION TO PROSECUTE, No. 5, 9 Bur. L.T. 128.

(22) Remand necessary when—Plaint amended in appeal. See CIV. PRO. CODE (1908), No. 660-a, 32 Ind. Cas. 906.

Re-marriage.

(1) See BUDDHIST LAW — INHERITANCE. No. 4, 9 Bur. L.T. 97.

(2) Of widow—Right to husband's estate—Widow's unchastity after inheritance, effect. See HINDU LAW—WIDOW, No. 32, 32 Ind. Cas. 338.

Re-marriage (Hindu Widows) Act.

See ACT XV OF 1856.

Renewal of Execution Application.

Execution application struck off—Restoration—Objection as to limitation—Jurisdiction. See CIV. PRO. CODE (1908), No. 372, 35 Ind. Cas. 337.

Rent.

(1) *Enhancement of—Rent, payable partly in cash and partly in kind—Bengal Tenancy Act (VIII of 1885), S. 30, applicability of.*

The word "money-rent" in S. 30 of the Bengal Tenancy Act refers to a tenancy where the rent is solely payable in money, and, as such, the section does not apply to a case in which rent is paid partly in cash and partly in kind. *Priya v. Tarini*, 24 O.L.J. 373=35 Ind. Cas. 618.

SANDERSON, C.J. and MUKERJEE, J.

(2) *Suit for—Original tenant, heirs of—Liability, if joint and several—Decree against one, if maintainable—Indian Contract Act (IX of 1872), S. 43.*

In a suit by a co-sharer-landlord for arrears of rent against the heirs of the original tenant the Court below passed a money decree, against one of the defendants only for the entire claim :

Held, that the decree could not stand inasmuch as it was not a case of a joint contract which might be enforced against any of the joint contractors, but the defendants became jointly interested by operation of law in a contract made by a single person (a). *Shalkh Sahad v. Krishna*, 24 O.L.J. 371=35 Ind. Cas. 563.

CHATTERJEE and NEWBOULD, JJ.

Rent—(Continued).

References :—(a) 12 C.L.J. 591; 11 C.W.N. 1026, D.; 12 O.L.J. 643, F.

(3) *Sale for arrears for rent—Application to set aside sale—Bengal Tenancy Act (VIII of 1885), S. 174—Effect of non payment of the 5 per cent. provided for by the section—“Officer of the Court”—Review—Appeal.*

There is no duty cast upon the officer of the Court to give any information to the defendant, for any purpose which he might require under S. 174 for the purpose of making a deposit under that section. The law throws the obligation upon the defendant, himself, to ascertain for himself by whatever means he likes, the amount he has to pay into Court. But it casts no responsibility, no duty whatsoever, upon the officer of the Court to furnish information or give information. If an officer of the Court does yield to any application that may be made to him by a judgment-debtor, then he gives that information, not by virtue of his acting as an officer of the Court, but solely by virtue of his friendship, or regard, or as agent of the individual to whom he gives the information (a).

What constitutes an act of the Court must depend upon the circumstances of each case. Mere casual act by an officer of the Court cannot be treated as the Court's act. For an act to be clothed with that character, must be an act of a prescribed officer acting in accordance with the prescribed rules of the Court.

The deposit of money, to be a valid deposit and to give the Court jurisdiction, to accept and set aside the sale must be heard within 30 days from the sale and not later. There may however be cases where possibly a mistake might have been or may be made, where an individual judgment-debtor may be misled by an officer of the Court, as such. In such a case the Court always has power in the exercise of its jurisdiction to redress a wrong.

Where an order setting aside a sale under S. 174 of the Bengal Tenancy Act was without jurisdiction, the High Court had jurisdiction to set aside the order of the first Court refusing to review the order to set aside the sale. *Sarjoo Prasad Misra v. Nannoo Rai*, 1 Pat. L.J. 459 = 35 Ind. Cas. 779.

ATKINSON and JWALA PRASAD, JJ.

Reference :—(a) 26 C. 449, F.

(4) *Suit for rent—Rent claimed at higher rate than amount entered in Road Cess Return—Road Cess Act (IX of 1880), S. 20—Effect of entry in Record of Rights.*

The mere alteration in area due either to re-measurement or to encroachment will not take the case out of S. 20 of the Road Cess Act.

Neither the entry in the Record of Rights, which only raises a presumption, nor the *jama wasilakki*, which only shows the defendant's rent in any particular year, can override the statutory prohibition contained in S. 20 of the Road Cess Act.

Rent—(Continued).

Where the holding is the same and there has been no material alteration of it the plaintiff landlord is not entitled to a rent higher than that shown in the Road Cess return. **Dhanukdhari Mahton v. Salyid Serajul Huda**, 1 Pat. L.J. 521.

CHAMIER, C.J. and JWALA PRASAD, J.

Reference :—19 Ind. Cas. 249, F.

(5) **Suit for rent—Title of third person set up—Parties.**

When in suits for rent the tenant defendants set up the title of a third person, such third person is no necessary party to the proceeding. **Rameshwar Pershad Singh v. Nankhu Mod**, 32 Ind. Cas. 553.

SHARFUDDIN and TEUNON, JJ.

(6) **Mokarrari lease—Provision for enhanced, for collection charges—Construction of contract.** See **ABWAB**, No. 1, 36 Ind. Cas. 404.

(7) **Appeal—Decision on question of amount of, payable.** See **BEN. ACT VIII OF 1869 (LANDLORD AND TENANT PROCEDURE CODE)**, Nos. 2 and 3, 36 Ind. Cas. 277.

(8) See **BEN. ACT VIII OF 1865 (TENANCY)**, No. 51-b, 36 Ind. Cas. 795.

(9) **Award of interest or damages on arrears of—Mandatory provision.** See **BEN. ACT VIII OF 1865 (TENANCY)**, No. 35-b, 36 Ind. Cas. 955.

(10) **Basis of, enhancement of, discussed—Decree of special Judge determining amount of enhancement—Appeal.** See **BEN. ACT VIII OF 1865 (TENANCY)**, No. 22, 1 Pat. L.J. 409.

(11) **Suit for—Conflicting claims to landlord's right—Second appeal.** See **BEN. ACT VIII OF 1865 (TENANCY)**, No. 69-a, 32 Ind. Cas. 695.

(12) **Suit for, of jalkar—Limitation.** See **BEN. ACT VIII OF 1865 (TENANCY)**, No. 94, 33 Ind. Cas. 110.

(13) **Written lease—A definite amount over and above amount stated as, but forming part of consideration, if abwab.** See **BEN. ACT VIII OF 1865 (TENANCY)**, No. 37, 21 C.W.N. 108.

(14) **Stipulation to pay interest on arrears of, "at 75 per cent. with full damages", if by way of penalty—Contract Act (IX of 1872), S. 74—Mere high rate if sufficient to demand interference.** See **BEN. ACT VIII OF 1865 (TENANCY)**, No. 36, 21 C.W.N. 112.

(15) See **MAD. ACT I OF 1908 (ESTATES LAND)**, No. 16-b, 32 Ind. Cas. 493.

(16) See **MAD. ACT I OF 1908 (ESTATES LAND)**, No. 4, 31 Ind. Cas. 852.

(17) **Commutation of—Principles regarding ward of.** See **MAD. ACT I OF 1908 (ESTATES LAND)**, No. 26, 34 Ind. Cas. 935.

(18) **Dispute between joint landlords as to collection of—Collector's order declaring particular person as landlord—Revision.** See **MAD. ACT I OF 1908 (ESTATES LAND)**, No. 7-a, 36 Ind. Cas. 212.

Rent—(Continued).

(19) **Grant to Brahmin before Permanent Settlement for subsistence—Onus—Suit for commutation of.** See **MAD. ACT I OF 1908 (ESTATES LAND)**, No. 4-a, 32 Ind. Cas. 229.

(19-a) **Finding of Collector re rent—Subsequent suit for determining—Res judicata.** See **MAD. ACT I OF 1908**, No. 28-a, 32 Ind. Cas. 706.

(20) **Acquisition of occupancy right—Possession for more than 12 years—Payment of.** See **U.P. ACT II OF 1901 (AGRA TENANCY)**, No. 7, 30 Ind. Cas. 798.

(21) **Previous suit for—Small Cause nature—Question of title incidentally determined—Later suit for title—Previous determination, whether bars trial of the issue in later suit—No res judicata.** See **CIV. PRO. CODE (1908)**, No. 21, 34 Ind. Cas. 123.

(22) **Suit for rent—Proceedings on appeal.** See **CIV. PRO. CODE (1908)**, No. 16, 24 C.L.J. 514.

(23) **Rent payable by judgment-debtor—Execution purchaser if can recover—Extent of liability of execution purchaser—Suit for contribution.** See **CONTRACT ACT**, No. 69, 23 C.L.J. 125.

(24) **Hotel keeper—Landlord and tenant—Right to sue for—Breach of contract—Distraint.** See **CONTRACT ACT**, No. 14, 112 P.L.R. 1916.

(25) **Suit for, against some heirs of tenant.** See **CONTRACT ACT**, No. 41, 36 Ind. Cas. 243.

(26) **Agreement by guardian to pay, at enhanced rate of, rent whether binding on minor.** See **GUARDIAN AND WARD**, No. 4, 35 Ind. Cas. 582.

(27) **Judi, payment of—Liability of tenant to pay customary, to Inamdar.** See **INAM**, No. 4, 18 Bom. L.R. 950.

(28) **Failure to collect—Gross negligence and misconduct—Liability to pay amount of profits.** See **LAMBARDAR**, No. 2, 30 Ind. Cas. 203.

(29) See **LANDLORD AND TENANT**, No. 52, 33 Ind. Cas. 419.

(30) See **LANDLORD AND TENANT**, Nos. 39 and 40, 33 Ind. Cas. 214.

(31) **Adverse possession, title by—Lessee, if can acquire such title against his lessor—Non-payment of, if creates adverse possession.** See **LANDLORD AND TENANT**, No. 34, 24 C.L.J. 453.

(32) **Evidence as to uniform rate of.** See **LANDLORD AND TENANT**, No. 50, 33 Ind. Cas. 415.

(33) **Permanent tenure created before Transfer of Property Act—Transferability—Decree for, against registered tenant—Sale of tenure in execution—Rights of prior purchaser.** See **LANDLORD AND TENANT**, No. 66, 33 Ind. Cas. 502.

(34) **Tenant out of possession—Liability to pay.** See **LANDLORD AND TENANT**, No. 70, 36 Ind. Cas. 537.

(35) **Registered lease—Suit for recovery of, by assignee of landlord.** See **LIMITATION ACT (1908)**, No. 180, 1 Pat. L.J. 506.

Rent—(Concluded).

(35-a) Right to collect. See LIMITATION ACT (1908), No. 244-A, 32 Ind. Cas. 827.

(36) Collection of. See RECEIVER, No. 7, 33 Ind. Cas. 69.

(37) German, secular agent of Basel Mission—Lease by, of land in British India—Whether he can sue for—Limitation on alien enemy's right of suit. See TRADING WITH ENEMY, No. 2, 31 M.L.J. 860.

(38) Apportionment of. See TRANSFER OF PROPERTY ACT, No. 30, 34 Ind. Cas. 409.

(39) Assignment—Debt—Simple mortgage and subsequent lease of the hypotheca to mortgagee—Mesne profit. See TRANSFER OF PROPERTY ACT, No. 16, 31 Ind. Cas. 473.

(40) Execution of *Kabuliat* for enhanced—Effect of. See UNDERPROPRIETARY RIGHT, No. 1, 30 Ind. Cas. 387.

Rent Act.

See BEN. ACT X OF 1859.
See OUDH ACT XIX OF 1868.
See OUDH ACT XXII OF 1886.
See U. P. ACT XII OF 1881.

Rent (Agra) Act.

See U. P. ACT XIV OF 1886.

Rent Decree.

(1) Non-transferable occupancy holding, sale of, under—Right of mortgagee to set aside. See CIV. PRO. CODE (1908), No. 342, 31 Ind. Cas. 859.

(2) Tenure held by widow—Against the widow—Execution of decree—Execution against the holding in the hands of the reversioners. See HINDU LAW—WIDOW, No. 29, 34 Ind. Cas. 581.

Rent, Enhancement of.

(1) *Fresh suit after dismissal of suit for enhancement whether maintainable—Exemplar area.*

After dismissal of a suit for enhancement of rent, a fresh suit for a subsequent year can be filed. An exemplar area should not be confined to a single holding area. It should extend to an extent sufficient to make certain that the rates arrived at are really prevailing rates. *Badri Prasad v. Ram Charan*, 31 Ind. Cas. 866.

BAILLIE, S.M., and TWEEDY, J.M.

(2) Suit for enhanced Kattubadi—Second appeal. See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 22, 31 Ind. Cas. 871.

(3) Appeal—Right to enhance or vary rent—Determination of amount of rent. See BEN. ACT VIII OF 1869 (LANDLORD AND TENANT PROCEDURE CODE), Nos. 2 and 3, 30 Ind. Cas. 277.

(4) See BEN. ACT VIII OF 1865 (TENANCY), No. 23, 33 Ind. Cas. 85.

Rent, Enhancement of—(Concluded).

(5) Contract to pay more than $\frac{1}{2}$ annas in the rupee—Void in toto. See BEN. ACT VIII OF 1865 (TENANCY), No. 17, 34 Ind. Cas. 45.

(6) See OUDH ACT XXII OF 1886 (RENT), No. 9-a, 32 Ind. Cas. 416.

(7) See OUDH ACT XXII OF 1886 (RENT), No. 10, 33 Ind. Cas. 786.

(8) Tenant holding at fixed rate under agreement—No period fixed—Rent, if can be enhanced? See OUDH ACT XXII OF 1886, (RENT), No. 11, 33 Ind. Cas. 157.

(9) See U. P. ACT II OF 1901 (AGRA TENANCY), No. 26, 31 Ind. Cas. 889.

(9-a) See U. P. ACT II OF 1901 (AGRA TENANCY), No. 26-a, 32 Ind. Cas. 734.

(10) Agreement not in writing—Such agreement insufficient. See U. P. ACT II OF 1901 (AGRA TENANCY), No. 25, 34 Ind. Cas. 369.

(11) Rent fixed by Collector—Enhancement by agreement—Validity of. See U. P. ACT II OF 1901 (AGRA TENANCY), No. 24, 34 Ind. Cas. 441.

(12) Rent fixed in perpetuity by agreement—Enhancement. See U. P. ACT II OF 1901 (AGRA TENANCY), No. 27, 31 Ind. Cas. 459.

(13) See U. P. ACT III OF 1901 (LAND REVENUE), No. 9, 33 Ind. Cas. 180.

(14) See U. P. ACT III OF 1901 (LAND REVENUE), No. 8, 33 Ind. Cas. 186.

(15) Custom to pay enhanced rent. See LANDLORD AND TENANT, No. 35, 30 Ind. Cas. 486.

(16) Enhancement subsequently declared illegal—Notice of ejectment if proper—Estoppel. See LANDLORD AND TENANT, No. 37, 33 Ind. Cas. 163.

(17) Oral agreement to pay enhanced rent. See LANDLORD AND TENANT, No. 51, 33 Ind. Cas. 417.

(18) Partition papers, clerical error in—If enhancement of rent. See LANDLORD AND TENANT, No. 43, 33 Ind. Cas. 234.

Rent Free Grant.

(1) *Grant made in lieu of service—Alienation of such grant—Right of purchaser as against grantor.*

Where a grant was made rent-free the grant was non-transferable and the purchaser of the grant from the original grantee cannot acquire any valid title as against the grantor. *Girdhar Gopal v. Gaya Prasad*, 34 Ind. Cas. 672.

CAMPBELL, J.M.

Reference:—35 Ind. Cas. 594=1 O.L.J. 32 dissented from.

(2) Resumption of land so granted by forcible dispossession. See U. P. ACT II OF 1901 (AGRA TENANCY), No. 2, 36 Ind. Cas. 958.

Rent Recovery Act.

See MAD. ACT VIII OF 1865.

Rent Suit.

(1) A suit for rent is not a suit for determination of title to immovable property. *K. P. Mahomed Ebrahim v. K. E. Mahomed*, 9 Bur. L.T. 110 = 35 Ind. Cas. 337.

JJ KIN, J.

(2) Valued below Rs. 100—Whether second appeal lies. See *BEN. ACT VIII OF 1885 (TENANCY)*, No. 67, 20 C.W.N. 1352.

(3) Occupancy holding mortgaged prior to—*Agra Tenancy Act—Parties—Civ. Pro. Code* (1908), O. I, r. 9. See *U. P. ACT II OF 1901 (AGRA TENANCY)*, No. 20, 31 Ind. Cas. 456.

(4) Not exceeding Rs. 100 in value—Decree, execution of—Order passed in execution proceedings by the District Judge, if appealable. See *APPEAL—GENERAL*, No. 11, 24 C.L.J. 331.

(5) Suit for rent against tenant—*Res judicata*. See *LANDLORD AND TENANT*, No. 53, 33 Ind. Cas. 420.

(6) See *RES JUDICATA*, No. 22, 33 Ind. Cas. 159.

(7) See *RES JUDICATA*, No. 21, 34 Ind. Cas. 354.

Rent, Suit for.

(1) Land situated in a Zamindari—*Ryoti* land—*Ijara* lease—Jurisdiction of Civil Court to try. See *MAD. ACT I OF 1908 (ESTATES LAND)*, No. 1, (1916) 2 M.W.N. 240.

(2) See *MAD. ACT I OF 1908 (ESTATES LAND)*, No. 29, 4 L.W. 278.

Re-opening.

Fraud—Of suit for accounts—Evidence. See *CIV. PRO. CODE* (1908), No. 353, 35 Ind. Cas. 603.

Re-sale.

(1) Buyer failing to take delivery of goods and the seller exercising his powers of—Damages, claim for, at market rate—Maintainability. See *CONTRACT ACT*, No. 108, 8 L.B.R. 367.

(2) Stipulation for re-purchase—No date fixed for re-payment—Transaction amounting to mortgage—Intention of parties. See *SALE*, No. 14, 36 Ind. Cas. 991.

(3) See *VENDOR AND PURCHASER*, No. 5, 35 Ind. Cas. 631.

Residence.

(1) Place of—Defendant living and carrying on business at one place—Mere possession of ancestral abode and lands elsewhere—Effect. See *CIV. PRO. CODE* (1908), No. 56, 112 P.R. 1916.

Residuary Legatee.

Grant of letters to guardian of minor not being executor or—Grant of letters for moveable property. See *ACT V OF 1881 (PROBATE AND ADMINISTRATION)*, No. 1-a, 36 Ind. Cas. 266.

Res Judicata.

(1) *Ostensible owner, transfer by, when binds real owner—Transfer of Property Act*, S. 41.

Res Judicata—(Continued).

In a suit by A to recover from B property the title to which was disputed between A and B, M, in whose favour B had on 14th March 1893 executed a usufructuary mortgage—in lieu whereof on 21st January 1895 another mortgage was executed in his favour by B,—was made a defendant, apparently on the ground of his being a transferee under the mortgage of 14th March, 1893. The suit was decreed.

In a suit by M to enforce his mortgage of 21st January, 1895, which the representative in title of A contested, the High Court held that the decision in the previous suit was *res judicata* and also that S. 41 of the Transfer of Property Act did not apply to give M a title, although B had got his name entered in the Revenue papers as owner, because, the application for the entry having been opposed by A, B could not be said to have been entered as ostensible owner with A's consent, and also because, if M had made enquiries before he advanced money to B, he could have discovered the fact of B's opposition and facts showing B's title.

The Judicial Committee on appeal found the judgment of the High Court to be so satisfactory and sufficient that they felt themselves justified in advising the dismissal of the appeal without following the practice of making an elaborate report. *Nagheswar Prasad Pande v. Raja Pateshri Partab Narayan Singh*, 20 C.W.N. 265 = 3 L.W. 454 = (1916) M.W.N. 142 (P.C.) = 34 Ind. Cas. 673.

VISCONTENT HALDANE, LORD PARMOOR, LORD WRENBURY, SIR JOHN EDGE and MR. AMER ALI.

(2) *Prior suit—Dismissal on the ground of limitation—Question as to validity of sale by receiver raised in later suit—No bar of res judicata—Limitation Act, 1908—Non-applicability to defences—S. 28, Limitation Act—Party in possession—His rights not affected by the section.*

In execution of a decree obtained against B, M and their sons, U was appointed receiver with authority to sell certain properties and to clear off the decree-debt. U sold a house belonging to B, M and their brother G, to N. N obtained possession of the house except two *kothris*. N brought against G and others the present suit for the recovery of the two *kothris*. G had already sued for the cancellation of the sale effected by U, but his suit was dismissed as time-barred. In the present suit G again pleaded that the sale was not binding on him.

Held, that the matter in dispute cannot be regarded as *res judicata*, for nothing was decided in the former suit, which was dismissed on the score of limitation.

The Limitation Act only provides periods of limitation within which suits must be brought. It does not provide periods of limitation for defences.

S. 28 of the Limitation Act is also no bar, as that section merely provides that, at the determination of the period allowed by law to any person for instituting a suit for possession of

Res Judicata—(Continued).

any property, his right to such property shall be extinguished. *Gokal Chand v. Nidar Mal*, 1 P.R. 1916—32 Ind. Cas. 485.

SHAH DIN and CHIVVIS, JJ.

(3) *Res judicata within time for appeal—Subsequent suit—Appeal pending—No appeal in subsequent suit.*

A landlord filed suits in 1910 against the tenant to enforce acceptance of *pattas* for *Faslis* 1818 and 1919. They were dismissed by the Sub-Collector on the 19th December 1910 on the ground of want of jurisdiction but were remanded for disposal by the District Court on the 28th November, 1911. The Sub-Collector on remand passed a decree in both suits on the 26th March, 1912. Appeals were filed to the District Court on the 17th June, 1912. The landlord filed a suit in 1911 against the tenant to enforce acceptance of *patta* for *Fasli* 1320. The Sub-Collector on the 23rd May 1912, passed a decree in favour of the landlord on the ground that the decision in the earlier suits passed on the 26th March, 1912, rendered the contentions raised in the suit *res judicata*. No appeal was filed by the defendant against the decree in the suit of 1911. Appeals against the suits of 1910 came on for disposal before the District Judge on the 7th December, 1912, and he dismissed them on the ground that the decision of the Sub-Collector in the suit of 1911 against which no appeal was filed, rendered the question raised in the appeal *res judicata*.

Held, on second appeal: (1) that the Sub-Collector was wrong in holding that the decision passed by him in the suits of 1910 had the force of *res judicata* during the interval between the date of his decree and time allowed by law for filing the appeal:

(2) that the erroneous decision in the suit of 1911 which was not on the merits but on a mistaken view of the law by the Sub-Collector would not render the question raised in the appeals against the decrees in the suits of 1910 *res judicata*;

and (3) that the District Judge was not debarred from deciding the appeals on the merits because no appeal was filed against the decree in the connected suit.

An appeal is only a continuation of the original proceedings and the decree passed by the appellate Court is the decree in the suit. On the filing of an appeal, the judgment ceases to be *res judicata* and becomes *sub judice*.

The functions of an appellate Court are not the same in England and America as in India and consequently great care has to be exercised before the decisions based on practice and procedure of a highly technical character are followed in considering questions arising under the Civ. Pro. Code.

Explanation IV to S. 13 of the Civ. Pro. Code of 1892 which enacted that a decision liable to appeal may be final within the meaning of the section until the appeal is made, has been omitted in the present Code of 1908, and the omission which was in all probability made in view of the decision of 11 A. 148 removes any

Res Judicata—(Continued).

doubts or difficulties in dealing with the question; and it is not necessary to speculate on the class of cases to which this explanation can be applied, if a judgment liable to appeal is only held to be provisional and not operative as *res judicata*. *Chengalavala Gurrazu v. Venkateswar Row*, (1916) M.W.N. 223=19 M.L.T. 268=30 M.L.J. 379=33 Ind. Cas. 9.

AYLING and KUMARASWAMI SASTRI, JJ.
Reference:—11 A. 148, R.

(4) *Claims when ought to be joined by plaintiff.*

The plaintiff cannot be allowed to litigate his title over again unless his claims are mutually destructive or there is any embarrassment in joining the rights. Where the plaintiff did not set up the title which he could have brought forward as an alternative basis of his claim on the last occasion, he cannot be allowed to litigate it in a second suit.

The observations in 27 M. 760 as to suits by reversioners would seem to be opposed to the decision of the Judicial Committee in 11 B. L.R. 158. *Rangaswamy Patrodu v. Appalaswamy*, (1916) M.W.N. 286=34 Ind. Cas. 456.

COUTTS-TROTTER and SESHAGIRI Aiyar, JJ.

References:—27 M. 760; 11 B.L.R. 158, R.

(5) *Ex parte order in execution, if constitutes—Test—Execution petition, dismissal for default of, if affects prior order in execution which has become res judicata.*

An *ex parte* order in execution may operate as *res judicata* in subsequent stages of the same proceedings. The test to be applied is whether a person allowed the order to be passed against him at one stage of the proceedings when he had an opportunity to contest the validity of that order and if he has done so, he will not be permitted in subsequent proceedings in that suit to contest the validity of that order and re-open questions which he ought to have met in the former proceeding (a).

The dismissal for default of an execution application has not the effect of vacating a prior order in execution which has become *res judicata* between the parties (b). *Periakaruppan Chetty v. Chidambaram Thambiran*, 3 L. W. 339=(1916) 2 M.W.N. 64=33 Ind. Cas. 443.

SADASIVA Aiyar and MOORE, JJ.

References:—(a) 12 C.L.J. 312; 26 M.L.J. 189, F. (b) 24 A. 282; 8 C. 51, R.; 28 C. 122, Expl.

(6) *Application to execute decree as assignee granted—No objection thereto—Notice issued to judgment-debtor—Objection raised subsequently, barred.*

Where a person, having established his title as the beneficial owner of a decree, applied under O. XXI, r. 16 of the Code to be permitted to execute the decree and notice was thereupon issued to the judgment-debtor, who did not object to the application and submitted to the order granting it, *held*, that the judgment-debtor was precluded from questioning the title of the former to execute the decree.

Res Judicata—(Continued).

Taj Singh v. Jagan Lal, 14 A.L.J. 370=38 A. 289=35 Ind. Cas. 234.

PIGGOTT and WALSH, JJ.
Reference:—12 A.L.J. 206, *Appr.*

(7) *Withdrawal of suit, order for—Inability to adduce all the evidence at the first hearing—Jurisdiction—Civ. Pro. Code (1882)*, S. 373.

Where the appellate Court allowed the plaintiff to withdraw from the suit on the ground that he had not been able to adduce all the evidence which he would have liked to adduce at the first hearing:

Held, that such order, not being contemplated by S. 373 of the Code of Civil Procedure, was without jurisdiction, and a fresh suit brought in pursuance of that order was barred by *res judicata*. **Kali Prasanna Sili v. Panchanan Nandi Chowdhury**, 23 C.L.J. 489=20 C. W.N. 1000=33 Ind. Cas. 670.

SANDERSON, C.J. and NEWBOULD, J.
References:—11 C.L.J. 45; 11 C.L.J. 512, *F.*

(8) *Suit in which family custom was the subject of contest and threshed out in the presence of all branches of the family—Right of descendants of non-contesting branches to reopen the matter.*

Where it is necessary to establish or deny a custom in the family, and where pains have been taken to bring upon the record every branch of the family, and where that custom has been the subject of contest and thoroughly threshed out in the presence of all branches of the family, the matter cannot be again raised by the descendants of those branches, even though certain branches did not take an active part in the contest, but contented themselves with admitting that the custom existed. **Mowar Sheurbax Singh v. Mowar Thakur Dayal Singh**, 1 Pat. L.J. 221=36 Ind. Cas. 960.

ROE and JWALA PRASAD, JJ.
References:—12 C. 580; 13 C. 352, *R.*

(9) *Finding of fact—Matter directly in issue—Implied decision.*

The plaintiff sued for the property of his uncle's son S. The defendant pleaded that he was adopted son of the plaintiffs' uncle and S was imbecile and the factum and validity of adoption were *res judicata*. The pleas were allowed.

In a previous suit the plaintiff alleged that S was an imbecile and denied the factum and validity of the adoption and claimed the whole of the property of another uncle of his. The first Court had found that S was imbecile and adoption was not proved. On appeal the adoption was held proved and opinion was expressed that there was no need to go into the question of imbecility of S.

Held, that the plaintiff's present suit was barred by *res judicata*, for in the previous suit the Court by deciding the validity of the adoption had impliedly found that S was an imbecile. **Onkar Lal v. Radha Nath**, 95 P.L.R. 1916=36 Ind. Cas. 267.

SHADI LAL and LE-ROSSIGNOL, JJ.

Res Judicata—(Continued).

(10) *Plea of res judicata whether, may be waived—Judgments inter partes—Later adjudication supersedes earlier one.*

The plea of *res judicata* is one which does not affect the jurisdiction of the Court, but is a plea in bar of a trial of a suit or an issue as the case may be, which a party is at liberty to waive.

On principle it is impossible to make a distinction between a case where the plea is omitted to be taken by accident or mistake and where it is omitted to be taken by design (a).

On principle, in cases of judgments *inter partes*, the later adjudication should be taken as superseding the earlier. **Moturi Seshayya v. Sri Rajah Venkatadri Appa Row**, 31 M.L. J. 219=(1916) 2 M.W.N. 219=36 Ind. Cas. 283.

AYLING and SKRINIVASA AYYANGAR, JJ.
References:—(a) 1 A.L.J. 416; 13 A.L.J. 764, *R.*

(11) *Civ. Pro. Code (Act V of 1908), S. 11—Decision embodied in decree.*

The plaintiff sued, in 1910, to eject the defendant from certain lands, praying that the *mulgeni* lease executed by a predecessor-in-title of his to defendant was invalid and not binding on him, and that the plaintiff was entitled to evict the defendant as a yearly tenant. The Court decided the first point in the plaintiff's favour; but held that for want of notice the plaintiff was not entitled at that stage to evict the defendant. After due notice given the plaintiff again sued the defendant in ejectment. The defendant pleaded once more the *mulgeni* lease in his favour. The lower Courts held that the defence was barred by *res judicata* and decreed the claim. On second appeal:—*Held*, that the law of *res judicata* was applicable, inasmuch as in the earlier suit the first part of the plaintiff's prayer found a place in the decretal order and was as much decreed as the other part of the prayer which in the second part of that decretal order was rejected. **Mota Hollappa v. Yithal Gopal Habbu**, 18 Bom. L.R. 712=40 B. 662=36 Ind. Cas. 74.

BEAMAN and HEATON, JJ.

(12) *Finding by the lower Courts—Decision by the High Court on a different point—Strict construction adopted—Adverse possession—Disturbance of possession under decree of Court—Decree reversed in Second Appeal—Continuity of possession broken—Evidence Act, S. 114.*

The plaintiff, a trustee of a temple, sued to eject the 1st defendant. The defence was that he was a permanent *mulgeni* tenant and could not be ejected. The plaintiff had sued the 1st defendant and others for possession before, when this defendant set up the same defence and the two lower Courts held that the defendant was only a *chalgani* tenant and decreed possession, but the High Court reversed the decrees on the ground of insufficiency of notice. Hence the present suit. The plaintiff contended that the plea of the defendant was barred by *res judicata*. The District Judge upheld the contention.

Res Judicata—(Continued).

Held, that the defendant's plea was not *res judicata*, the plea of *res judicata* being one in restraint of the right of a litigant to have his case fully tried and determined.

The judgment which is pleaded in bar of this right must be strictly construed (a).

Illustration (e) to S. 114 of the Evidence Act is not exhaustive and the general language of the section applies to all acts and proceedings which might be presumed to have been done in the usual course of business.

When defendant began to assert an adverse title from 1894, plaintiff brought a suit in 1903 in ejectment and got possession under the decree of the Court below which was reversed in Second Appeal and the defendant got into possession again. It was held that in consequence of this disturbance of possession, the continuous possession which the defendant was bound to have proved was broken in a second suit by the plaintiff to eject the defendant.

28 M. 338 is no authority for the position that the period during which possession was taken under a hostile title would enure for title benefit of the original holder. *Laxmipathaya v. Ramachendra*. (1916) 2 M.W.N. 133=20 M.L.T. 228=31 M.L.J. 311=35 Ind. Cas. 421. *SESHAGIRI AIYAR and PHILLIPS, JJ.*

References:—(a) 37 M. 70, D.; 13 C. 17; 18 C. 647, F.

(13) Question of Law.

(Per *Seshagiri Iyer, J.*—In his order of reference), the decision on a question of law in one proceeding is, not *res judicata* in any later proceeding except to this extent, namely, that the right which was the object matter of the former proceeding and was established in favour of one party cannot be questioned in the subsequent proceeding (b). *Aiyasamier v. Yenkatachelam Mudali*, 31 M.L.J. 513= (1916) 2 M.W.N. 296=20 M.L.T. 391=4 L.W. 507.

ABDUR RAHIM, O.C.J., SESHAGIRI AIYAR and PHILLIPS, JJ.

References:—30 M. 461; 18 M.L.J. 548, R.

(14) Civ. Pro. Code (Act V of 1909), S. 11—*Res judicata*—*Privity between the parties*—*Privity of estate*—*Mortgagor who has mortgaged before suit cannot represent the estate*—*Decree not binding on mortgagee not a party.*

During the minority of defendant No. 1 a piece of land belonging to him was sold by his mother to Bhoje who conveyed it to Bavohi. It was then mortgaged by Bavohi to plaintiff in 1891. Defendant No. 1 having attained majority brought a suit in 1898 against his mother, Bhoje and Bavohi to set aside the sale. To this suit plaintiff was not a party. The suit was decided in defendant No. 1's favour; and in execution, he recovered possession of the land in 1901. About that time, the plaintiff obtained a decree on his mortgage against Bavohi; and he purchased the land at a Court sale held in execution of his decree. The plaintiff having sued to recover possession of the property, was met by the plea of *res judicata*,

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inasmuch as he was bound by the decree against his mortgagor Bavohi in 1898.

Held, negating the plea, that the plaintiff, as a mere mortgagee, was not bound by the earlier decision, because his title arose prior to the suit in which the decree against his mortgagor was obtained, and the mortgagor Bavohi possessing only the equity of redemption had not in him any such estate as would enable him sufficiently to represent the mortgagee in the suit instituted after the mortgage (a).

To make the principle of *res judicata* applicable, there must be between the parties in the earlier and the later suit some privity. *Ramchandra v. Malkapa*, 18 Bom. L.R. 767=40 B. 679=36 Ind. Cas. 413.

BATCHELOR, A.C.J. and SHAH, J.

Reference:—8 A. 824 (338), F.

(15) Unnecessary findings cannot operate as *res judicata*—*Mahomedan Law*—*Wakf created by will, validity of*—*Civ. Pro. Code, S. 11.*

Where a finding has been arrived at on a certain issue and it is sufficient to dispose of the case, other findings on other issues cannot be treated as a final decision of the matter covered by them so as to operate as *res judicata*.

By the law of the Shia sect of Muhammadans as well as by that of the Sunni sect a valid *wakf* can be created by will (25 All. 236, *referred to*). *Izzat-un-nissa Begam v. Mussammat Kaniz Fatima Begam*, 19 O.C. 69=36 Ind. Cas. 643.

STUART and PANDIT KANHAIYA LAL, J Cs.

(16) Civ. Pro. Code (Act V of 1909), S. 11—*Suit by saranjamdar to recover possession of lands for non-rendering of service*—*Suit dismissed on the ground that land was not held on service tenure*—*Second suit for recovering possession on the same ground by succeeding saranjamdar*—*Suit to recover assessment for land*—*Limitation Act (IX of 1908), Art. 130.*

In 1888, the plaintiff's brother, a *saranjamdar*, sued the predecessors-in-title of the defendants for the recovery of possession of the suit land on the ground that the defendant had ceased to perform service and had been holding the lands wrongfully without payment of assessment. The Court held in favour of the defendants that they did not hold the lands on condition of rendering the service. The plaintiff, who became the *saranjamdar* on his brother's death sued, in 1912, to recover possession of the land on the ground that the defendants had no longer been rendering any service; and, in the alternative, he sued to recover assessment of the lands. The lower Courts held that the suit was barred by *res judicata* and limitation. On appeal:

Held, (1) that the decision of 1888 operated as *res judicata*, for the plaintiff took the estate, as it was on the death of the previous holder, by virtue of his inheritance from the previous holder subject to the provisions of the formal resumption and re-grant by Government free

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from debts and charges under the sarranjam rules ;

(2) That the claim for payment of assessment was barred by limitation, for neither a special mode of devolution nor an incapacity for alienation prevented limitation from operating against the estate inherited by the plaintiff. **Madhavarao v. Anusuyabai**, 18 Bom. L.R. 768 = 40 B. 606 = 36 Ind. Cas. 505.

SCOTT, C.J. and HEATON, J.

(17) *Civ. Pro. Code (Act V of 1908), S. 11—Might and ought to have claimed in the first suit—Suit on mortgage—Suit to recover possession—Void mortgage—Mortgage of unrecognised sub-division of a bhag—Second suit to recover mortgage money—Failure of consideration—Suit for money had and received—Limitation—Limitation Act (IX of 1908), Art. 62—Contract Act (IX of 1872), S. 24.*

In 1896, K (father of defendants Nos. 1 and 2) mortgaged to R (predecessor-in-title of defendant No. 3) an unrecognised share of a *bhag*, on condition that after possession by the mortgagee for eleven years the mortgage amount was to be paid to him whenever he should demand it either out of property or by the mortgagor or his heirs personally. R went into possession of the land ; but his rights under the mortgage claim were sold and purchased by the plaintiff at a Court-sale. The plaintiff filed a suit in 1910 against the defendants to obtain possession of the property : the suit failed on the ground that the mortgage was invalid. In 1911, he filed the present suit to recover Rs. 788-7-0 from the estate of the deceased mortgagor or, in the alternative, to recover a smaller sum from the holder of a decree against the representative of the deceased mortgagee. The claim having been resisted on the grounds that it was barred by limitation and *res judicata* inasmuch as the plaintiff might and ought to have made the present claim in the suit of 1910 :

Held (1) that the claim was not barred by *res judicata* for (a) the claim for possession was not really a claim on the mortgage but a claim by virtue of the purchase by the plaintiffs of the mortgagee's rights ; and (b) at the time of the suit of 1910 his right according to the terms of the mortgage-deed had not matured, no demand having been made since the expiry of the eleven years mentioned in the deed ;

(2) that the claim was barred by reason of Art. 62 of the Indian Limitation Act, 1908, for the mortgage-deed being void the consideration failed *ab initio* and the mortgagee's right was to claim repayment of the money advanced to the mortgagor within three years of the date of the mortgage-deed as money had and received. **Bai Diwali v. Umedbhai**, 18 Bom. L.R. 773 = 40 B. 614 = 36 Ind. Cas. 564.

SCOTT, C.J. and HEATON, J.

(18) *Civ. Pro. Code (Act V of 1908), S. 11—Sale of lands in execution of a decree—Subsequent suit by a party for setting aside the sale as illegal the lands being occupancy*

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lands—Khoti Act (Bom. Act I, of 1880), S. 9.

In execution proceedings between the parties, certain Khoti lands were sold and purchased by the defendant at a Court-sale. The plaintiff then sued to recover possession of the lands alleging that the lands being occupancy lands could not be sold under S. 9 of the Khoti Settlement Act :—

Held, that, as the execution sale decided inferentially between the plaintiff and the defendant that the lands sold were not occupancy lands, the plaintiff could not be allowed to re-open and investigate the same question of fact a second time. **Kashinath v. Dhondshet**, 18 Bom. L.R. 786 = 40 B. 675.

BEAMAN and HEATON, JJ.

(19) *Decree obtained by fraud—Civ. Pro. Code, S. 11—Evidence Act, S. 44.*

Held, that the principle laid down in S. 11 of the Civ. Pro. Code is substantially modified by the provisions of S. 44 of the Indian Evidence Act and the principle of *res judicata* does not operate in the case of a decree obtained by fraud. **Sri Radha Kishan v. Wajid Ali Khan**, 19 O.C. 334 = 36 Ind. Cas. 746.

STUART, J.C.

(20) *Civ. Pro. Code, 1908, S. 11—Decision of Revenue Court that plaintiff as co sharer not entitled to sue for ejectment—Suit as lambardar—Co-sharer cultivating lands, if tenant.*

The judgment of a Revenue Court deciding that the plaintiff as co-sharer was not entitled to maintain a suit for ejectment cannot operate as *res judicata* with reference to the question whether the plaintiff as a *lambardar* is entitled to maintain such a suit.

The question whether a co-sharer cultivating lands in a village in a portion of which he is a co-owner is invariably to be regarded as a co-sharer accountable for the rent to the body of co-sharers at the time of the distribution of profits or as a tenant on behalf of the general body of co-sharers is not one admitting of an invariable answer. **Jai Ram v. Gulzari Mal**, 35 Ind. Cas. 612.

SUNDAR LAL, J.

References:—11 A.L.J. 742 ; 36 A. 441 ; 29 A. 763 ; 4 A.L.J. 1, R.

(21) *Civ. Pro. Code (Act V of 1908), S. 11—Madras Estates Land Act (I of 1908), S. 189—Suit for rent—Exclusive jurisdiction of Revenue Courts—Such exclusive jurisdiction not ousted by a prayer for declaration of title—Amendment by striking out prayer for rent—Revenue Court's decision on question of title not res judicata.*

A Revenue Court's decision on the question of title cannot be *res judicata* in a subsequent suit in the Civil Court, as under S. 11, Civ. Pro. Code, the decision in the first Court by a Court not competent to try the second suit cannot be pleaded as *res judicata* in the second suit.

As the claim for rent in the case of an estate is exclusively cognizable by the Revenue Court the Civil Court cannot be given jurisdiction

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over that claim by the addition of that claim to a *bona fide* claim for declaration of title to *melwaram*. But the plaint can be permitted to be amended by confining the suit to a prayer for declaration of the plaintiff's title to *melwaram*. *Subbanna Achariast v. Gopalakrishna Achariast*, 34 Ind. Cas. 354.

SADASIVA AIYAR and MOORE, JJ.

References:—20 M. 392; 12 Ind. Cas. 430 = (1911) 2 M.W.N. 307, F.

- (32) *Civ. Pro. Code, 1908, S. 11—Suit for rent—Finding of fact in former suit—When operates as res judicata in later suit—Previous suit for reasonable rent—Suit dismissed—Finding as to rent being less than claimed—Effect—Parties in subsequent suit bound.*

Plaintiff sues the defendants for the rent of a holding at the rate of Rs. 30 per mensem. The defendants plead that the holding was rent free. In a previous suit between the parties under S. 23, Act X of 1959 in which the plaintiff claimed rent at the rate of Rs. 49-3-0, the Judicial Commissioner of Chota Nagpur found that the rent was at the rate of Rs. 30 but dismissed the suit on the ground that the rate claimed was higher.

Held that the rate of rent was a question directly and substantially in issue in the former suit and that it operated as *res judicata* in the present suit and was binding on the defendants (a). A finding of fact to operate as *res judicata* must be material and necessary to the decision of the suit (b). *Milton Poddar v. Jadab Chandar Chattopadhyay*, 33 Ind. Cas. 159.

MULLICK, J.

References:—(a) and (b) 10 W.R. (F.B.) 14 (20); 11 C. 301; 17 A. 174; 6 C. 319, R.

- (23) *Civ. Pro. Code (Act V of 1908), S. 11—Suit for price of goods sold—Omission of vendee to plead part payment of price to vendor's agent—Subsequent suit by vendee for the amount, bar of—Revision—Interference by High Court in absence of petition.*

A sued for the price of jewels sold to B without giving him credit for a sum paid by him to A's agent C in part payment of the price, and obtained a decree for the whole amount. B then sued A and C for the money paid in part payment.

Held (1) that the claim against A was barred by the decision in the previous suit; (a) (ii) that as C had not paid to A the money received from plaintiff, he was liable, and though the plaintiff had not applied for revision of the lower Court's decree dismissing the suit against C a decree could be passed against him, inasmuch as all the persons were parties to the petition filed by A. *Sreekakulam Ramlah Settli v. Kapulooru Chintiah*, 33 Ind. Cas. 623.

SREENIVASA AIYANGAR, J.

References:—(a) 11 M.L.T. 201 = (1912) M. W.N. 172 = 13 Ind. Cas. 649, D.

- (24) *Decree, execution of—Mesne profits—Interest.*

One Musammat Sarvi Begam brought a suit against her brothers and sisters for possession

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of her share in her father's estate and for mesne profits. She got a decree on the basis of a compromise. The decree distinctly stated that the mesne profits would carry no interest. Musammat Taj Begam also obtained a decree (Sarvi Begam being a party to her suit), for mesne profits which, in her case, were to carry interest. She realised the amount due to her by means of a regular suit against Sarvi Begam in execution of whose decree certain money had been realised. Sarvi Begam now applied to execute her decree. The Subordinate Judge awarded her interest on the mesne profits but no final orders were passed, the decree-holder being ordered to furnish some information. An appeal was filed against the order to the High Court in which the appellant challenged the allowing of interest. The appeal was dismissed as premature, but the Judges in the High Court discussed certain matters of principle decided by the Court below. The decree-holder having asked for interest, *held*, (1) that the interest could not be granted, the question not being *res judicata*; (2) that the High Court having come to the conclusion that the appeal was premature, the further observations were made *obiter*. *Taj Begam v. Sarvi Begam*, 14 A.L.J. 1171.

WALSH and SUNDAR LAL, JJ.

- (25) *Revenue Court—Former suit in that Court for occupancy holding—Finding on defendant's title—Later suit in Civil Court for the holding and the grove—Former decision no bar as regards title to the grove—Agra Tenancy Act, 1901, S. 202—Applicability and scope.*

Where the plaintiff, the zamindar of a village, sued in the Revenue Court the defendant for possession of a holding and the defendant contested the suit on the ground that he as the original tenant's adopted son succeeded to the holding as well as to the grove and the Revenue Court dismissed the suit and the plaintiff then brought a suit in the Civil Court for possession of the holding as well as the grove.

Held that the Revenue Court could not have decided the suit brought in respect of the grove and that its decision could not operate as *res judicata* in the subsequent suit relating to the grove.

S. 202 of the Tenancy Act has no application inasmuch as the suit, so far as the grove was concerned was not a suit relating to an agricultural holding. *Mizaji Lal v. Hori Lal*, 34 Ind. Cas. 162.

HANERJI and PIGGOTT, JJ.

- (26) *Decision of case in favour of a party—Point not affecting ultimate decision—Determination against said party—Effect of such determination in subsequent suit.*

Where a case is decided in favour of a party, though one of the points in the case is found against him, such finding would not operate as *res judicata* against him in a subsequent suit, inasmuch as he cannot prefer an appeal against the finding on the particular point, since the ultimate decision in the case is in his

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favour. **Jagab Nath v. Suraj Bakhsh Singh**, 30 Ind. Cas. 502.

" **TWEEDY, S.M. and HOLMS, J.M.**

(37) *Erroneous decision on question of law.* An erroneous decision on a question of law in a previous suit is no bar in a subsequent suit between the same parties (a). But the findings of fact in the previous suit are clearly *res judicata* between the parties (b). **Veeraraghava Thathachariar v. Krishnaswami Thathachariar**, 31 Ind. Cas. 269.

SADASIVA AIYAR and NAPIER, JJ.

References:—(a) 4 M. 219; 21 Ind. Cas. 979; 30 M. 461, F. (b) 37 M. 70, F.

(38) *Landlord and tenant—Notice of ejectment—Suit contesting the notice of ejectment—Suit dismissed—Subsequent suit to recover the occupancy—Oudh Rent Act S. 108 (10).*

Where a suit by a tenant contesting the validity of a notice of ejectment served by the landlord had been dismissed, a subsequent suit by him to recover the occupancy is barred by *res judicata* and the question decided in the prior suit as to the nature of the tenancy cannot be reopened in the subsequent suit. **Har Bakh Singh v. Lalla**, 34 Ind. Cas. 640.

CAMPBELL, J.M.

(29) In Burma there are no Revenue Courts and there can be no case of *res judicata* by reason of the order of the Revenue Officer. **Maung Kaw La v. Maung Ke**, 35 Ind. Cas. 356.

MAUNG KIN, J.

(29-a) *Civ. Pro. Code, 1908, S. 11—Matter directly and substantially in issue in previous suit—Incidental finding.*

The question what was "the matter directly and substantially in issue" in a previous suit depends on whether the parties to the suit and the Court have dealt with the matter as if there was a relief claimed in respect of that matter also, that is to say, though the matter was in the first instance brought in issue as ancillary or incidental to the matter in respect of which the relief was claimed, it was dealt with and decided as if it formed a direct and principal issue in the suit (a).

An incidental finding as to boundary not on a question directly and substantially in issue in a previous suit is not a *res judicata* as regards the question of title to that strip in subsequent suit between the same parties. **Muhammad Abdul Qader v. Jnan Chandra Pal**, 32 Ind. Cas. 738.

HOLMWOOD and IMAM, JJ.

Reference:—(a) 2 C.L.J. 540, R.

(30) *Musalman Wakf Validating Act (VI of 1913), S. 3, title and preamble—Act, if operates retrospectively—Res judicata—Decision in previous suit between same individuals, but brought by plaintiff in another capacity—Decision of High Court on legal grounds declaring a wakf invalid, conclusive in later suit even when not strictly res judicata.* **Mahomed Bukth Majumdar v. Dewan Ajmon Raja**, 19 C.W.N. 967 = 48 O. 158 = 32 Ind. Cas. 701. See Final Part 1916, Col. 1213.

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(31) *Inconsistent decisions—Latter to prevail—Execution proceedings.* **Dambar Singh v. Munawar Ali Khan**, 13 A.L.J. 764 = 37 A. 591 = 30 Ind. Cas. 775. See Final Part, 1915, Col. 1214.

(32) *Res judicata between co-defendants—Conflict of interests between defendants—Judgment defining rights and obligations inter se.* **Shwe Tha U v. Hla Rhi**, 8 Bur. L.T. 160 = 30 Ind. Cas. 604. See Final Part, 1915, Col. 1214.

" (33) *Decision of Munsif in ordinary jurisdiction—Suit on the Small Cause side.* **Sellam Iyengar v. Veerappa Chetty**, 18 M.L.T. 171 = (1915) M.W.N. 605 = 30 Ind. Cas. 522. See Final Part, 1915, Col. 1214.

(34) *Finality of execution proceedings—Suit to declare that a particular judgment-debtor is no party to a decree, held to be incompetent—Code of Civil Procedure (1889), Ss. 13, 244.* **Rajwant Prasad Pande v. Ram Ratan Gir**, 29 M.L.J. 165 = 2 L.W. 671 = 13 A.L.J. 937 = 17 Bom. L.R. 754 = 37 A. 485 = (1915) M.W.N. 766 = 18 M.L.T. 173 = 20 C.W.N. 35 = 23 C.L.J. 55 = 30 Ind. Cas. 949 (P.C.). See Final Part, 1915, Col. 1215.

(35) *Rent decree obtained by mortgagee against mortgagor—Property attached in execution and released on claimant's objection—No suit brought to contest the order of release—Same property again attached by mortgagee under his decree on mortgage—Property again released on claimant's objection—Suit by defeated decree-holder to set aside the order of release—Res judicata.* **Mussammat Khan Devi v. Mussammat Nihal Devi**, 101 P.R. 1915 = 32 Ind. Cas. 43. See Final Part, 1915, Col. 1216.

(36) *Claim to property attached by receiver in Insolvency—Adjudication by Insolvency Court—Subsequent Civil suit for same relief, bar of.* See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 31, 33 Ind. Cas. 799.

(37) See BEN. ACT VIII OF 1885 (TENANCY), No. 52, 35 Ind. Cas. 695.

(37-a) *Finding of Collector re rent—Subsequent suit for determining rent.* See MAD. ACT I OF 1908 (ESTATES LAND), No. 28-e, 32 Ind. Cas. 706.

(38) *Proceedings relating to amendment of jamabandi—Decision of settlement officer whether res judicata.* See APPEAL (GENERAL), No. 2, 14 A.L.J. 140.

(39) *Compromise decree how far operates as res judicata—Compromise decree relating to properties outside the scope of the suit—Effect—Registration whether necessary.* See COMPROMISE, No. 2, 1 Pat. L.J. 208.

(40) *Unnecessary finding in prior suit—Not affecting later suit.* See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 16, 56 P.R. 1916.

(41) *Person added as formal party in former suit—Decision in such suit—Such person not affected in later suit.* See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 18, 65 P.R. 1916.

Res Judicata—(Concluded).

(41-a) Judgment-debtor's objections in execution department—Estoppel and. See EXECUTION OF DECREE, No. 34-d, 32 Ind. Cas. 754.

(42) Gross negligence of guardian—Confession of judgment by guardian. See GUARDIAN AND WARD, No. 1, 117 P.L.R. 1916.

(43) Alienation by father—Sale set aside by the sons to the extent of their share—Suit by alienee to recover proportionate consideration—Liability of the sons—Form of decrees. See HINDU LAW (ALIENATION), No. 16, (1916) 2 M.W.N. 217.

(44) Effect of previous decision not *inter partes*. See HINDU LAW (JOINT FAMILY), No. 6, 109 P.W.R. 1916.

(45) See JURISDICTION OF CIVIL AND REVENUE COURTS, No. 10, 34 Ind. Cas. 753.

(45-a) See LAND ACQUISITION ACT (1894), No. 11, 32 Ind. Cas. 922.

(46) See LANDLORD AND TENANT, No. 57, 33 Ind. Cas. 556.

(47) Suit for rent against tenant. See LANDLORD AND TENANT, No. 53, 33 Ind. Cas. 420.

(48) Dower, claim for—Cause of action for dower distinct from that for share in inheritance—Oudh Laws Act, S. 5. See MAHOMEDAN LAW (DOWER), No. 3, 19 O.C. 171.

(49) Decisions of Probate Court how far conclusive—Rule of *res judicata* not a technical rule. See PROBATE, No. 2, 20 C.W.N. 738.

(50) Decision on two grounds—Both *res judicata*—Question of law erroneously decided as against Government—How far *res judicata*. See MAD. REG. XXV OF 1802 (PERMANENT SETTLEMENT), No. 2, 31 M.L.J. 97.

(51) Dispute *inter partes* adjudicated upon in earlier suit—Pecuniary value of subsequent suit beyond jurisdiction of Court trying previous suit—Finding whether *res judicata*—Admissibility of previous judgment. See RELIGIOUS ENDOWMENTS, No. 2, 31 P.W.R. 1916.

(52) See RIPARIAN RIGHT, No. 1, 35 Ind. Cas. 356.

(53) Order for sale in Melkanomdar's suit—Jenmi's title, whether extinguished thereby—Prior suit by Melkanomdar, whether bars the Jenmi's suit. See TRANSFER OF PROPERTY ACT, No. 123, 4 L.W. 184.

Restitution.

(1) *Dependent judgment or order—Restitution, when to be had—Limitation—Interest—Civ. Pro. Code* (1908), S. 144.

It is a general rule, that, upon the reversal of a judgment, order or decree, all connected or dependent judgments or orders fall with it, specially judgments subsequently entered and dependent thereupon; but this rule does not operate by implication to set aside a distinct and independent judgment or proceeding though it forms a part of the same litigation.

Whether a judgment or order is a dependent judgment or order, that is, is merely ancillary and accessory to another judgment so as to

Restitution—(Concluded).

have its fate and fall to the ground along with it, is to be determined from the nature and scope of the proceedings.

In cases not comprehended strictly within the letter of S. 144 of the Civ. Pro. Code (which makes grant of restitution obligatory in certain circumstances) restitution is not a matter of right but depends upon the sound discretion of the Court and will be ordered only when the justice of the case calls for it; but the test of what is just, must be determined with reference to the imperative requirements of the law applicable to the subject-matter.

An obligation is imposed upon the Court to dismiss an application for execution of a decree, if the application is barred by limitation. Hence the Court cannot withhold relief by way of restitution, when a sum has been paid out on the strength of an erroneous decision upon a point of limitation.

The Court will not permit an injustice to be done by reason of an erroneous order made by it and will, when that erroneous order has been reversed, restore the parties to the position which they would otherwise have occupied.

When a person receives money under a decree which is afterwards reversed on appeal, the statute of limitation commences to run in his favour only from the reversal (a).

When a decree-holder withdraws money under a decree which is afterwards reversed on appeal, he is bound to restore the amount with interest at the rate of 6 per cent. per annum from the date of withdrawal to the date of repayment into Court (b). *Ashutosh Goswami v. Upendra Prosad Mitra*, 24 C.L.J. 467—21 C.W.N. 564.

MOOKERJEE AND CUMING, JJ.

References:—(a) 19 C.W.N. 1167, *doubted*. (b) (1871) L.R. 3 C.P. 465; (1875) L.R. 18 Eq. 659; (1871) L.R. 6 Ch. App. 558; (1877) L.R. 4 I.A. 197; 3 C. 161, *R*.

(2) Decree for redemption against mortgagee with possession reversed on appeal—Mortgagee's application to first Court for recovery of mesne profits for period of dispossession in execution of first Court's decree—Jurisdiction. See CIV. PRO. CODE (1882), No. 39, 20 C.W.N. 425.

(3) Whether can be obtained as against a *bona fide* auction-purchaser. CIV. PRO. CODE (1908), No. 266, 14 A.L.J. 302.

(4) When can be granted. See CIV. PRO. CODE (1908), No. 265, 3 L.W. 236.

(5) Ss. 144, 47, Civ. Pro. Code—Scope of S. 144—*Ex parte* decree—Sale in execution—Purchase by decree-holder—Crops taken by purchaser while in possession—*Ex parte* decree set aside—Suit for value of crops—Maintainability—Plaint treated as execution application under S. 47, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 271, 1 Pat. L.J. 43.

(6) Application for, when lies. See CIV. PRO. CODE (1908), No. 98, 4 L.W. 400.

Restitution of Conjugal Rights.

(1) *Discretion of Court in granting decree for restitution of conjugal rights—Restitution when may be refused.*

Restitution of Conjugal Rights—(Concluded).

The grant of a decree for restitution of conjugal rights is discretionary with the Court.

Where the girl was a minor at the time of her marriage, and the marriage has not been consummated and the girl has never been to the plaintiff's house, and there is no satisfactory explanation to account for her continual residence at her father's house though she attained puberty at least eight years before suit, *held*, the lower Court was right in declining, after such a lapse of time, to exercise its discretionary jurisdiction. *Ziada v. Mussamat Jowal*, 46 P.R. 1916=134 P.W.R. 1916=148 P.L.R. 1916=34 Ind. Cas. 538.

SHADI LAL and LESLIE JONES, JJ.

References:—82 P.R. 1908; 11 M.I.A. 551 215 P.L.R. 1912, R.

(2) *Conjugal rights—Suit for restitution—Semi-aboriginal tribe—Lalungs—Custom requiring a son-in-law to reside in father-in-law's house, if valid. Lengal Lalung v. Pengul Lalunganl*, 22 C.L.J. 92=20 C.W.N. 406=30 Ind. Cas. 796. See Final Part, 1915, Col. 1219.

(3) *Suit for, by Muhammadan husband—Plea—'Keeping a low caste mistress,' 'suit not bona fide' and 'laches' how far valid as defences—'Legal cruelty,' what amounts to—No difference between English and Mahomedan Laws as regards. Ambalath Yeettill Thekethill Mossa v. Vaillyakath Pathumma*, 2 L.W. 894=(1915) M.W.N. 836=30 Ind. Cas. 924. See Final Part, 1915, Col. 1219.

(4) Decree for, when to be passed—Discretion of Court. See APPEAL (SECOND APPEAL), No. 1, 28 P.W.R. 1916.

(4-a) See MAHOMEDAN LAW (DIVORCE), No. 1, 32 Ind. Cas. 707.

(5) See MAHOMEDAN LAW (MARRIAGE), No. 3, 36 Ind. Cas. 20=21 C.W.N. 345.

(6) Effect of apostasy. See MAHOMEDAN LAW (MARRIAGE), No. 1, 8 L.B.R. 461.

Restoration.

(1) See CIV. PRO. CODE (1909), No. 381, 1 Pat. L.J. 547.

(2) Conversion of an application for, to one for review whether allowable. See CIV. PRO. CODE (1909), No. 378, 21 C.W.N. 30.

(3) Execution application struck off—Objection as to limitation—Jurisdiction. See CIV. PRO. CODE (1909), No. 372, 35 Ind. Cas. 337.

Restoration of Appeal.

(1) Application for, rejected—Review—Order refusing to set aside order rejecting appeal—Appeal—Review rejected—Revision. See CIV. PRO. CODE (1909), No. 457-a, 32 Ind. Cas. 85.

(2) Appeal set down for hearing, and ordered to be heard next day—Date not communicated—Dismissal for default—Restoration—Appeal. See CIV. PRO. CODE (1909), No. 649-a, 32 Ind. Cas. 936.

Restoration of Suit.

(1) See ARBITRATION, No. 4, 115 P.R. 1916.

(2) See CIV. PRO. CODE (1909), No. 373-a, 32 Ind. Cas. 714.

Resumption.

(1) Rent free grant—of land so granted by forcible dispossession. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 2, 36 Ind. Cas. 958.

(2) See OHOWKIDARI OHAKRAN LANDS, No. 1, 32 Ind. Cas. 545.

(3) See CIV. PRO. CODE (1909), No. 204, 34 Ind. Cas. 713.

(4) Grove, when ceases to retain its character as such—Portion not occupied by trees—Resumption by piecemeal. See GROVE, No. 1, 32 Ind. Cas. 868.

(5) See LANDLORD AND TENANT, No. 35, 33 Ind. Cas. 147.

Resumption of Grant.

(1) See U.P. ACT II OF 1901 (AGRA TENANCY), No. 42, 31 Ind. Cas. 898.

(2) See LANDLORD AND TENANT, No. 53, 33 Ind. Cas. 420.

Resumption of Land.

Grant of land for services of a Huddar—Right to resume land when service not required—Right depending on the terms of the grant and character of services—Presumption—Burden of proof. See SERVICE TENURE, No. 1, 18 Bom. L.R. 695.

Resumption Suit.

Ex parte decrees, order setting aside—If appealable. See OUDH ACT XXII OF 1886 (RENT), No. 33, 34 Ind. Cas. 702.

Retrospective Effect.

Civ. Pro. Code (1909), O. XXI, r. 57, whether retrospective. See ATTACHMENT, No. 1, 31 Ind. Cas. 911.

Return of Plaintiff.

(1) See BEN ACT VIII OF 1885 (TENANCY), No. 61, 35 Ind. Cas. 76=21 C.W.N. 209.

(2) For presentation to Small Cause Court. See JURISDICTION OF SMALL CAUSE COURT, No. 2, 33 Ind. Cas. 768.

(3) Presentation of plaintiff returned—Expiry of period of limitation at time of representation. See LIMITATION, No. 5, 30 Ind. Cas. 544.

(4) Permission to re-file in proper Court—Order allowing further time—Court, power of—Suit, filing of—Last day—Plaintiff, risk of—Prosecution of a suit in a Court—Return of plaintiff, termination on. See LIMITATION ACT (1909), No. 5, 24 C.L.J. 355.

Re-union.

Of mahals—Claim for re-union by person having acquired properties in more than one mahal—Jurisdiction of Civil Court to question validity of re-union. See U.P. ACT III OF 1901 (LAND REVENUE), No. 16-b, 36 Ind. Cas. 664.

Revenue.

(1) Suit for annulment of sale for arrears of, not due—Collector, duty of. See BEN. ACT XI OF 1859 (LAND REVENUE SALES), No. 3, 31 Ind. Cas. 743.

(2) "Musafi Khairati"—Whether resumable. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 42, 31 Ind. Cas. 898.

(3) Sale for arrears of Government Revenue—Plea of adverse possession—Limitation. See SALE FOR ARREARS OF REVENUE, No. 1, 43, C. 779.

Revenue Agents, Pleaders and Mukhtar's Act.

See ACT XX OF 1865.

Revenue Courts.

(1) In Burma there are no Revenue Courts and there can be no case of *res judicata* by reason of the order of the Revenue Officer. **Maung Kaw La v. Maung Ke**, 35 Ind. Cas. 956.

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(2) Discretion of. See BEN. ACT VIII OF 1885 (TENANCY), No. 53, 1 Pat. L. J. 479.

(3) Suit for ejectment through,—Recognition of trespassers as tenants. See OUDH ACT XXII OF 1886 (RENT), No. 43-a, 36 Ind. Cas. 770.

(4) Mutation proceedings, registration of petitions of compromise filed in—Mutation proceedings in. See FAMILY ARRANGEMENT, No. 1, 19 O. C. 75.

(5) Suit in, to eject tenants—Subsequent suit by landlord in Civil Court—Saving of limitation. See LIMITATION ACT (1908), No. 45, 36 Ind. Cas. 770.

(6) See PARTITION, No. 8, 19 O. C. 151.

(7) Second appeal—Practice—First Court's judgment, not filed—Dismissal of appeal—Validity of. See PRACTICE AND PROCEDURE, No. 6, 34 Ind. Cas. 706.

(8) Decision of, that plaintiff as co-sharer not entitled to sue for ejectment—Suit as lambardar. See RES JUDICATA, No. 20, 35 Ind. Cas. 612.

Revenue Jurisdiction Act.

See BOM. ACT X OF 1876.

Revenue (Land) Act.

See C.P. ACT XVIII OF 1881.

See OUDH ACT XVII OF 1876.

See U.P. ACT III OF 1901.

See PUN. ACT XVII OF 1887.

Revenue (Land) Code.

See BOM. ACT V OF 1879.

Revenue Officer.

Acts of, under Mad. Act I of 1908—Power of the High Court to revise. See MAD. ACT I OF 1908 (ESTATES LAND), No. 29, 4 L. W. 278.

Revenue Papers.

Entry in, of name of widow of deceased member—Separation of family. See HINDU LAW (JOINT FAMILY), No. 34, 36 Ind. Cas. 44.

Revenue Records.

Entries therein—Evidentiary value. See LIMITATION ACT (1908), No. 58, 9 S.L.R. 143.

Revenue Recovery Act.

See MAD. ACT II OF 1864.

Revenue Register.

(1) Entry—Inconsistent with known facts—Weight to be attached to entry.

An entry made in a Revenue Register without any explanation as to how it originated or was brought into existence is, inconsistent with other known facts, not entitled to any weight. **Parmeshri Das v. Girdhari Lal**, 30 Ind. Cas. 240.

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(2) Land in name of husband and wife—Wife's right to claim property as heir. See ESTOPPEL, No. 5, 30 Ind. Cas. 692.

Revenue Sale.

(1) Suit for annulment of sale for arrears of revenue—Not due—Collector, duty of. See BEN. ACT XI OF 1859 (LAND REVENUE SALE), No. 3, 31 Ind. Cas. 743.

(2) What passes at a. See EJECTMENT, No. 1, 23 O.L.J. 151.

(3) Equity of redemption—Acquisition by prescription—Duty to pay taxes—Revenue sale.—Property acquired by fraud—Suit for recovery when lites. See TRANSFER OF PROPERTY ACT, No. 93, 19 M.L.T. 210.

Revenue Sale Law Act.

See BEN. ACT XI OF 1859.

Revenue Sales Land Act.

See BEN. ACT VII OF 1868.

Reversioner.

(1) Attestation of deed does not by itself create estoppel against or imply consent of the attesting. See HINDU LAW (WIDOW), No. 14, 20 M.L.T. 335.

(2) Suit by reversioner for setting aside will as forgery and for declaration of invalidity of widow's alienation—Nature of suit—Limitation. See HINDU LAW (WIDOW), No. 16, (1916) 2 M.W.N. 325.

(3) Tenure held by widow—Rent decree against the widow—Execution of decree—Execution against the holding, in the hands of the. See HINDU LAW (WIDOW), No. 29, 34 Ind. Cas. 581.

Review.

(1) Letters Patent Appeal—Review of judgment, if competent.

It is competent to the High Court to entertain an application to review a judgment passed in a Letters Patent Appeal.

The cases bearing on the subject considered, **Yenkatasubbarayudu v. Narayana Sastri**, 3 L. W. 172=19 M.L.T. 146=(1916) M.W.N. 135=32 Ind. Cas. 879=32 M.L.J. 144.

SESHAGIRI AIYAR and PHILLIPS, JJ.

Review—(Continued).

(2) *Limitation Act* (1908), Art. 173—*High Court, decrees of—Subsequent decision of the Privy Council—Review.*

An application for a review of a decree of the High Court must be presented within 90 days of the decree, and every day's delay over that period must be duly accounted for.

Quare.—Whether a subsequent decision of the Privy Council, laying down the law in a different manner, is a sufficient ground for review? *Ramaswami v. Raja Venkatanarasimha Naidu Varu*, 3 L.W. 241 = (1916) M.W. N. 277 = 32 Ind. Cas. 1000.

ABDUR RAHIM, J.

(3) *Limitation Act* (1908), S. 12—*High Court judgment—Application for review—Limitation if runs from before the signing of decrees—High Court Rules, Appellate Side, Chap. XI, r. 4—Deputy Registrar certifying application not in order—Application if must be presented within seven days of return of application with such certificate—Bengal Tenancy Act (VIII of 1885), S. 153—Question of title raised but not decided by Munsif exercising final jurisdiction—Appeal to District Judge if lies—District Judge deciding question of title in appeal—Second appeal if lies.*

In computing the period of limitation, for an application for review of a judgment of the High Court, the party applying for review is entitled to have excluded, under S. 12 of the Limitation Act, the time requisite for taking a copy of the decree, and the period of limitation cannot in such a case commence to run until, at all events, the day the decree was signed by the Judges.

Rule 4 of Chap. XI of the Appellate Side Rules was intended to apply to the case where the Deputy Registrar gives a certificate that the review application was in order, and not to cases where the certificate is to the effect that the proceedings were not in order.

The application for review was properly presented to the Courts presided over by the Chief Justice, as there was no time, after the application was put in order, to present it to the Bench which had disposed of the appeal in the first instance, one of them having retired from the Court some days before and the other having gone away on furlough two days after that date.

In a suit to recover arrears of rent (the amount in claim being less than Rs. 50) the defendant objected that the plaintiff was his *benamidar*. The Munsif, who had final jurisdiction under S. 153 of the Bengal Tenancy Act declined to go into the question of title, but dismissed the suit on the ground that the plaintiff had failed to prove realisation of rent from the defendant in previous years. The plaintiff appealed to the District Judge and also preferred an application for revision under the proviso to S. 153. The District Judge overruled the defendant's objection in the appeal that no appeal lay under S. 153, and found for the plaintiff on the merits.

Review—(Continued).

Held.—That no appeal lay to the District Judge from the decision of the Munsif as no question of conflicting title was decided by it; and the decision of the District Judge to the contrary was erroneous in law.

That a second appeal lay against this decision (a).

Held, per *Sanderson, C.J.*—That an appeal lay from the decision of the District Judge, which decided a question of conflicting title under S. 153, Bengal Tenancy Act (b).

Per *Mookerjee, J.*—Where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order cannot be defeated on the ground that the order was made without jurisdiction (c).

The Court directed the District Judge to deal with the application for revision under the proviso to S. 153 of the Bengal Tenancy Act. *Gangadhar Karmakar v. Sekhar Basini Dasgupta*, 20 C.W.N. 967 = 24 C.L.J. 235 = 35 Ind. Cas. 348.

SANDERSON, C.J., and MOOKERJEE, J.

References.—(a) 23 C.L.J. 235, overruled. (b) 12 C.W.N. 835, *Expt.* (c) 12 C.W.N. 835; 27 C. 362; 14 I.A. 160; 16 C.L.J. 77, *Diss.*

(4) *Non-appealing party, if can apply—Appeal to lower appellate Court—Second appeal by some of the parties—Civ. Pro. Code (Act V of 1908), O. XLVII, r. 2—“Where the ground of such appeal and the review are based on the same grounds”—Decree of the appellate Court, effect of—Appeal by some of the parties, effect of.*

The plaintiffs instituted a suit for recovery of possession of land against five defendants, who claimed to hold it under one title. The suit was decreed. An appeal preferred by all the defendants was dismissed. Three of the defendants (i.e., the defendants other than the first two) then preferred a second appeal and made respondents the plaintiffs and also the defendants who had not joined them in the appeal. The appeal was summarily dismissed under O. XLII, r. 11 of the Code of Civil Procedure:

Held, that an application for review on the ground of discovery of new and important evidence by the first two defendants, who did not prefer a second appeal, was entertainable by the lower appellate Court.

A defendant, who has not himself appealed, may apply for a review of judgment, notwithstanding the pendency of an appeal by a co-defendant, except in two contingencies, namely, *first*, where the ground for review is identical with the ground for appeal, and *secondly* when, as respondent in the appeal, he can present to the appellate Court the case on which he seeks review. Where the grounds on which the appeal was preferred were different from the ground on which the review is sought, namely, the discovery of new and important matter or evidence, the case does not fall within the exception.

Review—(Continued).

The expression "where the ground of such appeal is common to the applicant and the appellant" in O. XLVII, r. 1 (3) of the Code of Civil Procedure, refers to a case where the appeal and the review are based on the same grounds, and does not contemplate a comparison between the actual appeal by the defendant and a possible hypothetical appeal by the applicant for review.

If the decree of the lower Court is reversed by the appellate Court, it is absolutely dead and gone; if, on the other hand, it is affirmed by the appellate Court, it is equally dead and gone, though in a different way, namely, by being merged in the decree of the superior Court which takes its place for all intents and purposes; both the decrees cannot exist simultaneously. The fact that an appeal has been dismissed under O. XII, r. 11 of the Code of Civil Procedure, makes no difference in principle (a).

The effect of an appeal by some alone of the parties affected by a decree, is to leave untouched the decree as between the parties thereto. *Chandra Kant Bhattacharyya v. Lakshman Chandra Chakrabarti*, 24 O.L.J. 517 = 21 O.W.N. 430 = 36 Ind. Cas. 460.

MOOKERJEE and CUMING, JJ.

Reference:—7 B.L.R. 704 (714) (F.B.), F.

(5) *Order passed under mistake—Inherent power of Court—Madras Village Courts Act (I of 1889), S. 73—Power of District Munsif to review his own order.*

Every Court has an inherent power to set aside orders passed either under a mistake of the Judge or obtained by fraud upon the Court (a).

Although the Village Courts Act (I of 1889) does not provide for review of order passed by a District Munsif on applications made to him under S. 73 of the Act, he has power to set aside an order even though made by him under a mistake.

Query:—Whether the provisions of the Civ. Pro. Code apply to applications made to the District Munsif under S. 73 of the Village Courts Act? Paramasivam Pillai v. Periyannayagathammal, 32 Ind. Cas. 527.

KUMARASAWMI SASTRI, J.

References:—(a) 19 B. 113; 19 B. 116, F.; 3 Ind. Cas. 463 = 33 M. 65 = 6 M.L.T. 177 = 19 M.L.J. 725; 16 Ind. Cas. 518 = 23 M.L.J. 371 = 12 M.L.T. 360 = 13 Cr.L.J. 710 = (1912) M. W. N. 982; 21 M. 363, D.

(6) *Semble:—An inferior Court has no power of review unless granted by statute. Paramasivam Pillai v. Periyannayagathammal*, 34 Ind. Cas. 503.

SADASIYA AIYAR and MOORE, JJ.

(7) *Application for, or rehearing—Deposit of amount less than decretal amount—Effect. See ACT IX of 1897 (PROVINCIAL SMALL CAUSE COURTS), No. 2, 33 Ind. Cas. 133.*

(8) *Rejected—Appeal—Civ. Pro. Code, 1908, O. XLVII, r. 7. See U.P. ACT II of 1901 (AGRA TENANCY), No. 49, 31 Ind. Cas. 912.*

Review—(Continued).

(9) *Decree passed on award—Objection as to nullity of arbitration proceedings raised in appeal, allowed on review by appellate Court—Appeal—Maintainability. See ARBITRATION, No. 4, 115 P.R. 1916.*

(10) *See CIV. PRO. CODE (1908), No. 689, 31 M.L.J. 827.*

(11) *See CIV. PRO. CODE (1908), No. 192-a, 36 Ind. Cas. 996.*

(12) *Application for—Grounds. See CIV. PRO. CODE (1908), No. 698, 135 P.L.R. 1916.*

(13) *Application for review after filing of appeal. See CIV. PRO. CODE (1908), No. 700, 35 Ind. Cas. 867.*

(14) *Conversion of an application for restoration to one for, whether allowable. See CIV. PRO. CODE (1908), No. 378, 21 C.W.N. 30.*

(15) *Alternative remedy by way of, under S. 114, or O. XLVII, r. 1, when available. See CIV. PRO. CODE (1908), No. 378, 21 C.W.N. 30.*

(16) *Application for restoration of appeal rejected—Order refusing to set aside order rejecting appeal—Appeal—Review rejected—Revision. See CIV. PRO. CODE (1908), No. 257-a, 32 Ind. Cas. 86.*

(17) *Order granting application for review for "other sufficient reason" whether appealable—Revision whether lies. See CIV. PRO. CODE (1908), No. 702, 48 P.W.R. 1916.*

(18) *Judge who did not decide case but signed the decree if may entertain review application under O. XLVII, r. 2, Civ. Pro. Code—Review granted without notice by Judge who decided case if authorises Judge who signed decree to entertain review application. See CIV. PRO. CODE (1908), No. 703, 20 C.W.N. 391.*

(19) *Second application for review whether maintainable. See CIV. PRO. CODE (1908), No. 697, 14 A.L.J. 204.*

(20) *Amendment petition treated as review. See CIV. PRO. CODE (1908), No. 288, 3 L.W. 499.*

(21) *Decree by Division Bench of two Judges—Jurisdiction of Single Judge to amend decree—Court in granting application for review if bound to rehear whole case—Rehearing of case by single Judge without authority from Chief Justice—Jurisdiction. See CIV. PRO. CODE (1908), No. 710, 20 C.W.N. 1165.*

(22) *Order granting review whether appealable. See CIV. PRO. CODE (1908), No. 688, 1 Pat. L.J. 193.*

(23) *See CIV. PRO. CODE (1908), No. 709, 31 M.L.J. 509.*

(24) *See CIV. PRO. CODE (1908), No. 381, 1 Pat. L.J. 547.*

(25) *Application for, maintainability of, when appellate Court seized of case. See CIV. PRO. CODE (1908), No. 699, 156 P.L.R. 1916.*

(26) *See JURISDICTION OF CIVIL COURTS, No. 9, 36 Ind. Cas. 83.*

(27) *Agent's Court—Applicability of the provisions of the Civ. Pro. Code regarding rehearing and—Agency rules—Rules 10, 18 and*

Review—(Concluded).

20. See JURISDICTION OF CIVIL COURTS, No. 3, 31 M.L.J. 319.

(28) Award—Power of Court. See LAND ACQUISITION ACT (I OF 1894), Nos. 1 and 2, 31 M.L.J. 827.

(29) Appeal—Presentation after time prescribed—Of judgment—Time spent in application for—When may be deducted—'Sufficient cause.' See LIMITATION ACT (1908), No. 23, 34 Ind. Cas. 44.

(30) Review on ground not before taken, when allowed. See PRE-EMPTION, No. 9, 20 C.W.N. 1099.

(31) See RENT, No. 3, 1 Pat. L.J. 459.

(32) See REVISION, No. 4, 34 Ind. Cas. 503.

Revision.

(1) *Interlocutory order—No revision lies where the final decree to be passed by the lower Court would be appealable.*

Held, that ordinarily no revision lies to the Chief Court from an interlocutory order, where the final decree to be passed by the Court of first instance would be appealable. *Nawab Khan v. Mussammat Mehr Bano*, 76 P.L.R. 1916=36 Ind. Cas. 57.

REID, C.J.

(2) *Civ. Pro. Code (Act V of 1908), S. 115—Interlocutory order—O. XIV, r. 2 and O. XVIII, r. 1.*

Held, that interlocutory orders dealing with the decisions on question of jurisdiction are not open to revision:

Held, also that interlocutory orders cannot or, at any rate, should not be interfered with on revision as a matter of course (a). *Gulab Chand v. Sher Singh*, 149 P.W.R. 1916=8 P.L.R. 1917=35 Ind. Cas. 608.

BROADWAY, J.

References:—(a) 51 P.R. 1899, F.; 83 P.R. 1910=104 P.W.R. 1910=7 Ind. Cas. 718; 96 P.R. 1911=143 P.W.R. 1911=11 Ind. Cas. 231; 30 Ind. Cas. 845=18 M.L.T. 243, D.; 31 P.R. 1902; 64 P.R. 1905; 70 P.R. 1910=94 P.W.R. 1910; 4 P.R. 1911=26 P.W.R. 1911=9 Ind. Cas. 674; 27 Ind. Cas. 640; 72 P.W.R. 1910=6 Ind. Cas. 989; 164 P.W.R. 1911=11 Ind. Cas. 880, R.

(3) *Interference in—Practice as to—Civ. Pro. Code, S. 115—Practice.*

The High Court will not ordinarily interfere in revision with orders which can be questioned in an appeal from the final decree or set aside by a regular suit. But this is only a rule for the exercise of the Court's discretion, and there is nothing to prevent the High Court from interfering with an order from which no appeal lies, if the ends of justice require it; and in cases where a party can obtain complete and effective relief by the expeditious and cheap method of revision, the High Court may well grant that relief.

S. 115 of the Code of Civil Procedure says the High Court may make "such order as it thinks fit." The word "fit" is singularly wide

Revision—(Continued).

and it would be a mistake to treat this section as fettering the Court's discretion to refuse to pass an order in revision which would in its opinion operate inequitably, or even one which it is not satisfied to be necessary in the interests of justice (a). *Mulambath Kunhammad v. Parakat Kathiri Kutti*, 31 M.L.J. 827=5 L.W. 472.

AYLING and SRINIVASA AIYANGAR, JJ.

References:—(a) 27 M. 478; 26 M. 176=12 M. 176=12 M.L.J. 264, Not F.

(4) *Revision—Madras Village Courts Act (I of 1889), S. 73—Civ. Pro. Code (Act V of 1908), S. 115—Charter Act (24 and 25 Vict. C. 104), S. 15—Discretionary power of interference.*

Whether the order of a District Munsif under S. 73 of the Madras Village Courts Act, is subject to revision under S. 115 of the Civ. Pro. Code or S. 15 of the Charter Act, the High Court has a discretion to interfere or not according to the circumstances of the case.

Semble.—An interior Court has no power of review unless granted by statute. *Paramasivam Pillai v. Periyannayagath Ammal*, 34 Ind. Cas. 503.

SADASIVA AIYAR and MOORE, JJ.

References:—20 W.R. 180; (1891) 1 Q.B. 450; 39 M. 65, R.

(5) Suit for recovery of money—Document purporting to be receipt for amount, genuineness of, doubted. See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 8, 73 P.W.R. 1916.

(6) High Court's power of interference in. See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 7, 20 C.W.N. 1080.

(7) Insolvency proceedings—Power of revision by the Punjab Chief Court. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 63, 80 P.W.R. 1916.

(8) By Chief Court confined to questions of law. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 4, 109 P.R. 1916.

(9) Decision of Subordinate Judge on the Small Cause side—Appeal—Procedure. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 55, 31 Ind. Cas. 15=5 L.W. 220.

(10) Revisional jurisdiction of Board of Revenue. See BEN. ACT VIII OF 1876 (ESTATES PARTITION), No. 2, 1 Pat. L.J. 491.

(11) Error of law—Interference in revision. See BEN. ACT VIII OF 1885 (TENANCY), No. 65, 23 C.L.J. 557.

(12) Dispute between joint landlords as to collection of rent—Collector's order declaring particular person as landlord. See MAD. ACT I OF 1908 (ESTATES LAND), No. 7-a, 36 Ind. Cas. 212.

(13) *Ex parte* decree of Revenue Court—Setting aside without notice—Review—Both sides heard—Order confirmed—Revision to High Court if competent. See MAD. ACT I OF 1908 (ESTATES LAND), No. 42, 8 L.W. 158.

Revision—(Continued).

(14) Acts of Revenue Officer under Mad. Act I of 1908—Power of the High Court to revise. See MAD. ACT I OF 1908 (ESTATES LAND), No. 29, 4 L.W. 278.

(15) See U. P. ACT II OF 1901 (AGRA TENANCY), No. 19, 30 Ind. Cas. 770.

(16) See U. P. ACT III OF 1901 (LAND REVENUE), No. 10, 34 Ind. Cas. 689.

(16-a) See U. P. ACT III OF 1901 (U. P. LAND REVENUE), No. 9-a-1, 32 Ind. Cas. 1001.

(17) Judgment disposing of the appeal very short, not giving the facts is defective and good ground for. See PUN. ACT XVI OF 1887 (TENANCY), No. 18, 4 P.W.R. 1916 (Rev.).

(18) Evidence on record not considered by Court—Party not allowed to produce evidence—Interference in revision. See PUN. ACT I OF 1912 (COURTS AMENDMENT), No. 1, 25 P.L.R. 1916.

(19) Order of remand by the Agent—If open to revision by the High Court. See AGENCY RULES, No. 4, (1916) 2 M.W.N. 269.

(20) Decree in accordance with award—Revision when maintainable. See AWARD, No. 2, 11 P.W.R. 1916.

(21) Award—Decree—Revision when lies—Material irregularity—Misconduct of arbitrator—Court's power to modify award. See AWARD, No. 8, 78 P.R. 1916.

(22) Order rejecting award for misconduct—Appeal—Revision. See AWARD, No. 9, 107 P.W.R. 1916.

(23) See CIV. PRO. CODE (1908), No. 512, 36 Ind. Cas. 809.

(24) See CIV. PRO. CODE (1908), No. 676, 31 Ind. Cas. 978.

(25) Application for restoration of appeal rejected—Review—Order refusing to set aside order rejecting appeal—Appeal—Review rejected. See CIV. PRO. CODE (1908), No. 257-a, 32 Ind. Cas. 86.

(26) Execution sale—Mere payment without application to set aside sale—Application if to be in writing—Amendment of petition. See CIV. PRO. CODE (1908), No. 256-a, 32 Ind. Cas. 45.

(27) Powers of High Court in, under S. 115, Civ. Pro. Code. See CIV. PRO. CODE (1908), No. 60, 4 L.W. 411.

(28) See CIV. PRO. CODE (1908), No. 558, 34 Ind. Cas. 934.

(29) Absence or formal defect—Withdrawal of suit. See CIV. PRO. CODE (1908), No. 257, 35 Ind. Cas. 843.

(30) Arbitration—Award—Decree—Appeal. See CIV. PRO. CODE (1908), No. 728, 35 Ind. Cas. 914.

(31) By Board of Revenue. See CIV. PRO. CODE (1908), No. 351, 31 Ind. Cas. 479.

(32) Decree based on arbitration award, appeal from, and, of. See CIV. PRO. CODE (1908), No. 259, 31 Ind. Cas. 458.

Revision—(Continued).

(33) Disregard of law. See CIV. PRO. CODE (1908), No. 234, 35 Ind. Cas. 426.

(34) Error of law as to jurisdiction depending on finding of fact—Documentary evidence—Misconstruction. See CIV. PRO. CODE (1908), No. 233, 31 Ind. Cas. 209.

(35) Suit decreed under O. XVII, r. 3, Civ. Pro. Code—Proper procedure to set it aside—Revision whether lies. See CIV. PRO. CODE (1908), No. 399, 3 L.W. 524.

(36) Decision of preliminary issue regarding maintainability of suit—Interference in revision. See CIV. PRO. CODE (1908), No. 13, 3 L.W. 512.

(37) Order to refund poundage to auction-purchaser—Legality—Interference in revision—Conversion of civil miscellaneous appeal into a revision petition—Practice. See CIV. PRO. CODE (1908), No. 97, 3 L.W. 105.

(38) Judgment of Appellate Court not dealing with a point of limitation—Whether material irregularity. See CIV. PRO. CODE (1908), No. 229, 3 L.W. 176.

(39) Judgment of Full Bench of Presidency Small Cause Court—Question of limitation—Interference in revision. See CIV. PRO. CODE (1908), No. 228, 19 M.L.T. 24.

(40) Powers of Courts in striking off and adding parties—Dismissing suit for non-prosecution, when plaintiffs compromise with only some of the defendants—Court is bound to pass a decree embodying the terms of the compromise under O. XXIII, r. 3—Appeal if lies, when no decree passed—Alternative remedy by way of revision under S. 115, Civ. Pro. Code, if lies—Erroneous application of section of law, if open to revision. See CIV. PRO. CODE (1908), No. 254, 20 C.W.N. 752.

(41) Order granting review—Whether revision lies—Judgment bad in law—Whether revision lies. See CIV. PRO. CODE (1908), No. 702, 48 P.W.R. 1916.

(42) Ss. 55, 47, 145, 115, Civ. Pro. Code—Judgment-debtor released on security in order to enable him to apply to be adjudged insolvent—Failure of judgment-debtor to so apply—Application by decree-holder to forfeit security bond refused—Appeal whether lies. See CIV. PRO. CODE (1908), No. 130, U.B.R. (1916), 1st Cr., 103.

(43) Findings in the judgment, immaterial, to the decision, if appealable—S. 115, Civ. Pro. Code, under, of decree for costs. See CIV. PRO. CODE (1908), No. 177, 20 C.W.N. 1354.

(44) Interference of High Court on questions of fact. See CIV. PRO. CODE (1908), No. 696, 20 C.W.N. 1110.

(45) Decree in favour of Bank—Revision proceeding by defendant judgment-debtor—Liquidation of Bank during pendency of revision proceedings—Leave of Court if necessary to proceed with revision petition. See COMPANIES ACT (1882), No. 6, 91 P.R. 1916.

(46) Small Cause Court—Refusal to institute Criminal Proceedings—Decree-holder's locus

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standi to question the order. See CRIM. PRO. CODE, No. 8, 19 O.C. 91.

(47) Competency of revision when there is no appeal. See EXECUTION OF DECREE, No. 1, 3 L.W. 84.

(48) *Bona fide* application by decree-holder for extension of time—Whether a step-in-aid of execution—Court holding application not *bona fide*—Interference in revision. See EXECUTION OF DECREE, No. 10, 14 A.L.J. §90.

(49) Omission to consider—Distinct irregularity. See EVIDENCE, No. 4, 33 Ind. Cas. 414.

(50) Collector refusing to make reference—Order, if may be raised by the High Court—*Mandamus*. See LAND ACQUISITION ACT (1 OF 1894), No. 9, (1916) 2 M.W.N. 348.

(51) Land Acquisition—Collector's proceedings—Interference by High Court. See LAND ACQUISITION ACT (1 OF 1894), No. 6, 67 P. R. 1916.

(52) Letters Patent appeal—Judgment of reversal passed by single Judge of High Court cancelled—Effect—Position of Judge sitting alone—Whether his decision can be revised under S. 115, Civ. Pro. Code—Leave to appeal to Privy Council. See LETTERS PATENT (CALCUTTA), No. 8, 43 C. 90.

(53) See LIMITATION ACT (1908), No. 29, 101 P.R. 1916.

(54) Suit for price of goods sold—Omission of vendee to plead part payment of price to vendor's agent—Subsequent suit by vendee for the amount, bar of—Interference by High Court in absence of petition. See RES JUDICATA, No. 23, 33 Ind. Cas. 623.

(55) Application for sanction dismissed by Presidency Small Cause Court—Revisional powers of High Court—S. 195, Crim. Pro. Code.—S. 115, Civ. Pro. Code (1908). See SANCTION TO PROSECUTE, No. 1, 43 C. 597.

(56) Powers of Courts of appeal or, revision in revoking or granting sanction given or refused by a subordinate authority—Remand not proper. See SANCTION TO PROSECUTE, No. 5, 9 Bur.L.T. 128.

(57) See TRUSTEE, No. 1, 35 Ind. Cas. 204.

Revivor.

(1) Meaning of—What amounts to. See LIMITATION ACT (1908), No. 304, 20 C.W.N. 889.

(2) Meaning of. See LIMITATION ACT (1908), No. 301, 20 C.W.N. 1051.

Right of Suit.

(1) *Right to officiate at funeral, suit for declaration as to—Specific Relief Act (1 of 1877), S. 42, "legal character"—Code of Civil Procedure (V of 1908), S. 9, "right of office."*

This was a suit by a priest alleging that he has by custom a right to officiate at all funeral ceremonies performed upon the banks of the

Right of Suit—(Continued).

Ganges between certain definite points, that the principal defendant in the case, in contravention of this custom, entered the house within the *birt* of the plaintiff, and received from his household a certain sum of money, that by old established custom based upon a Will made 300 years ago, any priest entering upon the *birt* of another is bound to refund any sums realised from disciples living in that *birt*. The relief sought for in the plaint was (1) a declaration of the plaintiff's *Mahapatni birt jujmanka*, (2) that the boundaries thereof be declared, (3) that it be declared that the house in which defendant officiated comes within those boundaries, (4) that the amount received by him be recovered from the defendant, and (5) that a permanent injunction be issued restraining defendant from trespassing upon the plaintiff's *birt*.

Held (1) that the right to go into the house of a disciple when called for by him, or to enter upon it as of right though not called for, does not create any legal character, and that no suit for a declaration of such a right is maintainable;

(2) that the plaintiff's claim did not come within the words "legal character" in S. 42 of the Specific Relief Act, or "the right to an office" in S. 9 of the Code of Civil Procedure;

(3) the freedom of the subject entitles all Hindus to call in at any time their own particular priest, or any priest whom they may themselves prefer, to perform any office; and so long as that inherent freedom exists, there can vest in no one any legal character or any right to the office of performing ceremonies in private houses. Therefore no suit for a declaration of any such right will lie.

(4) Plaintiff was not entitled to a decree for any money unless he can prove that there was a contract between himself and the defendant, whereby that defendant has bound himself to pay to the plaintiff all sums received from ceremonies performed within the plaintiff's *birt*.

Mere proof of a custom that among the Brahmin priests of Patna there was an implied contract not to interfere with the rights of each other, did not amount to proof of a contract by the defendant to pay to the plaintiff sums of money received for officiating at ceremonies within the plaintiff's *birt*.

No suit will lie for recovery of a voluntary offering, if that suit is based upon custom (a). *Hira Panday v. Bachu Panday*, 1 Pat. L.J. 381 = 35 Ind. Cas. 345.

ROE and JWALA PRASAD, JJ.

References :—(a) 2 W.R. 69. F.; 30 A. 234, R.

(2) *Contract—Uncertainty—Public policy—Agreement by a Gayawal to pay part of his earnings from certain ceremonies to an Achariya—Maintainability of a suit on the agreement.*

The privilege of priests are capable of alienation and delegation and though no one can compel another to employ a particular priest against his will, a suit will lie against a priest if the suit is brought on the ground that he i.

Right of Suit—(Continued).

bound by contract to give the plaintiff a certain share of his earnings (a).

Where there is a definite contract by which a Gayawal undertakes that if he performs any ceremonies without calling in his Acharjya to assist, he will pay to Acharjya in one set of circumstances three-fourths and in another the whole of his (Gayawal's) earnings from the performances of those ceremonies, such a contract is not void. It is enforceable in a Court (b), *Bapu Lal Barik Gayawal v. Harihar Pandit*, 1 Pat. L.J. 589.

ROE and JWALA PRASAD, JJ.

References:—(a) 9 M.L.A. 348, B. (b) 15 W. R. 631; 26 O. 356; 10 W.R. 457; 29 C. 470, R.

(3) *Provision in mortgage deed restraining mortgagee's right to sue—Independent clauses regulating the right—Construction of document.*

A clause in a mortgage deed provided on the face of it that the mortgagee could not sue unless (1) the entire demand for two instalments for two consecutive years and interest for the principal on two consecutive years remained unpaid and (2) nothing was paid for two consecutive years on account of principal or interest. *Held* that it was not the intention of the parties that the two sub-clauses should be treated independently of each other and therefore the right to sue did not accrue to the mortgagee unless nothing was paid on account of principal or interest for two years. *Babu Narendra Bahadur v. The Oudh Commercial Bank, Limited*, 30 Ind. Cas. 323.

STUART, A.J.C.

(4) See *BEN. ACT III OF 1899 (MUNICIPAL)*, No. 3, 18 Bom L.R. 878.

(5) Suit for declaration that decree obtained by defendant against plaintiff was satisfied and for injunction restraining execution, if maintainable. See *CIV. PRO. CODE (1908)*, No. 115, 31 M.L.J. 429.

(6) Refund of purchase-money — Right of suit by auction-purchaser Act XIV of 1882, S. 315. See *CIV. PRO. CODE (1908)*, No. 521, 14 A.L.J. 1216.

(7) Absence of privity of contract—Direction to purchaser to pay vendor's debt—Right of creditor to enforce such undertaking. See *CONTRACT ACT*, No. 62, 36 Ind. Cas. 792.

(8) Decree, validity of, if can be raised in execution — Judgment against a lunatic — Lunatic not represented by a legal guardian—Right of suit to set aside decree. See *EXECUTION OF DECREE*, No. 16, 24 O.L.J. 375.

(9) See *FOREIGN JUDGMENT*, No. 1, 9 Bur. L.T. 106.

(10) Alienee from a co-parcener—Possession of specific property alienated, suit for, incompetent. See *HINDU LAW (ALIENATION)*, No. 19, 10 S.L.R. 34.

(11) Suit for partial partition by alienee from a co-parcener against subsequent alienee from the remaining co-parceners does not lie. See *HINDU LAW (PARTITION)*, No. 6, (1916) 2 M. W.N. 156.

Right of Suit—(Concluded).

(12) Contract, breach of—Indemnity bond—Damages—No actual loss, if action premature—No action for damages on future loss of possession—Loss of title, substantial loss. See *INDEMNITY BOND*, No. 1, 20 M.L.T. 263.

(13) See *KABULIAT*, No. 1, 33 Ind. Cas. 211.

(14) Mortgage in favour of minor if enforceable by him or by others on his behalf. See *MINOR*, No. 5, 31 M.L.J. 575.

(15) Suit for partition, if maintainable by a lessee of mining rights for a term against lessor's co owners—Partition of underground mines and minerals, if possible. See *PARTITION*, No. 6, 20 C.W.N. 1306.

(16) See *RELIGIOUS ENDOWMENTS*, No. 6, 34 Ind. Cas. 548.

(17) Trading with enemy—German, Secular Agent of Basel Mission—Lease by, of land in British India—Whether he can sue for rent—Limitation on alien enemy's right of suit. See *TRADING WITH ENEMY*, No. 2, 31 M.L.J. 869.

Right of Way.

Easement—Grant by parol—Validity—No registered instrument necessary. See *TRANSFER OF PROPERTY ACT*, No. 62, 34 Ind. Cas. 95.

Right to begin.

Application for transfer of suit—Applicant's right to begin. See *CIV. PRO. CODE (1908)*, No. 67, 14 A.L.J. 242.

Riparian Rights.

Rights of Riparian owner—Infringement—Damages—Proof—Revenue proceedings—Res judicata—Civ. Pro. Code (1908), S. 11.

The right of a Riparian owner to use the water flowing past his land is a natural right and it must be in respect of a natural stream and not an artificial waterway.

To exercise such a right, it is not necessary that the water should empty itself into a river or a lake. So long as water runs in a defined channel which is not artificial, and from a known source and it goes past a man's land, that man has the right to treat it as a stream from its source so far as the lower end of his land (a).

A person who owns land which is not on the bank of a river or stream cannot possibly have the rights of a riparian owner, for even a riparian owner properly so called, because he occupies land on the bank of a stream, cannot use the water from the stream for the purposes of a piece of land which is not on the bank (b).

In order to support an action by one riparian owner to restrain another person diverting the water beyond his riparian tenement it is not necessary that the plaintiff should prove that he has suffered any damage. Nor the fact that the plaintiff's land is simply irrigated independently of the stream constitutes a defence to the plaintiff's suit (c).

Riparian Rights—(Concluded).

In Burma there are no Revenue Courts and there can be no case of *res judicata* by reason of the order of the Revenue Officer. **Maung Kaw La v. Maung Ke**, 35 Ind. Cas. 356=9 Bur. L.T. 1183.

• MAUNG KIN, J.

References:—(a) 28 B. 105, F. (b) 7 B. 209; 91 L.T. 105; 28 M. 236, R. (c) 24 C. 865, F.

Risk Note.

Form H. consignment under—Wilful neglect. See **RAILWAY COMPANY**, No. 1, 35 Ind. Cas. 265.

River.

(1) Whether the section applies to accretions from bed of private. See **BEN. REG. XI OF 1825 (ALLUVION AND DILUVION)**, No. 1, 1 Pat. L.J. 536.

Riwaj-i-am.

(1) Entries in the, opposed to general custom and unsupported by instances—Effect—Entries in the *riwaj-i-am* attested by people for whom it was prepared—Evidentiary value—Duty of Court. See **CUSTOMS (PUNJAB—ADOPTION)**, No. 1, 8 P.W.R. 1916.

(2) Entries opposed to general custom and not supported by proof of instances—Entries of very little value. See **CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION)**, No. 3, 7 P.R. 1916.

(3) Value of, when signed by ancestors of parties. See **CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION)**, No. 5, 19 P.W.R. 1916.

(4) Entry in, regarding succession to land without discrimination between ancestral and self-acquired property—Construction. See **CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION)**, No. 7, 38 P.R. 1916.

Road.

Limited access of public to a private place—Presumption of dedication of road to public. See **PUNJAB ACT III OF 1911 (MUNICIPALITY)**, No. 1, 109 P.R. 1916.

Road Cess.

(1) See **MORTGAGE (GENERAL)**, No. 33, 1 Pat. L.J. 589.

Road Cess Act.

See **ACT IX OF 1880**.

Road Cess Return.

(1) Suit for rent—Rent claimed at higher rate than amount entered in. See **RENT**, No. 4, 1 Pat. L.J. 521.

Rules and Orders of Calcutta High Court.

Breach of rule 4b (e) of the General. See **LEGAL PRACTITIONERS ACT (XVIII OF 1879)**, No. 6, 36 Ind. Cas. 442.

Rules of Chief Court (Burma).

R. 46 (a). See **PRACTICE AND PROCEDURE**, No. 2, 9 Bur. L.T. 122.

Rules of High Court.

(1) **Calcutta High Court Rules and Circular Orders—Commissioners—Jurisdiction of District Judge over them—Nature and extent of—Civ. Pro. Code, O. XXVI, r. 5.**

The powers given to a District Judge by the Calcutta High Court Rules and Circular Orders do not authorise him to set aside an order passed by the Trial Judge in respect of the Commissioner's remuneration. The District Judge is only given a certain amount of disciplinary jurisdiction in the matter of the appointment of Commissioners to make enquiries, etc., for the purpose of maintaining a particular standard of efficiency among them. **Pearl Mohan Kundu v. Mohlal Kanta Saha Choudhury**, 34 Ind. Cas. 855.

CHATTERJEE and NEWBOULD, JJ.

(2) Original Side Rules of Practice of 1902, r. 533—Whether *ultra vires*. See **VAKIL**, No. 1, 31 M.L.J. 698.

Rules of Practice.

Allahabad High Court Rules, Ch. XVI, r. 22—Fees to pleader authenticated by affidavit of agent—Payment by cheque—Amendment of decree pending appeal.

Where the payment of fees to a pleader was authenticated by an affidavit under Ch. XVI, r. 22 of the High Court Rules and the agent stated in his affidavit that the payment was made by means of a cheque of a third person and the natural inference to be drawn from the words of the affidavit was that the agent who made the affidavit got the cheque and brought it to the pleader.

Held that this was a sufficient compliance with the rule.

The High Court cannot amend a decree which is the subject-matter of an appeal to the Privy Council. **Risal Singh v. Balwant Singh**, 32 Ind. Cas. 194 (F.B.).

RICHARDS, C.J., BANERJEE and WALSH, JJ.

Running Account.

Ss. 60, 61—Appropriation—Payment in discharge of. See **CONTRACT ACT**, No. 60, 1 Pat. L.J. 474.

Ryot.

Transfer of holding by, to under-raiyat—Ejectment of under-raiyat by tenure-holder—Notice if necessary. See **BEN. ACT VIII OF 1885 (TENANCY)**, No. 27, 34 Ind. Cas. 912=21 C.W.N. 363.

Ryot at Fixed Rate.

Tenancy, real nature of, how determined—Occupancy raiyat holding at a rent not charged for 40 years, if. See **BEN. ACT VIII OF 1885 (TENANCY)**, No. 5, 24 C.L.J. 363.

'Ryot' and 'Ryoti Land.'

Definition of. See MAD. ACT I OF 1908 (ESTATES LAND), No. 12, 3 L.W. 582.

Ryoti Land.

Suit for rent—Land situated in a Zamindari—*Ijara* lease—Jurisdiction of Civil Court to try. See MAD. ACT I OF 1908 (ESTATES LAND), No. 1, (1916) 2 M.W.N. 240.

Ryotwari Tenant.

Ryotwari tenants' position different from Inamdar's. See CROWN GRANTS, No. 1, 31 M.L.J. 483.

Ryotwari Tenure.

(1) Government lands under, purchased by zamindar—Jurisdiction of Civil Courts. See MAD. ACT I OF 1908 (ESTATES LAND), No. 17, 39 M. 944.

Safe Custody.

Deposit of money for.—Deposit by depositors in bank where he had his own money—Failure of Bank—Liability to make good loss. See CONTRACT ACT, No. 135, 36 Ind. Cas. 31.

Salary Chit.

(1) Agency, termination of—Question of fact, meaning of—Evidence to be taken—Relevant considerations in deciding the question, what are—Practice among Nattukottai Chetties. See PRINCIPAL AND AGENT, No. 4, 31 M.L.J. 687.

(2) Nattukottai Chetties—Agency, expiry of, meaning of—Intention and conduct of parties to be considered. See PRINCIPAL AND AGENT, No. 3, 31 M.L.J. 685.

Sale.

(1) *Payment of consideration, whether necessary to pass title—Registration of sale-deed, effect of—Intention of parties—Suit for redemption—Mortgagee, possession of.*

Ordinarily upon the due execution and registration of a sale-deed, the title in the property sold passes from the vendor, unless it is proved that both the parties intended that the payment of price should be a condition precedent to the transfer of ownership (a).

Where, therefore, a sale-deed was properly executed and registered and the vendor recited in the deed and admitted before the Sub-Registrar that he had received the entire consideration but no part of the price was ever paid to him.

Held, that, despite the non-payment of consideration, the terms of the deed coupled with the acknowledgment before the Sub-Registrar showed that the vendor intended to divest and did indeed divest himself of the ownership which immediately vested in the vendee (b).

In order to prove to have acquired title by adverse possession, a mortgagee cannot rely on 12 years' rule, unless he proves a subsequent

Sale—(Continued).

valid sale, in the absence of which his possession must be taken to retain its original character (c). *Abdul Aziz Khan v. Kala Shah*, 50 P. W.R. 1916=32 Ind. Cas. 961.

SHADI LAL and LESLIE JONES, JJ.

References:—(a) 55 P.R. 1911=41 P.W.R. 1911=9 Ind. Cas. 547; R. (b) 132 P.R. 1879, F. (c) 32 C. 296 (P.C.) 1 C.L.J. 584=2 A.L.J. 71=9 C.W.N. 201=7 Bom. L.R. 1=32 I.A. 23=21 B., 793; 14 M. 38; 146 P.W.R. 1911=11 Ind. Cas. 429, R.

(2) *Contract for sale—Suit for specific performance—Specific Relief Act, S. 27—Onus on defendant to prove absence of notice of prior contract—Registration Act (1908), Ss. 50 (1), 17—No priority of registered sale-deed over a contract for sale previous to such deed.*

A contracted to sell a village to the plaintiff on condition that the auction-sale of the same property should be set aside. Subsequently A sold the property by means of a registered sale-deed to B. In a suit for specific performance of the contract, *held* that, having regard to S. 27, Specific Relief Act, the onus of proving that he was a bona fide purchaser without notice lay on the defendant and that his subsequently registered sale-deed had no priority over the contract for sale in favour of the plaintiff. *Naubat Rai v. Dhaunkal Singh*, 14 A.L.J. 111=38 A. 181=32 Ind. Cas. 963.

RICHARDS, C.J., and RAFIQ, J.

(3) *Money left with vendee to pay off mortgagee—Money not paid—Suit against vendee—Trust.*

One L mortgaged certain zamindari and mortgagee rights to J. D. She then sold the entire mortgaged property to R, leaving with him money to pay off the mortgage of J. D. J. D. sued for sale on foot of his mortgage and got a decree. The zamindari was sold, but the mortgage rights could not be sold. In consequence, a balance was left due to J. D., who made an application for a decree under S. 90 of the Transfer of Property Act. This was granted against the mortgagor. J. D. now sued R on the ground that a trust had been created in his favour in respect of the money left with R to be paid to him. *Held*, that no trust was created in his favour. He was no party to the sale in favour of R and his rights to proceed against the mortgaged property were in no way affected by it. *Jamuna Das v. Ram Autar Pande*, 14 A.L.J. 151=38 A. 209=33 Ind. Cas. 351.

RICHARDS, C.J., and RAFIQ, J.

(4) *Vendor and purchaser—Contract to sell land—Contract Act, S. 55—Time of the essence of the contract—Time for completion fixed by the contract, effect of—Specific performance—Undue delay—Intention—Forfeiture of deposit and power to resell, if contract not completed within a fixed time.*

Where, in a suit for specific performance of a contract to sell land, the issue is whether time is of the essence of the contract, the law applicable to the point is contained in the Contract Act, S. 55, which does not lay down any

Sale—(Continued).

principle which differs from those which obtain under the law of England as regards contracts to sell land. Under English law equity, which governs the rights of parties in cases of specific performance of contracts to sell real estate, looks not at the letter, but at the substance of the agreement, in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. That section adopts and embodies in reference to sales of land that doctrine which is laid down in (1802) 2 Sch. and Lef. 692, (1853) 3 D.M. and G. 284, (1867) 3 Ch. App. Cases 61 and (1915) A.C. 386.

The Court will apply the doctrine, if it can do justice between the parties, and if there is nothing in the express stipulation between the parties, the nature of the property or the surrounding circumstances which would make it inequitable to interfere with or modify the legal right.

The application of the doctrine may be excluded by any plainly expressed stipulation, if its language plainly excludes the notion that the fixed time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation.

The doctrine however will not be applied where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time.

The Court will infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract, the construction of which, however, cannot be affected by what takes place after it has once been entered into.

A stipulation in a contract of sale of land that, should the purchaser not pay the balance of the purchase money within the period therein fixed, he was to have no right to the deposit paid on account and any claim of his was to be void, and the vendor was, after the fixed date, to be at liberty to resell, was held not to make time of the essence of the contract. *Jamshed Khodaram Irani v. Burjorji Dhunjibhai*, 30 M.L.J. 186=19 M.L.T. 184=3 L.W. 239=23 C.L.J. 358=20 C.W.N. 744=18 Bom. L.R. 163=(1916) M.W.N. 229=14 A.L.J. 225=40 B. 289=32 Ind. Cas. 246 (P.C.).

VISCOUNT HALDANE, LORD PARMOOR,
LORD WRENBURY, SIR JOHN EDGE
and Mr. AMEER ALI.

Reference:—38 B. 77, reversed.

(5) *Title, proof of—Registered deed, non-production of—Oral evidence, if admissible—Evidence Act, Ss. 65 (b), 91—Vendor's admission—Estoppel, plea of*

A vendee of immovable property under a registered deed, if required to prove his title, must do so by the production of the deed or lay the foundation for the admission of secondary evidence with regard to it. No oral evidence

Sale—(Continued).

of that sale can be adduced under S. 91 of the Evidence Act (a).

When a transaction which is avoidable is admitted by the person, who is entitled to avoid it, it cannot be questioned by a third party.

Secondary evidence in the nature of admission by vendor as to sale of immovable property in favour of vendee, cannot, in the absence of conditions mentioned in cl. (b) of S. 65 of the Evidence Act, be admitted.

A plea of estoppel which depends on questions of fact should be put clearly in issue. *Safar Ali v. Mohesh Lal Chowdhury*, 23 O.L.J. 122=34 Ind. Cas. 956.

SHARFUDDIN and COXE, JJ.

References:—(a) 27 A. 271=9 C.W.N. 477, D.

(6) *Reg. No. XXXI of 1803, S. 6—Sale deed reserving condition that vendee would pay revenue for land sold as well as for that not sold—Validity of covenant—Liability of vendee upon transfer by vendor of the land reserved.*

One Altaf Hussain sold certain land to the predecessor of the defendants and reserved some land for himself. The sale-deed contained a covenant to the effect that the vendee would pay the revenue for his share as well as for the land reserved by the vendor for himself. The vendor subsequently sold the reserved land to the plaintiff. In a suit to recover the revenue which the plaintiff had to pay owing to the defendants' refusal to pay:

Held, that the agreement was void and that the covenant was a personal one and the plaintiff had no right to sue for the breach of such a covenant. *Ali Hussain v. Hakim-ul-lah*, 14 A. L.J. 266=38 A. 230=33 Ind. Cas. 187.

RICHARDS, C.J., and RAFIQ, J.

(7) *Occupancy holding and fixed rate holding—Sale of, by the same deed—Suit to set aside the sale—Suit not maintainable.*

Where a person, having by the same deed conveyed his occupancy and fixed-rate holdings for a certain consideration, afterwards sued to set aside the sale on the ground that the transaction was illegal covering as it did the sale of his occupancy holding which was prohibited by law, held, that the plaintiff could not succeed in the suit to set aside the sale of the fixed rate holding. The maxim '*in pari delicto potior est conditio possidentis*' applied.

The contract for sale is one thing and a deed of transfer is another, and it does not necessarily follow that because the contract is unenforceable, the transfer is void. *Bajrangli Lal v. Ghura Rai*, 14 A.L.J. 276=38 A. 332=32 Ind. Cas. 913.

RICHARDS, C.J. and RAFIQ, J.

(8) *Oral sale without possession—Subsequent one by registered deed—Notice of first sale—No priority to second vendee—Registration Act (1908), S. 48.*

Plaintiff bought certain land by oral agreement which was recorded in the Patwari's diary. Possession could not be handed over to the plaintiff as the land formed part of a larger

Sale²—(Continued).

area under mortgage. The same land was later on sold to defendant (one of the mortgagees) by registered deed :

Held, that S. 48 of the Registration Act was inapplicable in the circumstances of the case, and further that the second vendee having notice of the earlier sale by oral agreement could not claim priority over the former sale in plaintiff's favour. **Abbas Khan v. Malik Shadi Khan**, 1 P.W.R. 1916 (N.W.F.P.).

BARTON, J.C.

References :—56 P.R. 1900 ; 4 B. 127 ; 10 C. 250 ; 13 M. 324, F.

- (9) *Deed—Construction—Sale or mortgage—Sale with a condition of re-purchase—Transfer of Property Act, S. 58 (c).*

In 1899, the plaintiffs mortgaged ninety-two pieces of lands with the defendants to secure a loan of Rs. 8,000, bearing interest at the rate 8 per cent. per annum. In 1904, the plaintiffs executed a sale-deed to the defendants, whereby they sold twenty of the pieces of lands mortgaged, for a sum of Rs. 13,000, and stipulated that if the consideration money was re-paid to the defendants in lump or in instalments within the period of twenty years, the defendants should reconvey the lands to the plaintiffs. On the same day, the plaintiffs passed to the defendants a permanent lease of the lands sold, at a fixed annual rental of Rs. 412 8-0. In 1911, the plaintiffs alleged that the transaction of 1904 was a mortgage and sued to redeem the same on accounts being taken under the Dekkhan Agriculturists' Relief Act :

Held, that the transaction in question was not a mortgage but a sale with an option to the plaintiffs to re-purchase. **Narayan Ramkrishna Pandit v. Vigneshwar Ganap Hegde**, 18 Bom. L.R. 250=40 B. 378=34 Ind. Cas. 414.

BACHELOR and SHAH, JJ.

- (10) *Sale of land—Difficulty in identifying the property sold—Duty of vendor—Rights of vendee.*

A vendor of land, when he holds himself out in that capacity, is bound to know and ascertain if, in fact, the subject-matter of what he is selling exists, and he must be in a position to give possession of the physical thing which he has contracted to sell.

The obligation is upon the seller to give possession to the purchaser, and not upon the purchaser to go and get possession for himself, especially when any difficulty arises in identifying the particular land sold. **Darpan Koer v. Kedar Nath**, 1 Pat. L.J. 140=35 Ind. Cas. 539.

CHAPMAN and ATKINSON, JJ.

- (11) *Sale-deed—Construction of—Mortgage by conditional sale—Sale with agreement to reconvey—Distinction between—Intention of parties—Transfer of Property Act (IV of 1882), S. 58 (c).*

The question in this case was whether a sale-deed and an agreement executed on the same

Sale—(Continued).

day constituted a mortgage by conditional sale. The sale-deed was not only an absolute conveyance of the property but contained recitals which showed an intention to extinguish a prior mortgage between the same parties, and to discharge the vendor's obligations to other parties and a statement that the sale price was the "proper current market value" of the land.

There was also an agreement for reconveyance of even date which provided that "if you or your *Oollittar* or your heirs should pay the aforesaid amount at the beginning of the cultivation season of any year within four years from this day, I shall reconvey the lands to you by means of a sale-deed in accordance with that executed in my favour."

Held that these provisions were inconsistent with an intention that the transfer was for the purpose of securing the payment of money advanced by way of loan (Transfer of Property Act, 1882, S. 58 (a).)

Held also that the circumstances of the case did not indicate an intention that there should be the relationship of debtor and creditor between the parties, or that the property should be security for a debt.

Held further that the fact that there appeared to have been no margin between the sale price and the actual market value of the property went to show that the vendee at all events did not regard the transaction merely as securing to him the repayment of an advance.

Sales with agreements to resell cannot be said to be presumably mortgages by conditional sale. **Maruthal Goundan v. Dasappa Goundan**, 31 M.L.J. 375=5 L.W. 141=36 Ind. Cas. 393.

BAKEWELL and NAPIER, JJ.

Reference :—(a) 12 A. 387, R.

- (12) *Registration of sale-deed—No taint of fraud—Consideration not paid—Title passing notwithstanding—Stranger alleging fraud—Burden of proof—Declaratory suit by claimant under Civ.Pro. Code, O XXI, r. 63—No prayer for possession—S. 42, Specific Relief Act—No bar.*

Where there has been a registered deed of sale, which is not tainted by any fraud or the like, the deed passes the title and interest conveyed, although the purchase money has not been paid (a).

If a third party alleges that the deed is fraudulent and collusive, the burden would be on that party to prove the same.

The right of suit under O. XXI, r. 63, Civ. Pro. Code, 1908 (=S. 283, Civ. Pro. Code, 1882), is not controlled by the provisions of S. 42, Specific Relief Act, 1877, and a claimant would have the right to sue for a mere declaratory decree (b). **K.Y.K.M. Chetty Firm v. S.N.V.R. Chetty Firm**, 34 Ind. Cas. 125=9 Bur. L.T. 199.

MAUNG KIN, J.

References :—(a) 15 M. 54, R. & F. (b) 1 M. L.T. 432, R.

Sale—(Continued).

- (13) *Registration of sale deed—No delivery of possession—Effect—Whether property transferred to vendee—Intention of parties—Non-payment of consideration—Delivery of deed—Effect—Suit for possession by vendee—False plea of payment of consideration—Court's power to pass conditional decree.*

The mere registration of a document, especially if it be not accompanied by delivery, does not necessarily indicate the transfer of property to the vendee. It may be the intention of the parties that the ownership should not pass until the consideration is paid. If however that is the contention of the vendor, the burden of proving it would lie upon him. Ordinarily speaking, if a document be executed and registered in favour of any person and that person also gets the document, the mere fact of non-payment of the consideration would not affect the passing of the property (a).

Where, in a suit for possession by a vendee of immovable property, it was found that the vendee pleaded in a former suit that a certain portion of consideration was paid and again in the present suit the vendee instead of bringing the amount into Court and asking for relief upon that basis, again maintained falsely that the portion formed no part of the consideration.

Held that the Court can pass a decree for possession conditional on the vendee paying into Court within one month the portion of the consideration that was not paid together with the costs of the contesting defendants (b). **Jogendra Narain Roy Chowdhury v Manmatha Nath Chatterjee**, 34 Ind. Cas. 106.

CHITTY and WALMSLEY, JJ.

References:—(a) 27 O. 7 and 13 C.W.N. 692, R. (b) 17 C.W.N. 1161=17 C.L.J. 146, F.

- (14) *Stipulation for re-purchase—No date fixed for re-payment—Transaction amounting to mortgage—Intention of parties.*

A mere stipulation for re-purchase will not convert a sale into a mortgage and if nothing more is made to appear than that a sale has been made with a contemporaneous agreement by the purchaser to let the vendor have the property back on a refund of the price, the transaction must take effect as a sale.

Every mortgage imports a debt and in order to hold that a transaction of this character amounts to more than a mortgage, there must be something to show an intention to treat the property as security for the payment of a debt. **Kishen Dayal Pande v. Chandra Deo Pande**, 36 Ind. Cas. 991.

LINDSAY, J.

(15) *Sale of land by Hindu widow—Condition that vendee should pay amount of revenue to vendor for payment to Government—Non-registration of vendee's name—Partition under Partition Act (B.C. V of 1897)—Right of vendee to lands allotted to vendor.* **Brojo Nath Saha v. Dinesh Chandra Neogi**, 9 Ind. Cas. 67=21 C.L.J. 559=30 Ind. Cas. 419. See Final Part, 1911, Col. 898.

(16) *Transfer of Property Act, S. 54—Conditional promise to pay price—Condition not*

Sale—(Continued).

opposed to public policy. **Kauleshar Prasad Misra v. Abadi Bibi**, 19 A.L.J. 824=37 A. 631=30 Ind. Cas. 512. See Final Part, 1915, Col. 1233.

(17) *Sale, oral—Receipt of earnest money—Out-and-out sale—Incorrect entry of mortgage amount on that property, effect of—Failure of prompt execution and registration of sale-deed, effect of—Purchaser of property under registered deed with notice of prior oral sale—Right of Mortgages—Equity of redemption, sale of—Purchaser, right of, to redeem.* **Hardit Singh v. Behari Lal**, 104 P.W.R. 1915=29 Ind. Cas. 305=9 P.L.R. 1916. See Final Part, 1915, Col. 1233.

(18) *Whether share in village shamilat is included in the sale—Intention of parties.* **Shahamad v. Ibrahim**, 57 P.R. 1915=134 P.W.R. 1915=30 Ind. Cas. 100=60 P.L.R. 1916. See Final Part, 1915, Col. 1234.

(19) *Consideration—Kobala containing recital of payment of consideration—Benami, onus of proving—Defendant in possession—Presumption, whether arises—Admission of further evidence.* **Durga Charan Chandra v. Khorda Company, Limited**, 29 Ind. Cas. 696=20 C.W.N. 254. See Final Part, 1915, Col. 1235.

(20) *In favour of minor—Validity of—Transfer of Property Act, S. 5, 6 (h), 7, 54, 127.* **Munl Koer v. Madan Gopal**, 13 A.L.J. 1084=38 A. 62=31 Ind. Cas. 792. See Final Part, 1915, Col. 1236.

(21) *Construction of deed whether a document is deed of mortgage or—Whether it is a ground of second appeal.* See APPEAL (SECOND APPEAL), No. 6, 115 P.W.R. 1916.

(22) *Purchase-money paid by father—Son's name entered in sale-deed as sole vendee—Intention.* See BENAMI TRANSACTIONS, No. 3, 77 P.W.R. 1916.

(23) *Fictitious transaction—Vendor in possession—His own fraud no bar to resist claim for possession.* See BENAMI TRANSACTIONS, No. 1, 21 P.R. 1916.

(24) *Private sale of portion of property attached—Portion not sold not enough to satisfy decree—Decree-holder's right to proceed against property sold.* See CIV. PRO. CODE (1908), No. 139, 34 Ind. Cas. 91.

(25) *Followed by agreement for re-purchase—Construction—Onus.* See CONSTRUCTION OF DEED, No. 6, 35 Ind. Cas. 336.

(26) *Mortgage by conditional sale or sale with covenant to purchase—Test.* See CONSTRUCTION OF DEED, No. 2, 31 M.L.J. 760.

(27) *Transaction whether, or mortgage—Surrounding circumstances.* See CONSTRUCTION OF DEED, No. 7, 32 Ind. Cas. 192.

(28) *Contract of sale of goods—Orders for purchase limited to a certain maximum—Liberty to vendor to send or not to send the goods—Construction of contract.* See CONTRACT, No. 8, 18 Bom. L.R. 217.

(29) *Of immovable property—Deposit—Time when essence of the contract—Default—*

Sale—(Continued).

Forfeiture—Damages. See CONTRACT, No. 12, 9 S.L.R. 137.

(30) Contract for—Purchaser, a minor—Sale by *de facto* guardian, when valid. See CONTRACT ACT, No. 8, 32 Ind. Cas 638.

(31) Contract for sale of goods to be manufactured—Goods tendered inferior to sample—Reference to arbitration—Award—Breach of contract. See CONTRACT ACT, No. 113, 18 Bom. L.R. 532.

(32) By auction—Employment of puffers—Commission for sale outrageously high—Sale whether voidable. See CONTRACT ACT, No. 114, 3 P.W.R. 1916.

(33) Of goods—Goods not in accordance with contract—Goods when to be rejected—Reasonable time—Burden of proof. See CONTRACT ACT, No. 112, 23 C.L.J. 415.

(34) Of goods—Produce—Drawing samples, etc.—Tender—Proper time—Facilities to be given by vendor—Tender after drawing of samples—Effect. See CONTRACT ACT, No. 39, 9 S.L.R. 160.

(35) Usage of jute trade—Jute brought by *farials* and stored in Companies' godowns, burnt before weighment—Jute insured by Company—Incidence of loss—Passing of title—Unascertained goods—Intention. See CONTRACT ACT, No. 102, 20 C.W.N. 1224.

(36) Vendor's duty to tender goods at the specified time—Delivery of Railway receipt not sufficient—Rule 17 of the Bombay Cotton Trades Association Rules. See CONTRACT ACT, No. 51, 18 Bom. L.R. 96.

(37) Contract of—Suit for specific performance—Court-fee. See COURT FEES ACT, No. 13, 14 A.L.J. 434.

(38) Transfer of property coupled with license—Transfer void for want of writing or registration—Validity of mere licenses—Such license whether revocable. See EASEMENTS ACT, No. 10, 12 N.L.R. 75.

(39) Suit by *kanomdar* against the *jenmi* and a subsequent purchaser for specific performance of contract to sell—Purchaser when to be deemed to have notice of the agreement to sell. See KANOM, No. 1, (1916) 2 M.W.N. 31.

(40) Of land—Partial dispossession—Suit for loss—One for failure of consideration and not breach of covenant for title—Limitation. See LIMITATION ACT (1909), No. 170, 19 M.L.T. 163.

(41) *Zar-i-Ohaharum*—Right to sue—*Terminus a quo*—Completion of sale—Limitation. See LIMITATION ACT (1908), No. 199, 14 A.L.J. 382.

(42) Agreement to sell by him—Void—Contract Act, S. 11. See MINOR, No. 7, 33 Ind. Cas. 132.

(43) Guardian purchasing property for minor—Suit for possession by minor—Maintainability—Contract entered into with father of minor—Effect. See MINOR, No. 1, 14 A.L.J. 65.

(44) Suit for redemption—, set up by defendant—Neither mortgage nor sale proved—Effect.

Sale—(Continued).

See MORTGAGE—REDEMPTION, No. 17, 9 Bur. L.T. 114.

(45) Suit for partition if maintainable by a lessee of mining rights for a term against lessor's co-owners—Partition of underground mines and minerals, if possible. See PARTITION, No. 6, 20 C.W.N. 1306.

(46) Deed of gift—Transaction really a sale—Proof. See PRE-EMPTION, No. 7, 70 P.R. 1916.

(47) Sale when complete. See PRE-EMPTION, No. 10, 20 C.W.N. 1048.

(48) Sale and re-sale—Agreement creating right of redemption whether requires registration. See REGISTRATION ACT (1908), No. 14, 9 Bur. L.T. 67.

(49) Unregistered deed of sale—Admission of sale by vendor—Inadmissibility of sale-deed in evidence—Mutation proceedings admissible to prove alignment irrespective of the sale-deed. See REGISTRATION ACT (1908), No. 18, 110 P.W.R. 1916.

(50) Contract of sale—Claim for specific performance—Whether claim for possession against the usufructuary mortgagee of the vendor can be joined. See SPECIFIC PERFORMANCE, No. 2, (1916) M.W.N. 77.

(51) Non-registration of sale of land worth more than Rs. 100—Effect—Contract to sell—Suit for specific performance—Limitation. See TRANSFER OF PROPERTY ACT, No. 57, 9 Bur. L.T. 45.

(52) Oral sale—Vendee in possession of property sold—Delivery of possession—Whether can be made. See TRANSFER OF PROPERTY ACT, No. 52, 12 N.L.R. 3.

(53) Part payment of purchase-money—Transfer of possession—Owner selling the property to another person under a registered sale-deed—Right of second purchaser as against the first purchaser in possession. See TRANSFER OF PROPERTY ACT, No. 67, 18 Bom. L.R. 455.

(54) Portion of purchase-money left with vendee to pay off vendor's creditor—Money not paid—Unpaid vendor's lien—Whether enforceable against transferee from vendee for consideration without notice of lien. See TRANSFER OF PROPERTY ACT, No. 72, 14 A.L.J. 304.

(55) Purchase of immoveable property worth more than Rs. 100—No registered deed—Purchaser in possession—Rights of vendor and vendee. See TRANSFER OF PROPERTY ACT, No. 65, 8 Bur. L.T. 268.

(56) Representation in sale-deed that property was let on yearly tenancy—Tenancy turning out to be permanent—Misrepresentation—Purchaser's rights to damages. See TRANSFER OF PROPERTY ACT, No. 70, 18 Bom. L.R. 292.

(57) Right to damages between date of contract for sale and date of execution of sale-deed—Mesne profits. See TRANSFER OF PROPERTY ACT, No. 63, (1916) M.W.N. 284.

Sale—(Concluded).

(58) Sale-deed in minor's favour—Contract Act, 1872, S. 11. See TRANSFER OF PROPERTY ACT, No. 25, 31 Ind. Cas. 792.

(59) Sale-deed of property in possession of tenants—Interest conveyed is 'reversion' in the property—Sale deed should be registered. See TRANSFER OF PROPERTY ACT, No. 53, 18 Bom. L.R. 8.

(60) Transfer of immoveable property of less than Rs. 100 in value to mortgagee with possession on failure to pay off mortgage—Oral transfer accompanied by formal delivery of possession—Validity of sale—Effect as against subsequent vendee under registered sale-deed. See TRANSFER OF PROPERTY ACT, No. 54, 20 C.W.N. 195.

(61) Contract to sell—Subsequent purchaser with notice—Conveyance to contractee to sell—Suit for possession by purchaser with notice—Maintainability. See TRUSTS ACT, No. 14, 3 L.W. 467.

Sale Certificate.

Duty of Court to grant. See CIV. PRO. CODE (1908), No. 525, 1 Pat. L.J. 446.

Sale deed.

Decree directing execution of—Time fixed extended—Non-payment of amount in time—Right of decree-holder. See EXTENSION OF TIME, No. 2, 31 Ind. Cas. 457.

Sale for Arrears of Revenue.

(1) Sale for arrears of Government Revenue—Plea of adverse possession—Limitation—Incumbrance—Limitation Act (IX of 1908), Sch. I, Arts. 121, 142, 144.

Where a plaintiff sued for khas possession of certain lands purchased by him at a sale for arrears of revenue and also for the recovery of mesne profits in respect of those lands and the defendant's contention was that they had been in adverse possession of those lands for a long time, that their occupation was in the nature of an incumbrance and that the plaintiff were not entitled to avoid the same, it was held that the interest which the defendants acquired by adverse possession was an incumbrance within the meaning of Art. 121 of the Limitation Act (IX of 1908) and that the suit was barred by limitation. *Prasanna Kumar Dutt v. Jnanendra Kumar Dutt*, 43 C. 779= 31 Ind. Cas. 901.

RICHARDSON and IMAM, JJ.

References:—22 C. 244; 25 C. 167, *Appr.*; 12 C.W.N. 528; 13 C.W.N. 407, *D.*

(2) Suit for annulment of—Not due—Collector, duty of. See BEN. ACT XI OF 1959 (LAND REVENUE SALES), No. 3, 31 Ind. Cas. 743.

Sale in Execution of Decree.

Court sale, confirmation of—Suit to recover property wrongly attached and sold—Sale, if should be set aside first. See CIV. PRO. CODE (1908), No. 98, 4 L.W. 400.

Sale of Goods.

(1) Buyer failing to take delivery of goods and the seller exercising his powers of re-sale—Damages, claim for, at market rate—Maintainability. See CONTRACT ACT, No. 108, 8 L.B. R. 367.

(2) Delay of buyer in taking delivery—Damage to goods—Liability of purchaser. See CONTRACT ACT, No. 84, 10 S.L.R. 14.

(3) Delivery order in—Goods in existence and ascertained—Document of title. See CONTRACT ACT, No. 101, 36 Ind. Cas. 593.

(4) See DAMAGES. No. 1, 34 Ind. Cas. 273.

(5) Suit for price of goods sold—Commission of vendee to plead part payment of price to vendor's agent—Subsequent suit by vendee for the amount, bar of—Revision—Interference by High Court in absence of petition. See RES JUDICATA, No. 23, 33 Ind. Cas. 623.

(6) Contract not bearing eight-anna stamp and containing arbitration clause, not invalid. See STAMP, No. 2, 10 S.L.R. 14.

Sale of Land.

See SPECIFIC RELIEF ACT, No. 18, 34 Ind. Cas. 396.

Sale Proclamation.

(1) Execution—Duty of Court—Purchaser's remedy in event of improperly conducted sale. See CIV. PRO. CODE (1908), No. 495, 8 L.B.R. 427.

(2) Execution of decree—Property described in decree amplified in execution. See CIV. PRO. CODE (1908), No. 434, 35 Ind. Cas. 368.

(3) Proceedings in connection with—Objections of judgment-debtor rejected—Appeal. See CIV. PRO. CODE (1908), No. 104, 14 A.L. J. 363.

(4) Execution sale—Irregularity in proclamation—Application to set aside sale—Points to be proved. See CIV. PRO. CODE (1908), No. 497-a, 32 Ind. Cas. 990.

Sale (Revenue) Law Act.

See BEN. ACT XI OF 1859.

Salvage.

Suit for—See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 30, 9 Bur. L.T. 163.

Salvage Lien.

Subrogation—Prior and subsequent mortgage. One K owned certain Zamindari property. He died leaving a widow and a daughter him surviving. In his lifetime K got the name of his daughter entered in respect of his property, and the daughter came into possession thereof after K's death. The daughter died leaving a daughter, R. R's legal guardian sold a portion of K's property in order to pay off certain debts of K. K's widow then brought a suit for possession of the estate against R and her guardian. In order to be able to prosecute the suit she borrowed money by making two mortgages in favour of K.S. and M. She succeeded

Salvage Lien—(Concluded).

in the suit subject to the condition of her paying a certain sum of money to R's guardian. In order to raise this money the widow made a mortgage in favour of J, and covenanted in the deed that this mortgage would be a prior encumbrance on the property. R.S. sued to enforce his mortgage and U sued to enforce his, claiming in each case priority over the mortgages of K.S. and M.:

Held that U had no priority either on the ground of salvage lien inasmuch as he had no interest in the property when he advanced the money or on the ground of subrogation because there was no relation of debtor and creditor under the decree between R's guardian and K's widow. *Umrul Lal v. Rokmin Kuar*, 14 A.L.J. 953=35 Ind. Cas. 647.

PIGGOTT and LINDSAY, JJ.

Sambalpur Civil Courts Act.

See BEN. ACT IV OF 1906.

Sanction of the Court.

Devastanam Committee—Alienation of offerings to the Deity in favour of Archakas—Suit to declare the invalidity of the alienation—Suit against Committee and Archakas by two worshippers—Trustee not a party—No, or Advocate-General—Maintainability. See RELIGIOUS ENDOWMENTS ACT, No. 6, 31 M.L.J. 777.

Sanction to Prosecute.

(1) *Application for sanction dismissed by Presidency Small Cause Court—Revisional powers of High Court—S. 195, Crim. Pro. Code—S. 115, Civ. Pro. Code (1908)—Application for leave to sue—Whether a stage in a judicial proceeding.*

An application was made to the High Court under S. 115, Civ. Pro. Code (1908), to set aside an order made by a Judge of the Presidency Small Cause Court, Calcutta, refusing sanction to prosecute the plaintiffs for having made false claims.

Held that under S. 195, Crim. Pro. Code, the High Court is the superior Court of the Presidency Small Cause Court, and has power to deal with the order made by that Court.

Held also that an application for leave to sue was a stage in a judicial proceeding, where such leave was necessary to give the Court jurisdiction. *Budhu Lal v. Chattu Gope*, 43 C. 597=17 Cr. L.J. 504=36 Ind. Cas. 472.

CHAUDHURI, J.

(2) *Sanction for prosecution for perjury—Granted by Munsif—Omission to specify the statements for which prosecution ordered—Civil revision, power of High Court—Code of Civil Procedure (1908), S. 115—Delay in making application for sanction—S. 476, Crim. Pro. Code*

The omission by a Munsif to specify the false statements in regard to which he directs the prosecution of a certain person for perjury and also to mention the forged portion of a document for which he directs him to be prosecuted for forgery amounts to material irregularity

Sanction to Prosecute—(Continued).

within the meaning of S. 115 of the Code of Civil Procedure, and his direction to the Magistrate that such person may be convicted of any other offences that may be proved against him is without jurisdiction. In such cases the High Court has power to interfere under S. 115 of the Code of Civil Procedure.

In a case where steps under S. 476, Crim. Pro. Code, are to be taken, it is highly desirable that they should be taken as soon as possible and not delayed for several months after the trial of the suit. *Kashi Shykal v. King-Emperor*, 14 A.L.J. 814=38 A. 695=36 Ind. Cas. 836.

RAFIQ, J.

(3) *Civil Court taking action under S. 476, Crim. Pro. Code—Interference of High Court in revision under S. 439, Crim. Pro. Code—Legality—High Court's interference under S. 115, Civ. Pro. Code, when justifiable—Sanction to prosecute—Whether notice necessary.*

A High Court could not interfere, under S. 439, Crim. Pro. Code, in revision, with the proceedings of a Civil Court taken under S. 476 of the Code of Criminal Procedure, on the ground that S. 439 must be read with S. 435 of the Code of Criminal Procedure, and the power of revision is expressly confined to the records of inferior Criminal Courts (a).

Where the order of the lower Court was passed under S. 476, Crim. Pro. Code, it can only be interfered with by the High Court in the exercise of its civil jurisdiction under the provisions of S. 115 of the Code of Civil Procedure.

Sanction to prosecute may be granted without the issue of a notice and is not vitiated by the absence of such notice. But notice should ordinarily be issued, and in a case of non-attendance where a person may be prevented from attending by illness or any other sufficient cause, it appears to be clearly desirable that notice should issue. *Nga San Cheln v. Sookaram*, U.B.R. (1915), 3rd Qr., 83=32 Ind. Cas. 674.

SAUNDERS, J.C.

References:—(a) 4 L.R.R. 339; 40 C. 477, *Appr.*; U.B.R. (1907—1909), 1st Qr., Crim. Pro. Code, 1, R.

(4) *Crim. Pro. Code (Act V of 1899), S. 195, cl. 6—Sanction to prosecute—Expiry of time—Power of High Court to extend time.* The High Court can, under S. 195, cl. 6 of the Crim. Pro. Code, extend the time of a sanction to prosecute, even after the expiry of the period of six months from its date. *Krishna Kering & Co. v. J.R. Miller*, 18 Bom. L.R. 686=17 Cr. L.J. 377=35 Ind. Cas. 809.

BATCHELOR, A.C.J. and HEATON, J.

(5) *Crim. Pro. Code (Act V of 1899), S. 195 (6)—Sanction—Powers of Courts of appeal or revision in revoking or granting sanction given or refused by a subordinate authority—Remand not proper.*

Whether an appellate Court considering the question of revoking or granting a sanction to

Sanction to Prosecute—(Concluded).

prosecute given or refused by a subordinate Court be a Civil Court or not, its powers are limited by the express provisions of S. 195 (6) of the Code of Criminal Procedure to revoking or granting sanction. It has no power to remand a case to a subordinate Court for further consideration. *Sit Taw'v, Maung Gee*, 9 Bur. Ir.T. 128=17 Or. L.J. 252=34 Ind. Cas. 334.

U KIN, J.

(6) *Crim. Pro. Code*, S. 476—*Perjury—Action taken before suit ended—Suit dismissed—Material irregularity—Revision—Civ. Pro. Code*, S. 115—*Charter Act*, S. 15—*Difference between Judges of Division Bench—Judgment of the Senior prevails—Letters Patent*, cl. 36—*Civ. Pro. Code*, S. 98 (2). *In re Karri Venkanna Patrudu*, 18 M.L.T. 591=17 Cr. L.J. 42=32 Ind. Cas. 330. See Final Part, 1915, Col. 1243.

(7) *Ex parte* decree—Transfer to another Court for execution—Arrest of defendant—Suit by latter to set aside an *ex parte* decree on the ground of fraud—Decree *ex parte* set aside—Application for, See CRIM. PRO. CODE, No. 10, 1 Pet. L.J. 586.

(8) Order granting sanction—Appeal. See LETTERS PATENT (ALLAHABAD), No. 1, 14 A.L.J. 1230.

Sanyasi.

See RELIGIOUS ENDOWMENT, No. 4, 35 Ind. Cas. 630.

Saranjamdar.

See RES JUDICATA, No. 16, 18 Bom. L.R. 768.

Scheme.

Limitations to the Court's power to frame a scheme. See CIV. PRO. CODE (1908), No. 163, 3 L.W. 43.

Scheme Suit.

Act XX of 1869. (Religious Endowments), S. 18—Wakf—Removal of trustees. See CIV. PRO. CODE (1882), No. 31, 35 Ind. Cas. 880.

'Scribe.'

(1) Deed of gift—Attestation by two witnesses—One witness described as—Effect—Validity of attestation. See REGISTRATION ACT (1908), No. 32, 33 Ind. Cas. 33.

(2) Scribe if attesting witness. See TRANSFER OF PROPERTY ACT, No. 83, 20 C.W.N. 699.

Search Warrant.

Obtaining, maliciously and without reasonable and probable cause. See DAMAGES, SUIT FOR, No. 1, 20 M.L.T. 303.

Secondary Contract.

Primary and secondary obligations—Duty of Court to carry out. See CONTRACT, Nos. 18 and 19, 30 Ind. Cas. 323.

Secondary Evidence.

(1) See EVIDENCE ACT, No. 32, 32 Ind. Cas. 399.

(2) Admission of mortgage in prior proceedings. See EVIDENCE ACT, No. 37, 36 Ind. Cas. 696.

(3) Of old document, discretion to admit—Presumption when original not forthcoming. See EVIDENCE ACT, No. 34, 35 Ind. Cas. 328.

(4) Translation of a document, if—Admissibility. See EVIDENCE ACT, No. 29, 4 L.W. 331.

(5) Of unstamped document, inadmissibility of. See LIMITATION ACT (1908), No. 127, 33 Ind. Cas. 661.

(6) Appellate Court whether can admit document itself when secondary evidence alone *vs* the same was given at trial. See CIV. PRO. CODE (1908), No. 665-a, 32 Ind. Cas. 711.

Secretary of State.

Suit against—Notice. See CIV. PRO. CODE (1882), No. 28-a, 32 Ind. Cas. 235.

Security.

(1) S. 145 of Civ. Pro. Code if applies to security for production of judgment-debtor. See CIV. PRO. CODE (1908), No. 131, (1916) 2 M.W.N. 273.

(2) Pauper suit by woman—Not required. See CIV. PRO. CODE (1908), No. 571, 8 L.B. R. 387.

Security Bond.

See ACT III OF 1909 (PRESIDENCY TOWNS INSOLVENCY), No. 7, 39 M. 689.

Security for Costs.

(1) Appeal—Security for costs. See CIV. PRO. CODE (1908), No. 645-a, 32 Ind. Cas. 786.

(2) Guardianship—Father's right, if can be taken away—Divorce suit—Appeal by wife—Adultery admitted—Costs of appeal. See HUSBAND AND WIFE, No. 1, 24 C.L.J. 226.

Seigniorage.

Right of the Government to levy. See CROWN GRANTS, No. 1, 31 M.L.J. 483.

Self-Government Local Act.

See BEN. ACT III OF 1885.

Senate.

And the 'Syndicate, functions of—Regulation XLIV, if *ultra vires* of the Senate—Power of, to impose veto of Government on matters reserved for itself by Statute. See ACT VIII OF 1904 (UNIVERSITY), No. 1, 31 M.L.J. 634.

Separate Trial.

Causes of action essentially of different character. See CIV. PRO. CODE (1908), No. 172, 36 Ind. Cas. 29.

Servants.

Company wound up—Winding up order passed—Effect—Discharge of, of company—Appeal. See COMPANIES ACT (1882), No. 7, 4 L.W. 226.

Service.

Newspaper—Co-editor—Contract of service—Power of managing director to vary duties and hours of attendance—Refusal to do duties assigned—Claim for salary. See CONTRACT, No. 4, 30 M.L.J. 207.

Service Grants.

See CIV. PRO. CODE (1908), No. 204, 34 Ind. Cas. 713.

Service Inam.

Construction of grant—Grant burdened with service and grant in lieu of wages—Distinction—Grant when resumable. See GRANT, No. 1, 30 M.L.J. 132.

Service of Notice.

Information given to Pleader as to date of hearing—Notice not served on party—Appearance by Pleader without instructions—Dismissal for default, legality of.

In an appeal pending in the Court of a Commissioner, notice was issued to the appellant but it was not personally served on him, as he was absent from his house. On the date of the hearing the Pleader, who had been orally informed of the date of hearing, appeared and said that he was unable to prosecute the appeal as he had got no instructions from his client. The Commissioner thereupon dismissed the appeal for want of prosecution. *Held* that there was no proper service of the appellant and the Commissioner was wrong in having dismissed the appeal for default. **Sukh Mangal Tewari v. Ranaq Bihl**, 30 Ind. Cas. 199.

TWEEDY, S.M. and HOLMS, J.M.

Service of Summons.

Addition of party—Date of commencement of proceedings against such person. See CIV. PRO. CODE (1908), No. 309, 30 Ind. Cas. 795.

Service Tenure.

Seshgat vatan—Grant of land for services of a Huddar—Right to resume land when service not required—Right depending on the terms of the grant and character of services—Presumption—Burden of proof.

Where there is a grant of land in respect of service, the question whether the land is resumable merely by reason of the fact that services are no longer required by the grantor depends upon the terms of the grant and the character of services for which the grant was made. But the burden of proving that the case falls within the category of lands resumable falls on the grantor who seeks to resume them (a).

A distinction has to be drawn between a grant made for services rendered and to be rendered and a grant made as a remuneration for or in lieu of wages or service. In the case of this latter grant and not in the case of the former grant, the lands would be resumable on the discontinuance of service. **Baalingappa Yirbhadrappa Huddar v. Chandrapa Basawantrao Desai**, 18 Bom. L.R. 695—35 Ind. Cas. 860.

BATOHELOB, A.C.J. and SHAH, J.

References:—(a) 39 B. 68—17 Bom. L.R. 128, F.

Set-off.

(1) Decree for sale on mortgage against puisne encumbrancer—Personal decree in favour of puisne encumbrancer against mortgagee—Different capacities—Set-off whether permissible. See CIV. PRO. CODE (1908), No. 442, 14 A.L.J. 776.

(2) Equitable set-off, claim of, when will be allowed—Suit for rent between lessor and lessee—Barred claims for delinquent damages if can be set-off. See CIV. PRO. CODE (1908), No. 370, 3 L.W. 24.

(3) See COURT FEES ACT, No. 15, 36 Ind. Cas. 957.

(4) Equitable set-off when may be allowed. See MORTGAGE (GENERAL), No. 13, (1916) M.W.N. 351.

(5) Bill of Exchange—Acceptance of the bill—On due date, the acceptor claiming, of amounts owing to him by the bank—Tender of balance—Release of the drawer by such tender. See NEGOTIABLE INSTRUMENTS ACT, No. 1, 18 Bom. L.R. 689.

Setting aside Decree.

(1) *Small Cause Court suit tried on Original Side—Appeal to District Judge—Jurisdiction—High Court to set aside decree.*

Where a Small Cause suit is tried by a Munsif on the Original Side and his decision is reversed on appeal, the High Court is bound to set aside the appellate decree as being passed without jurisdiction (a). **Abdul Majid v. Bedyadhar**, 14 A.L.J. 984—39 A. 101.2.

KNOX, J.

Reference:—(a) 33 M. 323, F.

(2) *Fraud—Incorrect allegations in plaint—Suit against minor—Proper person to be appointed guardian ad litem—Gross negligence of guardian.*

A decree cannot be set aside on the ground of fraud by reason of its having been obtained upon statement contained in the plaint, subsequently found to be incorrect, if the plaintiff did not know in fact that they were incorrect.

Where a guardian duly appointed by a competent Court for the person and property of a minor is in existence when a suit is instituted against the minor, that guardian is the proper person to be made the guardian *ad litem* in the suit. But where the fact of that appointment is not known to the plaintiff, the appointment of an officer of Court as the guardian *ad litem* is not improper. A decree obtained against the minor in such a case is not liable to be set aside on the ground of gross negligence of the guardian where in spite of his best endeavours, he had not been able to obtain any instructions from the minor and had left the matter in the hands of the Court which decreed the suit in plaintiff's favour. **Girja Dayal v. Raghu Mal**, 33 Ind. Cas. 481.

LINDSAY, J.C.

(3) *Suit to set aside decree on ground of fraud—Evidence—Proof.*

Where a suit is brought to set aside a decree on the ground of fraud and the fraud alleged in the plaint is that certain false allegations were

Setting aside Decree—(Concluded).

made in the former plaint by the plaintiffs who proved those allegations by means of perjured evidence, the suit is not maintainable. In such a suit it must be demonstrated that some fraud has been practised upon the Court in the course of the judicial proceedings which terminated in the decree complained of. *Kure v. Jhinguria*, 35 Ind. Cas. 847.

LINDSAY, J.

References:—37 A. 535, F.; 41 C. 990; 18 L. T. 134, R.

(4) Suit for redemption of mortgage—Relief sought being setting aside of a consent decree between the parties and a prior sale-deed as fraudulent. See BOM. ACT XVII OF 1879 (DEKHAN AGRICULTURISTS' RELIEF), No. 2, 18 Bom. L.R. 708.

(5) *Ex parte* decree against pardanashin lady—Suit to set aside decree on ground of fraud. See BURDEN OF PROOF, No. 6, 36 Ind. Cas. 596.

(6) Consent decree—Power of Court to vary or set aside same. See CIV. PRO. CODE (1908), No. 284, 36 Ind. Cas. 239.

(7) *Ex parte* decree—Payment of decree amount on compromise—Order setting aside said decree after disposal of appeal by other judgment-debtors. See CIV. PRO. CODE (1908), No. 384, 30 Ind. Cas. 247.

(8) Suit for declaration that certain *ex parte* decree is invalid. See COURT-FEES, No. 3, 35 Ind. Cas. 797.

(9) Compromise decree—Right of party to prove that his consent was obtained by misrepresentation and fraud—Necessity for suit to set aside decree. See EVIDENCE ACT, No. 25, 30 Ind. Cas. 639.

(10) See EX-PARTE DECREE, No. 5, 34 Ind. Cas. 865.

(10-a) See EX-PARTE DECREE, No. 5-a, 32 Ind. Cas. 849.

(11) Suit merely for a declaration to set aside decree by minor after attaining majority—Form of decree. See GUARDIAN AND WARD, No. 1, 117 P.L.R. 1916.

(12) Minor—Decree against minor, grounds for setting aside of—Decree binding upon minor unless grounds exist for setting it aside—*Ex parte* decree against minor. See MINOR, No. 6, 19 O.C. 119.

Setting aside Dead.

(1) Execution of document to defraud creditors—Right of executant to have document set aside. See FRAUD, No. 3, 30 Ind. Cas. 482.

(2) See HINDU LAW (WIDOW), No. 16, (1916) 2 M.W.N. 325.

Setting aside *ex parte* Decree.

(1) See OUDH ACT XXII OF 1886 (RENT), No. 33, 84 Ind. Cas. 702.

(2) See CIV. PRO. CODE (1908), No. 204, 34 Ind. Cas. 713.

(3) Application to set aside *ex parte* decree—Dismissal of application for default—Appeal. See CIV. PRO. CODE (1908), No. 389, 36 Ind. Cas. 789.

Setting aside *ex parte* Decree—(Concluded).

(4) Pendency of appeal against an order refusing to set aside *ex parte* decree—Stay of proceedings in execution—Discretion of Court. See CIV. PRO. CODE (1908), No. 498, 35 Ind. Cas. 442.

(5) See LIMITATION ACT (1908), No. 29, 101 P.R. 491q.

(6) Appeal from conditional order setting aside decree—Costs not imposed. See CIV. PRO. CODE (1908), No. 390-a, 32 Ind. Cas. 954.

(7) See CIV. PRO. CODE (1908), No. 263-a, 32 Ind. Cas. 975.

Setting aside Sale.

(1) Court auction—Sale—Irregularity in the conduct of—Bona fide purchaser not protected—Major judgment-debtor—Treated as minor—Vitiated sale—Notice—Execution.

Although a bona fide purchaser at a Court-auction is protected where the decree was passed by a Court of competent jurisdiction notwithstanding the fact that the decree was vitiated by illegality or was afterwards set aside, he receives no such protection where the irregularity is in the conduct of the sale itself.

Where therefore an auction sale was held without notice to a major judgment-debtor wrongly treating him as a minor:

Held, it was such a grave and material irregularity as vitiated the sale and that the judgment-debtor was entitled to maintain a suit to set aside the sale on the sole ground of want of notice, unless the defendant pleaded facts which raised valid defences to the claim of the plaintiff which is, *prima facie*, a sustainable claim.

Held also, that it was for the auction-purchaser to set up any appropriate defences when the plaintiff had made the only necessary allegation in his plaint, viz., that no notice through Court as required by law was issued to and served on him (a). *Tanguturi Jagannadham v. Seshagiri Rao*, 20 M.L.T. 479.

SADASIVA IYER and NAPIER, JJ.

References:—(a) 25 B. 337 (P.C.); 18 O.W. N. 1058 (P.C.), F.; 21 M. 167, R.

(2) Appeal—Order setting aside—Sale in execution of rent decree—Bengal Tenancy Act (VIII of 1886). S. 173 (3), scope of—Civ. Pro. Code (Act V of 1908), S. 47, O. XXI, r. 90.

S. 173 (3) of the Bengal Tenancy Act provides a summary procedure to set aside a sale under the Act, which the Rent Courts are allowed to take, if they see fit, where no other question arises but the question of *benami*. But where in addition to this there are grounds of irregularity and fraud falling under S. 47, and O. XXI, r. 90, Civ. Pro. Code, the Court not only has the power, but it has the positive duty, not to adopt the summary procedure laid down in S. 173 but to try the case under the ordinary provisions of the Civ. Pro. Code, and the decision passed is open to first and second appeals. Where it is clear that the Court had no idea of

Setting aside Sale—(Continued).

confining its decision to S. 173, the mere fact that one of the grounds of irregularity and fraud urged against the sale was that the property was purchased by the judgment-debtor *benami*, would not bring the case within S. 173. *Sreenath Haldar v. Bepin Behari Mal*, 33 Ind. Cas. 574.

HOLMWOOD and IMAM, JJ.

References:—24 C. 707 = 1 C.W.N. 534, R.

(3) Suit for annulment of sale for arrears of revenue not due—Collector, duty of. See BEN. ACT XI OF 1859 (LAND REVENUE SALE), No. 3, 31 Ind. Cas. 748.

(4) See BEN. ACT IX OF 1879 (COURT OF WARDS), No. 2, 34 Ind. Cas. 86 = 20 C.W.N. 852.

(5) Nature of interest entitling exercise of right—Proof of title. See BEN. ACT VI OF 1908 (CHOTA NAQPUR TENANT), No. 5-d, 36 Ind. Cas. 829.

(6) Suit for redemption of mortgage—Relief sought being setting aside of a consent decree between the parties and a prior sale-deed as fraudulent. See BOM. ACT XVII OF 1879 (DEKHAN AGRICULTURISTS' RELIEF), No. 2, 18 Bom. L.R. 708.

(7) Suit for redemption—Prayer to set aside sale-deed as fraudulent—Suit outside the scope of the Act. See BOM. ACT XVII OF 1879 (DEKHAN AGRICULTURISTS' RELIEF), No. 3, 18 Bom. L.R. 763.

(8) See MAD. ACT I OF 1908 (ESTATES LAND), No. 35, 35 Ind. Cas. 153.

(9) See CANCELLATION OF DEED, No. 1, 33 Ind. Cas. 441.

(10) See CIV. PRO. CODE (1908), No. 110, 35 Ind. Cas. 478.

(11) See CIV. PRO. CODE (1908), No. 519, 10 S.L.R. 53.

(12) Application to set aside sale—Non-payment by judgment-debtor within time agreed upon—Power of Court to extend time—Appeal. See CIV. PRO. CODE (1908), No. 512, 36 Ind. Cas. 809.

(13) Auction-purchaser—Deposit—No confirmation of sale—Application to set aside sale. See CIV. PRO. CODE (1908), No. 506, 31 Ind. Cas. 913.

(14) Execution sale—Mere payment without application to set aside sale—Application if to be in writing—Amendment of petition—Revision. See CIV. PRO. CODE (1908), No. 256-a, 32 Ind. Cas. 45.

(15) Execution sale, setting aside of—Material irregularity. See CIV. PRO. CODE (1908), No. 514, 35 Ind. Cas. 411.

(16) Non-transferable occupancy holding, sale of, under rent decree—Right of mortgagees to set aside. See CIV. PRO. CODE (1908), No. 515, 31 Ind. Cas. 859.

(17) Sale in execution—Material irregularities in proclamation of sale. See CIV. PRO. CODE (1908), No. 516, 33 Ind. Cas. 946.

(18) See ESTOPPEL, No. 6, 31 Ind. Cas. 858.

Setting aside Sale—(Concluded).

(19) Purchase by three persons—Sale set aside by first Court—Appeal by one auction-purchaser—Effect. See EXECUTION SALE, No. 5, 32 Ind. Cas. 193.

(20) See GUARDIAN AND WARD, No. 2, 33 Ind. Cas. 436.

(21) Alienation by father—Sale set aside by the sons to the extent of their share—Suit by alienee to recover proportionate consideration—Liability of the sons—Form of decree—*Res judicata*. See HINDU LAW (ALIENATION), No. 16, (1916) 2 M.W.N. 217.

(22) See LIMITATION ACT (1908), No. 94, 31 Ind. Cas. 250.

(23) See LIMITATION ACT (1908), No. 101, U.B.R. (1916), 2nd Qr., p. 116.

(24) Minor—Sale of minor's property by guardian—Fraud of minor—Suit to set aside sale barred—Right to recovery of possession of property sold—Extinction of right. See LIMITATION ACT (1908), No. 118, 34 Ind. Cas. 188.

(25) Suit to set aside sale-deed giving no present interest in property, on ground of fraud. See LIMITATION ACT (1908), No. 160, 31 Ind. Cas. 106.

(26) See MALABAR LAW (ALIENATION) No. 1, (1916) 2 M.W.N. 312.

(27) Sale of lands in execution of a decree—Subsequent suit by a party for setting aside the sale as illegal the lands being occupancy lands—Khoti Act, S. 9. See RES JUDICATA, No. 18, 18 Bom. L.R. 786.

(28) See MAD. ACT I OF 1908 (ESTATES LAND), No. 35-a, 35 Ind. Cas. 891.

(29) Execution sale—Irregularity in proclamation—Application to set aside sale—Points to be proved. See CIV. PRO. CODE (1908), No. 497-a, 32 Ind. Cas. 990.

(30) Execution sale under Small Cause Court decree, suit to set aside, dismissed—Second appeal. See CIV. PRO. CODE (1908), No. 194-a, 32 Ind. Cas. 712.

(31) Execution-sale set aside—Result. See EXECUTION OF DECREE, No. 34-b, 32 Ind. Cas. 699.

Settled Accounts.

(1) *When can be re-opened—Release, effect of.* "Where the accounts have been shown to be erroneous to a considerable extent both in amount and in the number of items, or where, fiduciary relations exist and a less considerable number of errors are shown, or where the fiduciary relation exists and one or more fraudulent omissions or insertions in the account are shown, then the Court opens the account and does not merely surcharge or falsify." Nor would the fact of a release following upon a settled account otherwise liable to be opened make any difference. *Ramaswami Aiyar v. Gnanamani Nachiar*, 31 M.L.J. 851 = (1917) M.W.N. 121 = 5 L.W. 279.

ABDUR RAHIM, OFFG; C.J. and PHILLIPS, J.

Reference:—(1877) 9 Ch. D. 529 (533), F.

Settled Accounts—(Concluded).

(2) What is. See RELEASE, No. 1, 31 M. L.J. 861.

Settlement.

(1) 'By the founder' and 'along with the founder'—Meaning. See PUN. ACT XVI OF 1887 (TENANCY), No. 3, 3 P.R. 1916 (Rev.).

Settlement Act.

See OUDH ACT XXVI OF 1866.

Settlement Court.

Settlement Court's decree based on admission—Judicial decision. See OUDH ACT XXII OF 1886 (RENT), No. 22, 34 Ind. Cas. 755.

Settlement Decree.

(1) *Decree for under-proprietary rights without power of transfer, effect of.*

Where a decree passed by the Settlement Court on the admission of the superior proprietor declared the predecessor-in-interest of the defendant to be entitled to under-proprietary rights subject to the payment of an annual rent without any power of mortgage or sale, held, that the condition in the decree restraining alienation was inconsistent with the grant of under-proprietary rights and ought to be regarded as void and ineffectual. *Sarju Din Pandey v. Kamta Singh*, 19 O.C. 115—34 Ind. Cas. 353.

KANHAIYA LAL, A.J.C.

(2) *Execution of settlement decree awarding under-proprietary rights in entire village—Execution of lease by under-proprietor in favour of superior proprietor—Superior proprietor purchasing share in under-proprietary rights—Adverse possession—Joint possession—Heirs of some dead appellants not on record—Civ. Pro. Code, 1908, O. XXI, r. 43.*

Held that the Extra Assistant Commissioner had no authority to go behind and supersede or alter a settlement decree awarding under-proprietary rights in an entire village.

The effect of an under-proprietor executing a lease in favour of a superior proprietor does not detract the under-proprietor from his status as under-proprietor unless it is shown that the lease was acted upon or that the lessee obtained possession under it.

An under-proprietor, who is only entitled to a share in the entire village, might, it is conceivable, take some land belonging jointly to him and the other under-proprietors, undertaking to pay rent for the same in order that he might get the benefit derivable from personal cultivation; but such tenancy is, not necessarily inconsistent with his interest in the under-proprietary holding.

If there is joint possession and if there is no formal division of the land of a village into different *mahals* by metes and bounds, possession by some of the co-sharers of different portions of the joint land is sufficient to prevent limitation from running against them in regard to the remainder.

Settlement Decree—(Concluded).

Some of the appellants died and their heirs were not brought on record. The judgment proceeded on a ground common to all of them. Under the circumstances the appellate Court may reverse or vary the decree of lower Court. *Jang Bahadur v. Muhammad Abul Hasan Khan*, 35 Ind. Cas. 743.

LINDSAY, J.C. and KANHAIYA LAL, A.J.C.

References:—31 O. 970; 5 A.L.J. 511; 17 O. W.N. 595, E.

(3) *Decree awarding Dahyak rights—Possession of land by decree-holder—Assertion of under-proprietary rights.*

Where a Settlement Court passed a decree for Dahyak rights and not for under-proprietary rights or for sub-settlement, and the decree-holder continued in possession by virtue of certain patta and certain leases and not in pursuance of the decree in his favour, he was not entitled to the possession of under-proprietary rights in the land as distinguished from the right to Dahyak decreed as stated above. *Ram Aare v. Muhammad Abul Hasan Khan*, 30 Ind. Cas. 218.

LINDSAY, J.C. and KANHAIYA LAL, A.J.C.

References:—2 Ind. Cas. 297—12 O.C. 124; 13 Ind. Cas. 809—14 O.C. 335, R.

(4) *Settlement decree, explanation of—Groves and tanks—Under-proprietary rights in groves—Right to land after drying up of tanks—Tenant without right of occupancy—Oudh Rent Act (XXII) of 1886, S. 107-G.*

Held that a settlement decree only gave rights to *marai* grass and fishing in tanks and that it was only in the groves that under-proprietary rights were given.

Held also that as the decree was silent with reference to the land after the tanks had dried up, the occupier must be declared to be a tenant without a right of occupancy under S. 107-G of the Oudh Rent Act (XXII) of 1886. *Oudh Indra Pratap Sahi v. Nakhahed Sing*, 33 Ind. Cas. 254.

HOLMS, S.M. and CAMPBELL, J.M.

(5) *Property decreed in favour of Hindu widow at settlement—Reversioner's right in such property—Confiscation of proprietary rights in Oudh—Effect. See HINDU LAW (WIDOW), No. 7, 19 O.C. 1.*

(6) *Construction of. See JURISDICTION OF CIVIL COURTS, No. 5, 19 O.C. 339.*

(7) See LANDLORD AND TENANT, No. 48, 33 Ind. Cas. 266.

Settlement (Khoti) Act.

See BOM. ACT I OF 1880.

Settlement Officer.

Case relating to amendment of Jamabandi—Decision of Settlement Officer—Whether *res judicata*. See APPEAL (GENERAL), No. 2, 14 A.L.J. 140.

Settlement Pedigree.

(1) *Pedigree filed in Settlement Court, proof of—Admissibility in evidence of—Evidence Act, S. 32. See PEDIGREE, No. 1, 19 O.C. 321.*

Settlement Record.

"Lagan ab tak nahin dia" in settlement record.

The description "*lagan ab tak nahin dia*" in a settlement record is equally consistent with the possibility that the lands may be "*belagan*" that is rent free or "*kabil lagan*," that is capable of assessment. *Harbans Prasad Tewari v. Rama Kanta Tewari*, 35 Ind. Cas. 588.

KINGSFORD, J.

Several Liability.

See *RENT*, No. 24 O.L.J. 371.

Shahjog Hundl.

Admissibility in evidence—Bond—Stamp Act, Ss. 2 (2), 24, 35 (a) — *Negotiable Instruments Act*, Ss. 4, 5. *Keshari Chand Surana v. Asharam Mahato*, 22 C.L.J. 209 = 19 O.W. N. 1326 = 39 Ind. Cas. 250. See Final Part, 1915, Col. 1245.

Shamilat.

(1) *Rights of Khewatdars—Wajib-ul-arz—Entries in—Alluvion and diluvion—Adverse possession not recognised.*

The defendants held lands as owners in the village since 1853. At the time of settlement of 1866, there was no *shamilat* land in the village. The *wajib-ul-arz* provided that land belonging to proprietors which became submerged and remained under water for more than 12 years was upon re-appearance to be treated as the *shamilat* of the whole village. The land in dispute emerged some time between 1856 and 1880 and was accordingly recorded as *shamilat* in revenue papers and at partition in 1904-5 was treated as such and defendants were allotted shares. The plaintiffs contended that the defendants had no rights in the land, which belonged to them and had been in their possession all along.

Held that the plaintiff's claim was not valid, since by common consent the proprietors had decided that the right of ownership in the submerged land belonging to a proprietor should become extinct after lapse of 12 years and that on re-appearance the land should be considered as the property of all the proprietors in the village.

That the possession of the plaintiff could not be considered adverse to the defendants, according to the entry in the *wajib-ul-arz*. *Ahmad v. Jam Khan*, 92 P.L.R. 1916 = 86 Ind. Cas. 300.

SHADI LAL, J.

(2) *Sale of Khewat land—Whether sale conveying shamilat as well—Loss of sale-deed—Onus of proof—Vendee to prove that shamilat was also sold—Intention to include shamilat—Question of fact—Second appeal—Mere cultivation by Taraddadhar of shamilat—No objection—No estoppel.*

The sale of *khewat* land to the defendant does not *ipso facto* convey any rights to him in the *shamilat* land, because the *shamilat* is not a mere accessory to the land held by any proprietor.

Shamilat—(Concluded).

Where neither the sale-deed nor a copy thereof has been produced, the onus is upon the defendant to prove that the share in *shamilat* land had been sold to him (a).

The question whether the intention of the parties to the sale was that a proportionate share of *shamilat* should pass along with the *khewat* land is only a question of fact and furnishes no ground for second appeal (b).

No estoppel can arise against the plaintiffs from the mere fact that the defendant who was *taraddadhar* of half the well has been cultivating a part of the *shamilat* land without objection. *Saleh v. Mussammat Bakhtawar*, 36 Ind. Cas. 601 = 3 P.R. 1917.

SCOTT SMITH and BROADWAY, JJ.

References:—(a) 113 P.R. 1901 and 75 P. W.R. 1910, *Ref. to*; 10 P.R. 1894, *Diss. from*. (b) 36 M. 454; 102 P.R. 1916, *Ref. to*; 57 P.R. 1915, *Dist.*

(3) *Proprietors of village, who are—Persons who do not pay land revenue, but only tirni (grazing) charges, if entitled to share on partition of shamilat land. Bagga v. Saleh*, 19 C. W.N. 1023 = 29 M.L.J. 187 = 2 L.W. 706 = (1915) M.W.N. 642 = 29 Ind. Cas. 1005 = 6 P.R. 1916 = 1 P.W.R. 1916 (P.C.). See Final Part, 1915, Col. 1246.

(4) *Entry in two successive Settlements that all the members of a certain tribe are entitled to share in the Shamilat—Notice of entry to the contrary in the third settlement—Declaratory suit—Its cause of action. Budha Khan v. Mohammad*, 193 P. W.R. 1915 = 31 Ind. Cas. 287. See Final Part, 1915, Col. 1246.

(5) *Shamilat land—Possession of a portion of it by one of the owners—Its dispossession—Possessor only entitled to joint but not exclusive possession—Proprietor—Costs not to be allowed where both parties in fault. Nihal Singh v. Mal Singh*, 160 P.W.R. 1915 = 31 Ind. Cas. 862. See Final Part, 1915, Col. 1246.

(6) *Condition to partition it according to Revenue shares—Contention that regard should be paid to the shares fixed in 1858 Settlement and not those of 1892—Validity. See APPEAL (GENERAL), No. 9, 29 P.W.R. 1916.*

(7) *Application for partition of shamilat rejected by Revenue Officer—Suit for declaration of title to share of shamilat—Limitation. See LIMITATION ACT (1908), No. 307, 47 P.R. 1916.*

(8) *Co-sharer in the sub-division in which the share sold is situated—Co-sharer in a patti containing some land appertaining to that sub-division. See PRE-EMPTION, No. 20, 19 O.C. 394.*

Share-holder.

Company accepting certain person for many years as director—Right of third person to question his powers—Estopped. See *COMPANY*, No. 3, 31 Ind. Cas. 595.

Shebait.

(1) *Devolution—Shebait, position of—Vested interest—Heir-at-law.* Kunjamañ Dasi v. Nikunja Behari Das, 22 C.L.J. 404=20 C.W.N. 314=32 Ind. Cas. 823. See Final Part, 1915, Col. 1247.

(2) Properties held by adoptive father as *shebait*—Adopted son if may claim to hold as *shebait* jointly with after-born son—*Pitritritiyas*, and *Debakrittyas*—Proof that property has been endowed as *debutter*—Permanent image, if essential to valid dedication—Income of dedicated property exceeding expenses, if conclusive that *debsheda* only a charge on the property. See HINDU LAW (ADOPTION), No. 8, 20 C.W.N. 901.

(3) See RELIGIOUS ENDOWMENTS, No. 6, 34 Ind. Cas. 548.

(4) Will, construction of—Dedication to idols—Complete dedication or charge—Surplus income arising from debutter estate—Accumulation—Power given to *shebait* to invest—Cash and money—Devise of residuary estate. See WILL, No. 6, 23 C.L.J. 241.

Ship.

Outbreak of war—Goods shipped in enemy—Arrest of the ship as prize—Non-payment of bill at maturity—Goods delivered later at destination—Liability to pay amount of bill with interest. See CONTRACT, No. 15, 18 Bom. L.R. 915.

Shipment.

Shipment of goods—No letter of requisition to the captain—Liability in case of loss—Difference between Indian and English Law—Sale of Goods Act, S. 18—Contract Act, Ss. 83 and 91. Marji Jeta v. Honnavar Puthu Hari Pal, 18 M.L.T. 457=31 Ind. Cas. 334. See Final Part, 1915, Col. 1248.

Shipping.

Shipper and shipowner, rights and liabilities of. See CONTRACT, No. 20, 34 Ind. Cas. 843.

Shipping Contracts.

(1) *Charter-party—Bills of lading—Where the two documents conflict, the governing contract between shipping owner and charterer is the charter-party—When stevedore though appointed by charterer remains the ship-owner's agent—Damage caused by insufficient dunnage—Liability of ship-owner—Shortage, liability for.*

The plaintiffs chartered a steamer belonging to the defendants for a voyage from Akyab to Bombay. Under the terms of the charter-party the charterers' stevedores at the port of loading were to be employed at current market rates but not exceeding the owners' contract rates. The charter-party also provided that the owners were liable "to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage;" that the steamer was to be responsible for any proved shortage; and that all the sweepings were to be delivered to the

Shipping Contracts—(Concluded).

charterers at the port of discharge. The bills of lading, which were issued to the plaintiffs on shipping their goods, contained a special condition that the ship was not responsible for loss or damage caused by insufficient packing or for usual and reasonable wear and tear of packages. When the ship completed its voyage at Bombay, it was found that 710 bags of the plaintiffs were damaged, which damage was caused to a certain extent by improper laying of the dunnage at the port of loading; that there was a shortage of 400 cwt. in plaintiffs' consignment; and that the sweepings amounted to 576 cwt. The plaintiffs having sued to recover the amount of damages and the value of the shortage and the sweepings:

Held, (1) that the ship-owners were ordinarily liable to pay for the damage to cargo occasioned by bad stowage or improper or insufficient dunnage; and their liability was not modified by the clause in the charter-party about stevedores, for the stevedores remained the agents and paid servants of the ship-owners for the purpose of discharging the duty of the ship-owners in loading the cargo (a);

(2) that the defendants were also liable for the shortage notwithstanding the condition in the bills of lading, for as between the charterers and the ship-owners, the prevailing contract was the charter-party;

(3) that the plaintiffs were further entitled to the sweepings, under the specific provision made for them in the charter-party. *Bombay and Africa Steam Navigation Co. v. Haji Ajum Goolam Hussain*, 18 Bom. L.R. 230=41 B. 119=34 Ind. Cas. 525.

SCOTT, C.J. and HEATON, J.

Reference :—(a) (1892) 68 L.T. 76, F.

(2) *Shipper, liability of—"At shipper's risk with option of carrying on deck" in the Bill of Lading, meaning of.*

Apart from the general law which imposes on a carrier by sea the duty of carrying goods under decks, except in the case of express contract or custom to the contrary, the meaning of the clause "at shipper's risk with option of carrying on deck" is clearly in favour of the ship-owner and he is exempted from liability for damages caused to the goods by want of ventilation, by the terms of the clause "at shipper's risk" though he did not exercise the option of carrying the goods on deck. *British India Steam Navigation Co., Ltd. v. Jlawoola*, 8 Bur. L.T. 273=30 Ind. Cas. 939=8 L.B.R. 293.

FOX, C.J.

(3) Carriage by sea—Shipper and ship-owner, their rights and liabilities—Omission to call at appointed port—Breach of contract—Damages, suit for. See CONTRACT, No. 20, 34 Ind. Cas. 843.

Shipping Documents.

C.I.F.C.I. contract—Bill of exchange presented with—Acceptance of the bill. See CONTRACT, No. 15, 18 Bom. L.R. 915.

Signature.

(1) Will—Placing of mark under direction of testator, if valid affixture of mark. See ACT X OF 1865 (SUCCESSION), No. 6, 4 L.W. 255.

(2) Ancient document bearing signature made by a person on behalf of another—Presumption on about authority to make the—Evidence Act, S. 90. See PEDGREE, No. 1, 19 O.C. 321.

Simanadari Land.

If chakran land. See BEN. ACT VI OF 1870 (CHAUKIDARI), No. 2, 20 C.W.N. 404.

Small Courts Civil Circulars.

Form IV—Pleader's acts how far binding on clients—Pleader's authority to compromise—Vakalatnamah containing such authority whether sufficient. See PLEADER AND CLIENT, No. 5, 9 S.L.R. 218.

Sir Land.

(1) See U.P. ACT II OF 1901 (AGRA TENANCY), No. 23, 31 Ind. Cas. 893.

(2) Nature of sir, when transferred by gift to one not a co-sharer. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 6, 31 Ind. Cas. 906.

(3) Sale of ex-proprietary right—Suit for specific performance of contract of sale—Right of vendor. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 21, 30 Ind. Cas. 811.

(3-a) See U.P. ACT II OF 1901 (AGRA TENANCY), No. 6-a, 32 Ind. Cas. 737.

(4) See U.P. ACT III OF 1901 (LAND REVENUE), No. 1, 31 Ind. Cas. 855.

(5) See U.P. ACT III OF 1901 (LAND REVENUE), No. a, 32 Ind. Cas. 387.

(5-a) See U.P. ACT III OF 1901 (LAND REVENUE), No. 16-f, 32 Ind. Cas. 851.

(6) See WILL, No. 19, 32 Ind. Cas. 364.

Sival-Jama Rent.

Nature of. See MAD. ACT I OF 1901 (ESTATES LAND), No. 2, 35 Ind. Cas. 121.

Slander.

(1) Damages—Malice—Burden of proof—Privileged occasion.

The law applicable to a suit for damages for slander in India is the same as the English law. If the occasion is privileged, the *onus* is on the plaintiff to show actual malice in the defendant, and if the defendant make a statement honestly he is not liable for the slander even though there is no reasonable ground for his belief (2).

Refusal to apologise before suit may be evidence of malice, but it may equally be consistent with the defendant honestly adhering to his opinion. *A. J. Robertson v. Mrs. H. Y. Murray*, 8 Bur. L.T. 278—30 Ind. Cas. 390.

ORMOND and TWOMEY, JJ.

References:—(a) 47 L.J.Q.B. 230—37 L.T. 694—26 W.R. 104—14 Cox C.O. 10—3 Q.B.D. 287; 60 L.J.Q.B. 577—2 Q.B. 341—64 L.T. 638—39 W.R. 612; (1909) 19 T.L.R. 118, R.

(3) Decree for damages for slander reversed in appeal—Death of defendant during pendency

Slander—(Concluded).

of second appeal—Appeal whether abates. See ABATEMENT, No. 3, U.B.R. (1916), 1st Qr., 105.

Small Cause Court.

(1) Suit for damages for failure to restore crops deposited with defendant, cognizance of—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (j).

Where certain crops attached in execution of a Small Cause Court decree were, pending decision of an objection made against attachment, placed in charge of a certain person, and after decision of the objection in favour of the objector the crops were ordered to be restored to him, but the person put in charge failed to restore the crops and the objector instituted a suit for damages in respect of them, *held*, that such a suit was not cognizable by the Court of Small Causes under Art. 35 (j) of the Second Schedule of Act IX of 1887 as amended by Act VI of 1914. *Rahmpal v. Mathura*, 19 O.C. 226.

STUART, J.C.

(2) Full Bench of the, powers of—Full Bench, if a Court of appeal. See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), No. 3, 36 Ind. Cas. 1003—5 L.W. 147.

(3) High Court, power of, to supersede orders of. See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), No. 5, 4 L.W. 402.

(4) Decision of Subordinate Judge on the Small Cause side—Appeal—Revision—Procedure. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 55, 31 Ind. Cas. 15—5 L.W. 220.

(5) Suit to recover Katiari dues—Jurisdiction of. See BEN. ACT VIII OF 1885 (TENANCY), No. 91-d, 36 Ind. Cas. 600.

(6) Reference by District Judge of case tried by Small Cause Court—Validity—Interference of High Court. See CIV. PRO. CODE (1908), No. 696, 20 C.W.N. 1110.

(7) Refusal to initiate criminal proceedings—Decree-holder's *locus standi* to question the order—Revision. See CRIM. PRO. CODE, No. 8, 19 O.C. 91.

(8) Decree of—Transfer to Court of Munsif for execution—Order in execution—Appeal. See EXECUTION OF DECREE, No. 4, 14 A.L.J. 415.

(9) Suit for damages for use and occupation—Jurisdiction of, to determine question of title incidentally. See USE AND OCCUPATION, No. 1, 9 Bur. L.T. 60.

Small Cause Court, Jurisdiction of.

(1) Claim partly cognisable by Regular Courts and partly by Small Cause Courts—Jurisdiction of Regular Courts—Lease by mortgagor after mortgage decree but before sale, whether binds the auction-purchaser—Nature of mortgage decree—Lis pendens—Transfer of Property Act, Ss. 52, 58.

Where a suit was brought by the auction-purchaser under a mortgage decree against the lessee from the mortgagor-judgment-debtor, the lease being after the decree but before sale,

Small Cause Court, Jurisdiction of—(Contd.).

for the value of crops harvested and removed by the lessee, both before and after delivery of possession through Court:

Held, per *Seshagiri Iyer, J.*—The claim for the crops harvested and removed before delivery of possession, was a claim for an account and therefore removed from the cognizance of Small Cause Courts under Art. 31 of the Second Schedule of the Provincial Small Cause Courts Act (a).

The claim for the subsequent cutting and carrying away of the crops is a claim for damages cognisable by a Small Cause Court.

Where a claim is partly cognisable by a Regular Court and partly by a Small Cause Court, the claim for the consolidated amount is cognisable by a Regular Court.

Lis pendens continues in a mortgage suit up to the time of actual sale of the property and hence the lease by the mortgagor after decree but before sale does not bind the auction-purchaser.

The view of the Bombay High Court that the *lis pendens* depends upon the active prosecution of applications for enforcing the decree not approved.

A person who obtains a lease when a *Lis pendens* takes considerable risks and any payments made by him to the judgment-debtor do not bind the purchaser.

Per *Bakewell, J.*—The contentious proceeding terminated with the decree and therefore the lease does not fall within S. 52 of the Transfer of Property Act.

Under S. 88 of the Transfer of Property Act, the mortgage-decree finally determines the rights of the parties in the property and provides that, in a certain event, that is, default of payment by mortgagor before a certain specified day, the parties shall have no right but only an interest in the sale-proceeds and operates as a conversion of real property into personality. The property itself remains in *custodia legis*, no attachment is necessary, and no disposition by either party can affect the order of the Court, that the subject-matter of the suit as it then stood, shall be sold. Any construction whereunder either party retained a power of disposition over the mortgaged property would afford an opportunity of interminable litigation, against which the Court will certainly struggle.

The sale by the Court transferred to the purchaser the rights of the parties as they existed at the date of the decree, and therefore free from the lease subsequently created by the mortgagor. *Ramasami Aiyangar v. Govinda Iyer*, 20 M.L.T. 512—31 M.L.J. 889—5 L.W. 443.

ABDUR RAHIM, OFFG. C.J., and SESHAGIRI IYER, J.

Reference:—(a) 25 M. 103, F.

(2) Court of Small Cause—Jurisdiction.

Suit by executor or administrator for possession of moveable property belonging to the estate is cognisable by a Court of Small

Small Cause Court, Jurisdiction of—(Contd.).

Causes (a). *Ma Pu v. Ma Su*, 9 Bur. L.T. 201. FARLETT, J.

References:—(a) 11 W.R. 98 and 12 B. 573, F.

(3) Suit for declaration of title—Monies in hands of third person—Recovery not prayable in same suit—Declaration, if an incidental relief—Suit, whether cognizable by the Presidency Small Cause Courts. See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), No. 1, 4 L.W. 339.

(4) Second appeal—Suit for damages for cutting trees—Small Cause nature. See CIV. PRO. CODE (1908), No. 194, 20 M.L.T. 281.

Small Cause Court (Presidency).

(1) Judgment of Full Bench of—Question of limitation—Interference in revision. See CIV. PRO. CODE (1908), No. 228, 19 M.L.T. 24.

(2) Application for sanction dismissed by Presidency Small Cause Court—Revisonal powers of High Court. See SANCTION TO PROSECUTE, No. 1, 43 C. 597.

Small Cause Court Suit.

Tried on original side—Appeal to District Judge—Jurisdiction—High Court to set aside decree. See SETTING ASIDE DECREE, No. 1, 14 A.L.J. 984.

Small Cause Courts Act.

See ACT XI OF 1865.

Small Cause Courts (Presidency) Act.

See ACT XV OF 1882.

Small Cause Courts (Provincial) Act.

See ACT IX OF 1887.

Small Cause Courts (Provincial) Amendment Act.

See ACT VI OF 1914.

Small Cause Suit.

(1) *Small Cause Court—Suit filed—Transfer to Munsif's Court—Civ. Pro. Code (1908), S. 24—Provincial Small Cause Courts Act (IX of 1887), S. 35.*

A suit was filed in a Court invested with Small Cause Court powers. The presiding officer of that Court was transferred and he was succeeded by an officer who had not Small Cause Court powers. The case was thereupon transferred by the District Judge to the Munsif, where it was registered. The case was then referred to arbitration. The officer who had succeeded the previous officer before whom the suit had been originally filed was invested with Small Cause Court powers and the case was again transferred to him. The award was filed in that Court. The District Judge again transferred the case to an Additional Munsif who set aside the award. An appeal from that order was filed in the Court of the District Judge who declined to entertain it on the ground that no appeal lay to him. Upon a revision to the High Court, *held* that no appeal lay to the District Judge as the suit was a Small Cause Court suit and remained so

Small Cause Suit—(Concluded).

throughout. *Udho Singh v. Mul Chand*, 14 A.L.J. 705=36 Ind. Cas. 317.

SUNDAR LAL, J.

References:—13 A. 324; 38 M. 25, F.; 13 A. L.J. 639, D.

(2) *Sale of share in fruit of a jungle—Suit by vendee for damages for wrongful removal of fruits—Nature of suit—Jurisdiction of Small Cause Court—Art. 37, Act IX of 1887 (Provl. S.C. Courts)—Applicability. Bhanya v. Naka*, 11 N.L.R. 160=31 Ind. Cas. 5. See Final Part, 1915, Col. 1259.

(8) See CIV. PRO. CODE (1908), No. 495, 34 Ind. Cas. 909.

(4) Order of remand—Suit of Small Cause nature—Appeal from order. See CIV. PRO. CODE (1908), No. 198, 36 Ind. Cas. 396.

(5) Previous suit for rent—Small Cause nature—Question of title incidentally determined—Later suit for title—Previous determination, whether bars trial of the issue in later suit—No *res judicata*. See CIV. PRO. CODE, No. 21, 34 Ind. Cas. 123.

(6) Execution on Small Cause side—Order—Appeal—Revision. See EXECUTION OF DECREES, No. 1, 3 L.W. 34.

(7) Claim to grazing rights under village custom—Claim to interest in immoveable property—Not of Small Cause nature—Second appeal lies. See LANDLORD AND TENANT, No. 20, 12 N.L.R. 83.

(8) Contract for delivery of cattle—Suit for specific performance or compensation—Maintainability in Small Cause Court. See SPECIFIC PERFORMANCE, No. 7, 20 C.W.N. 1020.

(9) See TRUSTEE, No. 1, 35 Ind. Cas. 304.

Societies.

(1) Suits by or against corporations—Unincorporated, or clubs. See CIV. PRO. CODE (1908), No. 304, 9 Bur. L.T. 247.

(2) Gift, formed for the purpose of spreading Sanskrit learning—Society not registered—Gift of property to such society prior to registration void. See GIFT, No. 1, 14 A.L.J. 1038.

Soll.

Highway—Ownership of—Presumption. See HIGHWAY, No. 1, 31 Ind. Cas. 664.

Solicitor and Client.

See ATTORNEY AND CLIENT.

Sonship.

(1) Evidence of, or heirship. See FAMILY REPUTE, No. 1, 31 M.L.J. 607.

(3) Acknowledgment of. See LEGITIMACY, No. 1, 31 M.L.J. 607.

Special Judge.

Basis of enhancement of rent discussed—Decree of, determining amount of enhancement—Appeal. See BEN. ACT VIII OF 1885 (TENANCY), No. 22, 1 Pat. L.J. 409.

Specific Damage.

Public and private nuisance—Right of suit—English and Indian Law. See NUISANCE, No. 1, 12 N.L.R. 130.

Specific Performance.

(1) *Agreement to assign a decree—Whether it will be enforced after decree has become barred—Duty to keep decrees alive—The decree having become barred after agreement for sale and before assignment.*

A obtained a mortgage decree against B for sale of Whiteacre and Blackacre. Thereafter Whiteacre was sold under a prior mortgage. C being desirous of purchasing Whiteacre cheap agreed to purchase A's decree for Rs. 19,000, and thereby prevented A's executors from bidding and get Whiteacre cheap. Owing to causes for which C was not responsible, there was great delay in assigning A's decree to him, and eventually it became barred and C thereupon refused to take an assignment or to pay the Rs. 19,000.

In a suit by A's executors wherein they sued for specific performance, held that the contract could not be specifically enforced, the plaintiffs being unable to perform their part of the contract. *Jatindra Nath Bose v. Peyer Deyo Debti*, 14 A.L.J. 527=20 C.W.N. 866=31 M. L.J. 248=20 M.L.T. 25=3 L.W. 553=18 Bom. L.R. 609=1916 M.W.N. 403=24 C.L.J. 467=43 C 990=34 Ind. Cas. 69 (P.C.).

LORD SHAW, SIR JOHN EDGE and SIR LAWRENCE JENKINS.

(3) *Claim for possession—Vendor's mortgagees—Dismissal for misjoinder.*

A claim for possession can be included with a claim for specific performance of a contract for sale of immoveable property against the vendor. In a suit for specific performance a claim for possession against the usufructuary mortgagee of the vendor cannot be joined. When joined, the suit ought not to be dismissed for misjoinder but so much of the suit as asks for specific performance must be proceeded with. *Bugata Appia Naldu v. Chengalvala Jogiraju*, (1916) M.W.N. 77=32 Ind. Cas. 237.

WALLIS, C.J., and SESHAGIRI AYYAR, J.

(3) *Guardian and minor—Contract—Specific performance—Contract not specifically enforced where not beneficial to minor.*

The certificated guardian of a minor applied to the District Judge for permission to sell a house belonging to the minor for the purpose of paying off certain debts of the minor. The District Judge ordered the property to be sold by auction to the highest bidder, and the plaintiff offered the highest bid which was Rs. 1,300. The draft sale-deed was put up before the Court for approval and the District Judge made certain alterations in it. Plaintiff believing the alterations to have been made by the guardian himself refused to purchase. Subsequently he consented to purchase for Rs. 1,300 under the altered conditions, but the transaction was not completed. In the meantime other purchasers appeared and a bid of Rs. 2,000 was offered for

Specific Performance—(Continued).

the property by one Abdullah. The District Judge ordered the property to be sold to Abdullah. On a suit for specific performance of the contract for sale, held that the Court was justified in refusing to grant specific performance of the first contract as its enforcement would be to the detriment of the minor. *Imami v. Kallu*, 14 A.L.J. 645 = 38 A. 438 = 34 Ind. Cas. 298.

BANERJI and PIGGOTT, JJ.

- (4) *Plaintiff, what to prove—Contract for sale of land—Subsequent variation of contract—Contingent contract—Letters of administration, grant of—District Judge not consenting to alienation—Damages—Costs—Interference by appellate Court.*

Two Hindu ladies executed in favour of the plaintiffs a contract of sale and undertook to execute a conveyance on receipt of the price. The plaintiffs realised that such purchase was likely to involve them in serious trouble, and with a view to fortify their position they induced their vendors to apply for letters of administration in respect of the estates held by them and to obtain the sanction of the District Judge to the intended alienation under S. 90 of the Probate and Administration Act. The ladies accordingly applied for letters of administration at the instance of the plaintiffs, who also supplied the funds requisite for the conduct of the proceedings. The District Judge granted letters of administration, but ultimately declined to sanction the sale to the plaintiffs on the terms arranged. On the other hand, he sanctioned a sale in favour of the defendant who offered a higher price. In a suit for specific performance of the contract and in the alternative for damages:

Held, that the original contract was by implication varied by mutual consent, when, at the instance of the intending purchasers, the vendors agreed to obtain letters of administration, and was transformed into a contingent contract. As the contingency did not happen, the plaintiffs were not entitled to claim performance of the contract (a).

That, as there was no breach of the modified contract by the vendors, the plaintiffs were not entitled to damages.

Costs are in the discretion of the trial Judge and this discretion should not be interfered with by the appellate Court, unless good cause is shown.

Per Mookerjee, J.—The plaintiff must show that, in seeking the performance of a contract, he does not call upon the other party to do an act which he is not lawfully competent to do (b).

If Hindu ladies clothed with the character of administratrixes, make alienation with the sanction of the District Judge under S. 90 of the Probate and Administration Act, the alienation may not be operative precisely in the same way as a sale by order of the Court in administration proceedings, and the burden will heavily be upon those that may impeach the validity of

Specific Performance—(Continued).

the transaction (c). *Kali Dass v. Dass v. Nobokumari Dass*, 23 C.L.J. 606 = 20 O.W. N. 929 = 36 Ind. Cas. 665.

SANDERSON, & J., WOODROFFE and MOOKERJEE, JJ.

References:—(a) 12 O. 152; 11 O.L.J. 346, R. (b) (1805) 2 Sch. and Let. 549, F. (c) 5 C. 363 = 5 C.L.R. 374, R.

- (5) *Contract to lease—Plea of inadmissibility for want of registration—Validity—Admission of genuineness in pleadings—Negotiations—Oral contract—Written contract—Evidence Act, S. 91—Proof of admitted facts—Evidence Act, S. 58—Public policy.*

Where, in a suit, for specific performance of a contract to lease, the defendant in his written statement, while admitting its genuineness, pleads that the contract is legally ineffective for want of registration, a decree cannot be framed in terms of the contract and the suit ought to be dismissed.

Per Sadasiva Iyer, J.—If a plaintiff relies on a document and mentions its contents, but does not disclose the circumstances under which the document is inadmissible in evidence owing to some defect or other, and the defendant does not raise any objection as to its inadmissibility but on the other hand admits the contents and validity of the document, Courts might possibly act upon the defendant's admission in plaintiff's favour, notwithstanding that, during the course of the trial, the Courts find the document inadmissible owing to some defect or other; but even in such cases, if the provision of law declaring the inadmissibility or ineffectuality of a document was based on reasons of public policy, Courts ought to go behind the admission in the pleadings and refuse to act on the admitted facts in the plaintiff's favour. While S. 58 of the Evidence Act can be invoked where the documentary evidence about the admitted facts is shut out by the provisions made in purely revenue laws, it cannot be invoked to overrule the provisions of non-revenue enactments, nor can it be used to bind a party, who has made an admission of the genuineness of a document, when such admission is accompanied by the plea that the contract and the other facts mentioned in that document could not be relied upon by the opposite party owing to the provision of the Statutory Law relating to the registration, attestation, etc.

Ordinarily when the terms of a contract preceded by proposals, negotiations, conditional acceptances, counter-proposals and so on are reduced finally to the form of a document signed by one or both of the parties, the strong presumption is not that there are two independent contracts (the first an oral contract, the second the written contract), but that the written contract is the only final contract between the parties, and when a contract is once reduced to writing no other evidence can be given of its terms.

Quere.—Where a contract was completed sometime before the creation of evidence of it in writing which is legally inadmissible in

Specific Performance—(Continued).

evidence on incapable of creating any rights, whether the contract of prior date cannot be proved as an independent contract and whether such writing cannot be used as evidence of the prior contract though not itself creating rights.

Per Phillips, J.—Where there is an admission of liability in the pleadings and consequently there is no necessity to refer to the document itself which is inadmissible in evidence, a decree can be given in accordance with the terms of such a document, but where no liability is admitted and the defendant merely admits execution and pleads that the document is invalid for want of registration, it would be impossible to frame a decree without reference to the document and consequently no decree can be framed. *Kotam Reddi Seetamma v. Yennalakanti Kristnaswami*, 20 M.L.T. 44= (1916) 2 M.W.N. 93=31 M.L.J. 240=35 Ind. Cas. 18.

SADASIVA AIYAR and PHILLIPS, JJ.

(6) *Suit for—Proof—Non-performance of contract, when excused—Tender of full amount.*

The plaintiff who seeks specific performance of a contract has to show, *first*, that he has performed or been ready and willing to perform the terms of the contract on his part to be then performed; and, *secondly*, that he is ready and willing to do all matters and things on his part thereafter to be done. A default on his part in either of these respects furnishes a ground upon which the action may be resisted (a).

Non-performance by the plaintiff in a suit for specific performance is excused when that has resulted from the default of the vendor defendant (b).

A contract of sale was made orally on the 1st February, 1911. The price was fixed at Rs. 400; one rupee was paid on the date of the agreement which was to be carried out and completed within 10 days:

Held, that it was obligatory upon the vendee to tender the balance of the purchase-money to the vendor on or before the 11th February, 1911, and that, as he did not do so, there was a default on his part in the performance of an essential term of the contract.

The fact that the tender of the full amount would never have been accepted by the vendor would be no ground for non-performance on the part of the vendee. *Manik Chandra Bhowmik v. Abhoy Charan Gope*, 24 C.L.J. 90.

HOOKERJEE and ROE, JJ.

References:—(a) (1862) 1 Hyde 45; 14 W.R. 398; (1863) 13 Ir. Ch. R. 48; (1842) 1 Hare 341; 1 Bom. H.C.R. 262; (1909) App. Cas. 118 (122), R. (b) (1787) 1 T.R. 698, R.

(7) *Suit for delivery of cattle, specific performance of the contract or compensation—Alternative reliefs—S. 12, Specific Relief Act—Non maintainability of the suit—Art. 15, second schedule, Provincial Small Cause Courts Act—Substantial justice—S. 25, Provincial Small Cause Courts Act.*

The mortgagors entered into a contract with their mortgagees whereby, in consideration of the latter making an endorsement on the back

Specific Performance—(Continued).

of the mortgage-bond crediting 'Rs.' 215 to the mortgagor's account, the mortgagors agreed to deliver to the mortgagees certain heads of cattle. The mortgagees performed their part of the contract and then sued the mortgagors, in the Small Cause Court for delivery of the cattle promised, and in the alternative for damages. The Court having dismissed the suit as being, a suit for specific performance of a contract and thus beyond its competence as a Small Cause Court.

Held—That under S. 12 of the Specific Relief Act no suit for specific performance would lie as, unless there was something 'remarkable about the cattle, it was obvious that adequate compensation for the breach of the contract could be given in money.

Substantial justice was done by the High Court in the exercise of the powers under S. 25, Provincial Small Cause Courts Act, by directing that the plaint be amended by striking out the clause demanding specific performance, and the suit dealt with solely as a suit for damages occasioned by a breach of the contract. *Bharat Mahto v. Nisarall Sheikh*, 20 O.W.N. 1020.

ROE and JWALA PRASAD, JJ.

(8) *Suit for—Strangers claiming to be in adverse possession of the property—If proper parties—Property sold with full knowledge at an undervaluation—If disentitled vendor to relief—Landlord and tenant—Tenant's possession if adverse by non-payment of rent—Specific Relief Act, S. 22 (1).*

In the absence of an agreement to give possession of the lands contracted to be sold, strangers to the contract who claim to be in adverse possession of such lands are not proper parties to a suit to enforce specific performance of the contract of sale (a).

Where properties are sold for a sum considerably less than their value, but there is no evidence of any fact unknown to or fraudulently concealed from the vendor of which the vendee was aware or of the use of undue influence, the vendee is not disentitled to specific relief by reason of the provisions of S. 22 (1) of the Specific Relief Act.

Failure to pay rent is not such an assertion of right as will make the tenant's possession adverse. *Narasinga Row Gaday Row Sahib v. Rangasami Thevan*, (1916) 2 M.W.N. 191 = 4 L.W. 397=35 Ind. Cas. 871.

OLDFIELD and SADASIVA AIYAR, JJ.

Reference:—(a) (1916) 1 M.W.N. 77, F.

(9) *Specific performance of contract to sell—Contract proved different from contract alleged—Time not being essence of contract—Part performance—Personal contract with managing member of joint Hindu family—Liability of sons—Civ. Pro. Code (1908), O. VI, r. 17.*

In a suit for specific performance of contract to sell, if one contract is alleged and another proved, the suit should not be dismissed on that sole ground.

Having regard to O. VI, r. 17, Civ. Pro. Code (1908), if time is not of the essence of the

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contract and the defendants are therefore not justified in putting an end to the contract, and if especially there has been a part performance of the contract alleged by the plaintiff, the Court will allow an amendment of the plaint (if necessary) and give judgment for the plaintiff for specific performance of the contract as proved in the case.

In a suit on a personal contract made by the father (the manager of a joint Hindu family), on the death of the father, the sons will be liable as legal representatives to fulfil that contract in the place of their father, if that contract is according to the Hindu law binding on them. But where the contract to sell entered into by the father is neither for family necessity nor for purposes binding on the son, the Court will exercise a proper discretion by refusing specific performance against the sons. *Shunmugam Chetty v Subba Reddi*, 31 Ind. Cas. 1.

SADASIVA AIYAR and NAPIER, JJ.

(10) Tripartite agreement—Khas possession.

The plaintiffs entered into an agreement with the defendant and his landlords that they would give to the landlords another piece of land with similar rights in exchange for the lands of the defendant and that the defendant was to vacate the land on receipt of Rs. 60 from the plaintiffs as compensation for rendering his huts and receive out of the land so given in exchange an equal piece of land with rights similar to those he previously had for the purpose of his residence. On the defendant not vacating by rendering his huts even after receiving Rs. 60 from the plaintiffs, the plaintiffs sued to recover *khas* possession impleading the landlords as co-defendants.

Held that the landlords must grant a lease of a convenient plot of land out of the lands they got in exchange, in favour of the defendant with similar rights and of equal quantity with the land the defendant held under them and that on the execution of such a lease, the plaintiffs would get *khas* possession of the suit land. *Kangali Dhubi v. Ichhamoyi Debi*, 35 Ind. Cas. 840.

CHATTERJEE and NEWBOULD, JJ.

(11) Agreement to sell land—Time not essence of contract—Notice by one party to another to enforce contract.

In all matters of specific performance of contract for sale of land, time is not of the essence of the contract, until the parties expressly make it so. Though sometime is generally named in the agreement to sell, it is rarely adhered to, and it is not until one side or the other gives the opposite party reasonable notice to complete the agreement within a definite time, that the opposite party can be tied down to the time so prescribed. Where the agreement is not performed the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure. *Janardan Mahato v. Bhairab Chandra Mondal*, 30 Ind. Cas. 365.

CHITTY and RICHARDSON, JJ.

Specific Performance—(Continued).**(12) Agreement to sell land—Suit to enforce agreement not governed by Specific Relief Act—Rules applicable to suit—Justice, equity and good conscience.**

Where the provisions of the Specific Relief Act does not apply to a suit to enforce the specific performance of a contract of an agreement to sell land, the case will be governed by the ordinary rules of justice, equity and good conscience. In a suit for specific performance the plaintiff will succeed, if there are no laches and the suit is not barred by limitation. *Janardan Mahato v. Bhairab Chandra Mondal*, 30 Ind. Cas. 365.

CHITTY and RICHARDSON, JJ.

(13) Specific performance of contract—Agreement to reduce terms into writing—Contract if complete before writing—Contract completed subject to insertion of "usual terms and conditions," if specifically enforceable—Vendor if may waive such terms and enforce others—Earnest money, payment of, if conclusive of completed contract—Uncertainty—Variance between pleading and proof. *J.I.J. Hyam v M. E. Gubbay*, 20 C.W.N. 66=32 Ind. Cas. 53. See Final Part, 1915, Col. 1256.

(14) Sale by Official Receiver—Right of purchaser to sue—Receiver for. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 26, 9 Bur. L.T. 61.

(15) Contract to sell—Breach—Damages—Legal obstacle—Non-liability. See PUN, ACT XIII OF 1900 (ALIENATION OF LAND), No. 3, 120 P.R. 1916.

(16) Sir land—Sale of ex-proprietary right—Suit for, of contract of sale—Right of vendor. See U. P. ACT II OF 1901 (AGRA TENANCY), No. 21, 30 Ind. Cas. 811.

(17) Contract to convey land by one co-parcener—Specific performance if and when can be decreed against a surviving co-parcener. See CONTRACT, No. 9, 3 L.W. 435.

(18) Contract to settle property in consideration of donee coming and living with donor—Validity. See CONTRACT, No. 13, 20 C.W.N. 1054.

(19) Suit for—Limitation. See CONTRACT, No. 2, 23 C.L.J. 26.

(20) Contract to sell land together with cultivating rights in sir—Sanction to sell without reservation of occupancy rights in sir refused—S. 45, C.P. Tenancy Act—Contingent contract—Right to specific performance or damages—Ss. 14, 51, Specific Relief Act—Scope and applicability. See CONTRACT ACT, No. 37, 12 N.L.R. 69.

(21) Suit for, of contract of sale—Court-fee. See COURT FEES ACT, No. 13, 14 A.L.J. 434.

(22) Suit by kanomdar against the jenmi and a subsequent purchaser for specific performance of contract to sell—Purchaser when to be deemed to have notice of the agreement to sell. See KANOM, No. 1, (1916) 2 M.W.N. 81.

(23) See PRELIMINARY DECREE, No. 1, 9 Bur. L.T. 119.

Specific Performance—(Concluded).

(24) Contract for sale—Suit for—Onus on defendant to prove absence of notice of prior contract—No priority of registered sale-deed over a previous contract for sale. See *SALE*, No. 2, 14 A.L.J. 111.

(25) Unregistered deed of sale—Subsequent sale of same property by registered deed—Suit by first vendee and for declaration that the subsequent transaction was void, whether suit for. See *SPECIFIC RELIEF ACT*, No. 14, 1 Pat. L.J. 455.

(26) Right of mortgagee to lien on money deposited under decree for. See *TRANSFER OF PROPERTY ACT*, No. 42, 36 Ind. Cas. 968.

(27) Suit for, of contract to sell—Limitation. See *TRANSFER OF PROPERTY ACT*, No. 57, 9 Bur. L.T. 45.

(28) See *VENDOR AND PURCHASER*, No. 5, 35 Ind. Cas. 631.

(29) See *VENDOR AND PURCHASER*, No. 2, 9 Bur. L.T. 86.

(30) Misrepresentation as to extent of property—Compensation—Principle—Court of equity. See *VENDOR AND PURCHASER*, No. 7, 32 Ind. Cas. 47.

(31) Sale, agreement for—Instalment at specified dates—Forfeiture on default—Action for—If maintainable. See *VENDOR AND PURCHASER*, No. 3, 33 Ind. Cas. 323 (P.G.).

(32) Suit for, with an alternative claim for refund of purchase-money—Limitation. See *VENDOR AND PURCHASER*, No. 6, 32 Ind. Cas. 49.

Specific Relief Act (I of 1877).

(1) *Partition suit not to be dismissed because there is prayer of a declaration only and not for possession—Amendment of plaint proper—Claim against executor personally—Suit for construction of will—Civ. Pro. Code (1908), O. II, r. 5.*

A suit for partition cannot be dismissed on the ground that it prays for declaration of right only and not for possession. The defect may be remedied by amending the plaint.

A suit against executors as such and personally is not liable to be dismissed on the ground that there is omission to the cause title of the suit to designate them as executors when in the body of the plaint they have been so described.

O. II, r. 5, Civ. Pro. Code, 1908, permits in certain circumstances the joining of claims against executors with claim against them personally.

Where in a suit to construe a will and to administer the estate of the testator a claim for certain ornaments not belonging to the estate of the testator but of which the executors as such obtained possession is joined with the claims for other properties in the possession of the executors, it is unnecessary to put the plaintiffs to their election in respect of the

Specific Relief Act (I of 1877)—(Continued).

former claim. *Jagattarini Dasi v. Prafulla Chandra Ghose*, 35 Ind. Cas. 792.

• *TEUNON and SHEEPSHANKS, JJ.*

Reference:—(a) 31 B. 105, F.

(2) *S. 9—Tenants, eviction of, by a trespasser—Tenant's attornment in favour of other person than proprietor, effect of—Dispossession of proprietor without dispossession of tenants, effect of.*

Where a proprietor has leased his lands to tenants and those tenants have been evicted by a trespasser, held, that the dispossession of the tenants is the dispossession of the landlord and entitles him to relief under S. 9 of the Specific Relief Act.

Held further, that, where tenants in actual possession of the land have not been evicted, although they have, while remaining tenants of the proprietor, attorned in favour of another person and refused to pay rent to the proprietor, there has been no such effective dispossession of the proprietor as could enable him to maintain a suit under S. 9, Specific Relief Act.

Held also, that it is possible for a state of things to arise where a proprietor can be dispossessed within the meaning of S. 9 without dispossession of the tenants, although in such a case something more than an attornment to a third party would be necessary, e.g., forcible removal of the rent collectors of the proprietor and introduction of his own collecting agency. *Mihal Singh (Sardar) v. Raja Raghuraj Bahadur Singh*, 18 O.C. 353—32 Ind. Cas. 202.

STUART and PANDIT KANHAIYALAL, A.J.CS.

(3) *S. 9.—Suit for possession—Physical possession.*

Although there is authority for the view that a landlord who has let his land to tenants cannot maintain a suit for possession under S. 9 of the Specific Relief Act as he is not in physical possession there is nothing to prevent the landlord from bringing such a suit if the dispossession took place in the interval between the relinquishment of possession by one tenant and the entry of another tenant.

When the tenant quits the land the landlord's possession revives and continues till the entry of the next tenant (a). *San Hia Baw v. Hia Paw*, 9 Bur. L.T. 172.

PABLETT, J.

Reference:—(a) 28 M. 288, F.

(4) *S. 9—Mesne profits, whether can be claimed in a suit under—Civ. Pro. Code (1908), S. 11, O. II, r. 2 and O. XX. r. 12—Mesne profits—Res judicata—First suit for possession of lands with crops under S. 9, Specific Relief Act—Possession alone decreed—Subsequent suit for mesne profits, if barred.* *Thwal v. Arumugam*, 2 L.W. 157=(1915) M.W.N. 170—28 Ind. Cas. 1=30 M.L.J. 326. See Final Part, 1915, Col. 1259.

(5) *S. 9—Joint possession cannot be decreed under.* *Para Kochhan v. Para Kulla Yandu*, 29 M.L.J. 760—31 Ind. Cas. 720. See Final Part, 1915, Col. 1260.

Specific Relief Act (I of 1877)—(Continued).

(6) S. 9. See **TRESPASS**, No. 1, 20 C.W.N. 773.

(7) S. 12—Contract for delivery of cattle—Suit for specific performance or compensation—Maintainability in Small Cause Court. See **SPECIFIC PERFORMANCE**, No. 7, 20 C.W.N. 1020.

(8) Ss. 14, 15—Scope and applicability. See **CONTRACT ACT**, No. 37, 12 N.L.R. 69.

(9) S. 15. See No. 8, *supra*.

(10) S. 21—Scope—Final award—Bar to civil suit.

The proviso to S. 21, Specific Relief Act, relates only to inchoate and abortive arbitration proceedings, and not to a case where the contract to refer to arbitration has been carried out.

A complete award is equivalent to a final judgment binding on the parties and ousts the jurisdiction of the Court in a suit relating to the matters decided by the arbitrators. *San Nyeln v. Ma Kyaw*, 8 L.B.R. 157—33 Ind. Cas. 554.

TWOMEY, J.

References:—33 C. 881; 19 M. 290; 11 Bom. L.R. 20, F.

(11) S. 21. See **ARBITRATION**, No. 3, 9 Bur. L.T. 98.

(12) S. 22—Agreement to convey land by gift to Sitambari Jain Society—Construction of Agreement whether void for remoteness—Specific performance of the covenant whether can be granted. See **AGREEMENT**, No. 2, 1 Pat. L.J. 238.

(13) S. 22 (1). See **SPECIFIC PERFORMANCE**, No. 8, (1916) 2 M.W.N. 191.

(14) S. 27—Unregistered deed of sale—Subsequent sale of same property by registered deed—Suit by first vendee for registration of his deed and for declaration that the subsequent transaction was void, whether suit for specific performance—Whether the unregistered sale-deed admissible in evidence.

The plaintiff obtained a deed of sale executed by the defendant No. 1 and duly attested in respect of the property in suit. This document was not registered. On a subsequent date the first defendant sold the same property to the second defendant by a document duly registered. The plaintiff thereupon instituted a suit against both defendants, the relief asked for being, firstly, that the defendant No. 1 should be required either to register the existing unregistered sale deed or to execute and register a second sale-deed, and against defendant No. 2, he asked for a declaration that the transaction between the defendant No. 2 and defendant No. 1 was null and void by reason of the previous transaction with the plaintiff and should be so declared null and void and possession of the property delivered to the plaintiff. During the pendency of the suit the defendant No. 1 compromised the case with the plaintiff and executed and registered a fresh document as desired by the plaintiff. The defendant No. 2

Specific Relief Act (I of 1877)—(Continued).

continued to contest the suit. The lower Courts held that the suit as framed was not maintainable and concurred in dismissing the plaintiff's suit.

Held that the suit was one for specific performance under S. 27 (a) and (b) of the Specific Relief Act and that the suit should be remanded to the lower Courts for further consideration.

An unregistered deed may be used as evidence of that contract as between the contracting parties, but in a case against third parties under S. 27 (b) of the Specific Relief Act an unregistered deed cannot be used in evidence, for the existence of the previous contract is of vital importance in the case. The contract in this case is a transaction affecting property, and an unregistered sale-deed cannot be used in evidence of a contract which in itself affects property. *Madhur Sah v. Thag Sah*, 1 Pat. L.J. 455.

SHARFUDDIN and ROE, JJ.

(15) S. 27—Scope. See **CONTRACT**, No. 9, 3 L.W. 435.

(16) S. 27—Contract for sale—Suit for specific performance—Onus on defendant to prove absence of notice of prior contract. See **SALE**, No. 2, 14 A.L.J. 111.

(17) S. 27. See **TRUSTS ACT**, No. 14, 3 L.W. 457.

(18) S. 27 (b)—Sale of land—Contract to sell—Specific performance—Subsequent mortgage—Bona fide transaction—Notice of the prior agreement.

Under S. 27 (b) of the Specific Relief Act a contract of sale cannot be enforced against a bona fide transferee for value. A mortgage may not be quite in good faith *qua* a person entitled to pre-empt if a sale is disguised under its cloak, but it may be a good and a bona fide transfer as against a person who claims specific performance of an earlier contract of sale entered into by him with the mortgagor. The knowledge of a prior mortgage on the property in favour of the person in whose favour there was a prior agreement to sell and of the sale to the prior mortgagee of the share of the brother of the mortgagor, the fact that the terms of the subsequent mortgage were such as to make it well nigh irredeemable are not sufficient to fix the subsequent mortgagees with notice of the prior agreement to sell to the prior mortgagee. *Ram Bhajan v. Sheo Darsan Singh*, 34 Ind. Cas. 396.

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(19) S. 27 (b). See **BEN. ACT VI OF 1870 (VILLAGE CHOWKIDARI)**, No. 1, 33 Ind. Cas. 593.

(20) S. 31. See **EVIDENCE ACT**, No. 73, 31 Ind. Cas. 641.

(21) S. 31—Mortgage document—Description of land—Mutual mistake, it can be proved by oral evidence—Suit for rectification if necessary. See **EVIDENCE ACT**, No. 72, 3 L.W. 551.

(22) S. 38—Undue influence whether a branch of fraud in equity. See **CIV. PRO. CODE (1908)**, No. 654, 18 Bom. L.R. 27.

Specific Relief Act (I of 1877)—(Continued).

(22-a) Ss. 38, 41. See CONTRACT ACT, No. 67, 32 Ind. Cas. 804.

(23) S. 39—*Conveyance executed by accused in consideration of complainant withdrawing prosecution for non-compoundable offence—Suit to set aside such sale-deed, if lies—*

Parties in pari delicto, if entitled to declaratory relief—Court's discretion under S. 39.

The rule of law in England with regard to illegal contracts is that a Court of Law will not aid persons in enforcing the performance of an illegal contract or assist them to recover back property which they have given away under such an illegal contract when the persons and parties to the contract are themselves *pari delicto* in procuring this illegality.

The Courts of Equity in England have always refused to afford equitable relief in enforcing a contract void in law or restoring property which is based on an illegal contract where the illegality is apparent on the face of the document itself.

The principle on which Courts of Law and Equity have refused to restore property given away under an illegal agreement, is equally applicable when the relief prayed for is by way of a declaration, after the party seeking such relief has secured to himself the benefit of the agreement.

S. 39 of the Specific Relief Act in allowing relief to be granted in a proper and fit case, even when a contract out of which the right springs is void, leaves it entirely in the discretion of the Court to exercise the jurisdiction so conferred upon it.

Where L, B's agent, having purchased property, B alleged that it was purchased by L as B's trustee whilst L claimed to have purchased it in his own right, and the dispute culminated in civil actions brought by the parties against each other, and in B instituting criminal proceedings against L under Ss. 408, 477, Penal Code, but at the instance of arbitrators appointed by mutual consent, the disputes were settled and B withdrew the criminal and other proceedings against L and in consideration thereof L *inter alia* executed a sale-deed of the property purchased by him :

Held, in a suit by L to have the conveyance declared void and the sale set aside and cancelled, that the whole of the contract was illegal, as it was not possible to sever the legal from the illegal part.

That there being no evidence that there was any undue influence, fraud or duress or that the plaintiff took a more innocent part in the illegal compromise than the defendant, the Court would not grant relief under S. 39 of the Specific Relief Act. *Bindeshari Prasad v. Lekhraj Sahu*, 20 O.W.N. 760 = 1 Pat. L.J. 49 = 39 Ind. Cas. 711.

CHAPMAN and ATKINSON, JJ.

(24) S. 39—*Suit for cancellation of sale-deed when no consideration passed—Point to be considered—Document intending to operate on vendor's death, construction of—Will.*

Where there is a deed purporting to convey property for consideration and it is found that

Specific Relief Act (I of 1877)—(Continued).

no consideration passed, one of the questions to be determined for the purpose of S. 39 of the Specific Relief Act, 1877, is whether there was, any intention to effect a transfer. For if there was, their failure to pay in consideration does not necessarily make the sale-deed void or voidable.

It may only give the right to payment of consideration together with a lien in the property until the consideration is paid (a).

Where in a suit for cancellation of a sale-deed it was found that there was an agreement that the sale-deed should come into operation only in the event of the vendor's death, held that the document was really intended to operate as a will and would be revocable by the vendor at any time. *Govindasami Raja v. Kupam-mal*, 31 Ind. Cas. 77.

AYLING and TYABJI, JJ.

Reference :—(a) 25 B. 10 (18, 19), F.

(25) S. 42—*Will—Death of testator—Subsequent suit for mere declaration that will is null and void—Maintainability—Prayer for cancellation essential—Court fee payable—S. 7 (IV) (c), Court Fees Act.*

D, who had a wife named M, executed a will in favour of another lady G whom he described as his wife. D died shortly afterwards and his brother's sons sued for a declaration that the will was null and void and that G was not the widow of the deceased.

Held that, owing to D's death, the will had become operative, and plaintiffs cannot therefore ask for a mere declaration in respect of it, but must ask for its cancellation (a).

A suit for cancellation of a document falls under S. 7 (IV) (c) of the Court Fees Act and must be valued accordingly. But under that section plaintiffs are entitled to state the amount at which they value the relief sought (b). *Hukam Singh v. Musammam Gyan Devi*, 87 P.R. 1916 = 127 P.W.R. 1916 = 31 P.L.R. 1917 = 36 Ind. Cas. 95.

SHADI LAL and LESLIE-JONES, JJ.

References.—(a) 109 P.R. 1893, F. (b) 29 B. 207 ; 22 W.R. 438, R. ; 5 A. 331, Diss.

(26) S. 42—*Essence of section—Suit by trespasser for declaration that he is trespasser—Maintainability.*

The essence of S. 42, Specific Relief Act, is a title vesting in the plaintiff. No suit will lie by a trespasser for a declaration that he is a trespasser. See *Lal Singh v. Haldhar Narain*, 1 Pat. L.J. 95 = 36 Ind. Cas. 441.

SHARFUDDIN and ROE, JJ.

(27) S. 42—*Declaratory suit—Consequential relief claimable—Suit not competent—Mortgage—Mortgage redeemable—Suit for declaration that certain conditions were not enforceable.*

A declaratory suit is not maintainable when the plaintiff is entitled to claim a consequential relief. In this case plaintiff, mortgagee, sued for a declaration that certain conditions of the mortgage were not enforceable and it was admitted by his pleader that he could redeem the land and further relief was claimable and

Specific Relief Act (I of 1877)—(Continued).

the suit might, be dismissed. It was ordered accordingly. *Saidu Shah v. Malawa Ram*, 115 P.L.R. 1916.

BROADWAY, J.

(28) *S. 42—Insolvency—Declaratory suit by secured creditor—Leave of Court obtained under S. 16 (2), Act III of 1907.*

A secured creditor, who claimed priority over other creditors, applied for leave of the Court under S. 16 (2) of Act III of 1907 to establish the right claimed by him, and the other creditors of the insolvent, including the secured creditors, consented to the institution of the suit. *Held* that, in the circumstances of the case, S. 42 of the Specific Relief Act did not bar the suit by one of the secured creditors for a declaration that his mortgage was entitled to priority over the other mortgages on the property. *Lala Balmukand v. Seth Brij Lal*, 36 Ind. Cas. 1004.

RICHARDS, C.J. and BANERJI, J.

(29) *S. 42—Declaratory suit—Consequential relief—Plaintiff not in possession—Failure to amend plaint by adding claim for possession.*

When a plaintiff does not sue for consequential relief on the ground that he is already in possession, and has an opportunity of amending the plaint and adding a claim for consequential relief when the issue is framed, and fails to do so, the suit should be dismissed if it is found that he was not in possession (a). *Ma Shwe Yu v. Maung Sok Nyan*, 9 Bur. L.T. 90—32 Ind. Cas. 564.

TWOMEY and ORMOND, JJ.

Reference:—1 M. 40, F.

(30) *S. 42, proviso—Suit for declaration of title to properties in possession of Receiver.*

A suit under S. 42, Specific Relief Act, 1877, for declaration of title to certain ornaments and cash which were taken possession of by the plaintiff as heir to a Hindu widow on her death, and then, placed in the hands of the Receiver, cannot be thrown out on the ground that in the absence of a prayer for possession it was not maintainable by reason of the proviso to S. 42, Specific Relief Act, 1877, as the Receiver's possession would be considered to be the plaintiff's possession, if he succeeded in establishing his title. *Chintamani Patni v. Tarak Chandra Goswami*, 35 Ind. Cas. 17.

TEUNON and SHEEPSHANKS, JJ.

References:—27 M. 591 and 17 O.L.J. 480, relied on.

(31) *S. 42—Suit for declaration of right of specific character—Failure to prove facts establishing such right—Right to claim different relief—Adverse possession for more than 12 years—Limitation Act (IX of 1908), S. 28 and Art. 144.*

Plaintiff sued for a declaration of his *muburusi mukarrari* right to certain lands and of his title acquired thereto by adverse possession for upwards of 12 years. He further prayed for a declaration that certain decrees by the landlord were collusive and consequently the suit land was not liable to be sold in execution thereof.

Specific Relief Act (I of 1877)—(Continued).

It was found that there was no express contract of tenancy between the plaintiff, the alleged tenant, and the landlord, but the plaintiff was the purchaser of the right, title and interest of a third person in the suit property, which was a non-transferable occupancy tenancy.

The plaintiff got possession of the land and continued in possession for more than 12 years without paying any rent to the landlord, as the landlord refused to recognise him as tenant. It was argued on behalf of the plaintiff that by reason of his possession for more than 12 years he had acquired a title to a limited interest, which was a tenancy, and that he was entitled to a declaration of his tenancy. *Held* that the plaintiff having come to Court asserting that he was in possession of the land, and that he had obtained a title to permanent tenancy, which he said he had got from the third person, he could not be permitted to turn round and ask the Court for a declaration that by reason of his adverse possession he got a title to a non-transferable occupancy holding, when it was found that the interest of such third person was not a permanent tenancy but was only a non-transferable occupancy right. Adverse possession of a limited interest, though a good plea to a suit for ejectment, is good only to the extent of that interest; the nature and effect of possession must depend upon the nature and extent of the rights asserted by the overt conduct or express declaration of the person relying on it. In the present case the overt conduct of the plaintiff had all along been that he was entitled to the permanent tenancy and not to a non-transferable occupancy holding (a).

Per *Mukerjee, J.*—When a plaintiff seeks a declaration of a specific character and fails to establish the facts whereon such declaration can be founded, he is ordinarily not entitled to a different declaration, though the Court has a discretion in such matter and may, if the defendant is not taken by surprise, grant the plaintiff a declaration different from the precise relief sought in the prayer clause of the plaint (b).

It is doubtful whether S. 28 of the Limitation Act operates to extinguish the interest of the owner only or vests it in the adverse possessor also; if the latter, whether it holds good in respect of a non-transferable tenancy as between the disposessor and the landlord. *Nabin Chandra Ghosh v. Milkamal Mukhopadhyaya*, 36 Ind. Cas. 11.

SANDERSON, C.J. and MUKERJEE, J.

References:—(a) 35 C. 470 = 7 O.L.J. 499 = 12 C.W.N. 636; 32 Ind. Cas. 437 = 22 O.L.J. 419 = 20 C.W.N. 446 = 43 C. 713, R. (b) 5 C. 949 = 6 C.L.R. 260, R.

(32) *S. 44—Suit for declaration by presumptive reversioner—Interest of reversioner one of substantial character—Representation of whole body of reversioners.*

Per *Wallis, C.J.*:—Suits by a presumptive reversioner for a declaration that alienations by a widow are not binding on him and also a suit to declare an adoption invalid fall within

Specific Relief Act (I of 1877)—(Continued).

illustrations (e) and (f) of the Specific Relief Act. The interest of the reversioner is of a substantial character and he represents the whole body of reversioners in a suit for declaration of the invalidity either of an adoption or alienation. **Kodall Bapayya v. Kodall Akamma**, 36 Ind. Cas. 255.

WALLIS, C.J. and TROTTER, J.

References:—35 O. 777=8 C.L.J. 1=2 M.L. T. 27=12 C.W.N. 777, not approved.

(33) S. 42—*Suit for declaration—Issue as to maintainability of suit without prayer for consequential relief—Right to claim amendment of plaint in appeal.*

Where an objection to the maintainability of a suit under S. 42, Specific Relief Act was raised in the first Court and the issue was tried and decided adversely to the plaintiff, he could, in an appeal preferred by him against the decree of the first Court, apply for the amendment of the plaint, as he had elected to proceed with the suit subject to the risk of adverse decision. **Maung Sok Kyun v. Ma Shwe Yu**, 36 Ind. Cas. 611.

ORMOND and TWOMEY, JJ.

References:—15 M. 15, D.; 15 M. 255=2 M. L.J. 29; 26 C. 845=4 C.W.N. 162, R.

(34) S. 42—*Scope—'Legal character,' meaning of—Suit to declare that plaintiff is entitled to continue payment of subscriptions to the Kuri conducted by defendant—Maintainability.* **Ramakrishna Patter v. Narayana Patter**, 27 M.L.J. 634=(1914) M.W.N. 912=26 Ind. Cas. 883=39 M. 80. See Final Part, 1914, Col. 1049.

(35) S. 42. See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), No. 5, 4 L.W. 402.

(36) S. 42—*Order of Deputy Collector debarring one from appearing as vakil for parties in village Courts, ultra vires—Suit for declaration of invalidity of order, maintainability of.* See MAD. ACT I OF 1889 (VILLAGE COURTS), No. 2, 39 M. 808.

(37) S. 42—*Suit for declaration after withdrawal of attachment.* See CIV. PRO. CODE (1908), No. 487, 9 Bur. L.T. 89.

(38) S. 42. See HINDU LAW (ALIENATION), No. 22, 33 Ind. Cas. 183.

(39) S. 42. See LIMITATION ACT (1908), No. 197, 36 Ind. Cas. 255.

(40) S. 42. See PARDANASHIN WOMAN, No. 1, 35 Ind. Cas. 395.

(41) S. 42—*Suit by caveator for declaration that he has sufficient interest to apply for revocation of probate if lies—Declaratory decree prayed for—Strict fulfilment of statutory conditions necessary.* See PROBATE, No. 2, 20 C.W.N. 738.

(42) S. 42. See RIGHT OF SUIT, No. 1, 1 Pat. L.J. 381.

(43) S. 42—*Declaratory suit under O. XXI, r. 63, Civ. Pro. Code (1908)—No prayer for possession—Suit maintainable.* See SALE, No. 12, 34 Ind. Cas. 135.

Specific Relief Act (I of 1877)—(Continued).

(44) S. 42, proviso—*Suit for declaration that an endorsement on a document a forgery.*

Plaintiff brought a suit for a declaration that an endorsement on a mortgage-deed was a forgery. The suit was dismissed on the ground that the money on the bond having become due the plaintiff could bring a suit on the bond for the whole amount and in that suit the question whether the endorsement was a forgery or not could be gone into. Upon appeal by the plaintiff, held, that the suit was really of the nature indicated in S. 39 of the Specific Relief Act; the endorsement by itself was a document and it was similar to the several parts of a document as indicated in S. 40. **Ram Chandar v. Ganga Charan**, 14 A.L.J. 980=39 A. 103.

WALSH and SUNDAR LAL, JJ.

(45) Ss. 42, 54; 56 (1)—*Suit for declaration of landlord's right—No prayer for possession—Maintainability—Injunction—When may be granted.*

Where it is alleged by the plaintiffs that the defendants are in physical possession of certain lands as their tenants and the defendants deny the tenancy, a mere suit for declaration of the plaintiffs' right as landlords, without a prayer for possession, is not maintainable (a).

An injunction is an equitable relief and cannot be granted unless common law remedies failed. (Vide Specific Relief Act, Ss. 54, 56 (1).) **Mir Hussainbux Khan v. Kando**, 9 S.L.R. 174=32 Ind. Cas. 689.

PRATT, J.C. and CROUCH, A.J.C.

References:—(a) 5 Bom. L.R. 195, doubted; 33 M. 452, R.

(46) S. 45—*Syndicate—If public body—Public officer—"Laws for the time being in force," meaning of.*

The Syndicate being a statutory body appointed to carry out purposes of public benefit and vested with the executive Government of the University, the persons constituting it became *ipso facto* holders of a public office within S. 45 of the Specific Relief Act and could be proceeded against under the section.

Per **Kumaraswami Sastri, J.**—"Public office" means any office, created by the legislative or other lawful authority for the purpose of discharging functions which affect the public generally or any portion thereof. When a smaller body like the Syndicate is constituted from out of the members of a larger body the Senate, and certain specific functions are allotted to the former either by Statute or by Regulations having the force of law, a party aggrieved by an act of the smaller body, which act is within its special competence, can proceed against the smaller body.

The term "person holding a public office" in S. 45 of the Specific Relief Act is not used in the same sense in which the expression "public officer" and "public servant" are used in S. 2 (17) of the Civ. Pro. Code and S. 21 of the Indian Penal Code, respectively. The test under S. 45 of the Specific Relief Act is not whether the person receives emoluments for his

Specific Relief Act (I of 1877)—(Continued).

office but the nature of the acts to perform which he is appointed or which he is legally liable to perform.

Per-Coutts-Trotter, J.—"To attract the operation of S. 45 of the Specific Relief Act, it is not necessary that the right alleged to have been infringed must reside in the applicant and no one else."

"The expression 'laws for the time being in force' in proviso (b) to S. 45 of the Specific Relief Act includes also rules or regulations made under a statutory power and is not limited to Acts of the Legislature." *In re G.A. Natesan*, 31 M.L.J. 634 = 40 M. 125.

COUTTS TROTTER and KUMARASWAMI SASTRI, JJ.

(47) S. 45. See MAD. ACT III OF 1888 (CITY POLICE), No. 1, 31 M.L.J. 426.

(48) S. 54—*Perpetual injunction—Right to use water decreed in previous suit—Owner filling up tank.*

Where a decree in a previous suit, clearly declared the right of a person to use the water of a tank, the filling up of the tank for it was overgrown with weeds means the infringement of that right and should therefore be restrained by a perpetual injunction especially when the party who has acquired the easement offers to clear the weeds. *Aut Behary Gul v. Rameswar Mitra*, 35 Ind. Cas. 40.

FLETCHER and TRUNON, JJ.

(49) S. 54—Co-owner in sole actual occupation—Suit for injunction against trespassers—Maintainability. See CO-OWNERS, No. 3, 3 L.W. 542.

(50) S. 54. See No. 45, *supra*.

(51) S. 54, *ill. (p)*—*Form of declaratory decrees—Award of larger relief than in plaint—Legality—Injunction against community—Penal Code*, S. 296.

It is desirable that a Court by its decree should determine the rights in dispute as definitely as the evidence before it will permit. But a decree which is not more specific is not illegal (a).

A declaratory decree of a Civil Court should not be treated as authorising an act which is *per se* a criminal offence. In disposing of a charge under S. 296, Penal Code, arising out of a dispute between two rival religionists, the existence of a declaration regarding the rights of either party is doubtless only one of several factors which might have to be considered in deciding the guilt or innocence of the accused (b).

An injunction granted against a community sued in a representative capacity is good. That an injunction can be granted against a community so vaguely defined as "the inhabitants of a village" appears from *ill. (p)* to S. 54, Specific Relief Act, 1877 (c).

Award of larger relief than that claimed in the plaint is illegal. *Mahomed Hanif Sahib v. Anagappa Mudali*, 35 Ind. Cas. 106.

AYLING and NAPIER, JJ.

References:—(a) 2 M. 240; 6 M. 203, R. (b) 34 M. 92, D. (c) 80 M. 185, F.

Specific Relief Act (I of 1877)—(Concluded).

(52) S. 56 (b)—British Indian Court if may issue injunction to restrain proceedings in foreign Court. See FOREIGN COURT, No. 2, 20 C.W.N. 1913.

(53) S. 56. See No. 45, *supra*.

Stamp.

(1) Bengal Reg. X of 1899, Ss. 3, 17 and *sch. A, Arts 3, 20*—*Lost deed alleged to be insufficiently stamped—Presumption that documents accepted by Court are properly stamped—Mortgages in India before the Transfer of Property Act (IV of 1882)—No writing required.*

In a suit for redemption of an usufructuary mortgage, dated 1857 the documents on which the plaintiff relied to establish the mortgage was a certified copy of a petition of compromise filed in Court in that year. The suit was based on the recital in the petition relating to the mortgage and the certified copy in question bearing a one-rupee stamp was issued in 1857. The record of the proceedings in which the petition was filed was destroyed in the Mutiny. The defendants objected that the contract was not enforceable, inasmuch as the document was not properly stamped:

Held, that before the Transfer of Property Act (IV of 1882) came into force, such mortgages could be created without any writing, outside the Presidency towns by simple delivery of possession; that the said petition recited the terms on which the then dispute was settled, among them being the agreement relating to the usufructuary mortgage; that the mortgage was verbal and was valid and the present suit was not based on an agreement contained in the petition; that if the petition was treated as the document creating the mortgage, it must be presumed that the officer before whom it was presented satisfied himself that it was properly stamped and no inference that it was not as stamped could be derived from the fact that the copy bears a one-rupee stamp. *Ahmad Raza v. Salyid Abid Husain*, 18 Bom. L.R. 904 = 20 M.L.T. 447 = 14 A.L.J. 1099 = 38 A. 494 = 24 C.L.J. 504 = (1916) 2 M.W.N. 548 = 21 C.W.N. 265 = 5 L.W. 153 (P.C.).

LORD SHAW, LORD PARMOOR and MR. AMEER ALI.

(2) *Sale of goods—Contract not bearing eight-anna stamp and containing arbitration clause, not invalid.*

A contract for sale of goods signed by the parties which *inter alia* contains a clause which provides for reference to arbitration of disputes arising out of the contract, is not invalid on the ground that it does not bear an eight-anna stamp. *Tatachand v. Louis Dreyfus and Co.*, 10 S.L.R. 14 = 35 Ind. Cas. 449.

HAYWARD, A.J.C.

(3) Presentation of appeal—On last day of limitation—Negligence—Inability to get stamps—Unforeseen contingency—If proper ground for extension of time—Limitation Act, S. 6. See APPEAL—GENERAL, No. 12, 12 N.L.R. 171.

Stamp—(Concluded).

(4) Document 80 years old, copy of—Hand-writing—Presumption as to See EVIDENCE ACT, No. 49, 31 Ind. Cas. 579.

(5) Secondary evidence of unstamped document, inadmissibility of. See LIMITATION ACT (1908), No. 127, 33 Ind. Cas. 661.

(6) Letter accompanying deposit of title deeds, giving a personal remedy to the mortgagee, if simple mortgage requiring to be stamped and registered as such. See TRANFER OF PROPERTY ACT, No. 82, 31 M.L.J. 347.

Stamp Act (I of 1879).

Ss. 3 (11)—Award whether an 'instrument of partition'—Stamp duty—Secondary evidence to prove partition—Admissibility—Partial partition proved—Shifting of onus of proof—S. 91, Evidence Act. *Sukh Dial v. Mani Ram*, 29 P.R. 1915=27 Ind. Cas. 489=29 P.L.R. 1916. See Final Part, 1915, Col. 1266.

Stamp Act (II of 1899).

(1) *Chit given for an existing liability*—Promissory note—Want of stamp—Inadmissibility of the document in evidence—Right to recover on the original cause of action—Payments endorsed on the back—Period of limitation extended by such payments—Payments treated as in discharge of the original debt.

Where in lieu of the amount due on a settlement of accounts a *chit* was given which in fact was equivalent to a promissory note and the *chit* was unstamped, the *chit* for want of stamp is admissible for any purpose. The giving of a security in lieu of existing antecedent debt does not extinguish but merely suspends the cause of action on the original debt which revives if the security be not discharged at maturity the giving of the security being merely a conditional discharge.

Where the security cannot be sued upon the creditor can fall back on the original cause of action, payments made towards the *chit* and endorsed on the *chit* itself can be treated as made towards the original debt and in reduction thereof and such payments will operate to extend the period of limitation for a suit on the original cause of action. *Chokkallagam Chetty v. Annamalai Chetty*, 34 Ind. Cas. 417.

COUTTS-TROTTER and SRINIVASA AIYANGAR, JJ.

References :—7 M. 392; 41 I.A. 142; (1913) M. W.N. 754; 3 Wallace 37; 11 C.B. 191; 14 C.B. (N.S.) 728; (1895) 2 Q.B. 405; 5 C.B. (N.S.) 122; 1 Taunt 353; 3 East 253; 1 Salik 124; 3 Q.B.D. 371; 1 Mont. D. and D. 289, R.

(3) *Impounding documents such as hat chitas*—Jurisdiction—Civ. Pro. Code, 1908, O. VII, r. 14.

Under r. 14, O. VII, Civ. Pro. Code a plaintiff is bound to produce in Court the *hat chita* wherein the amount due is mentioned, when the plaint is presented. *Held* the Munsif had no jurisdiction to impound the *hat chitas* other than the one which formed the basis of

Stamp Act (II of 1899)—(Continued).

the plaintiff's claim before him in the performance of his functions. *Sashih Mohan Shah v. Kumud Kumar Biswas*, 35 Ind. Cas. 415.

MOOKERJEE and CUMING, JJ.

Reference :—25 M. 528, D.

(3) Ss. 2, cl. (3), 3, 19, 35, and Arts. (5) (c), 49—Account book—Entry—Undertaking to pay with interest—Promissory note or agreement—Stamp duty payable—Want of stamp—Character of document not altered thereby—Execution of promissory note outside British India—Absence of presentation, payment or negotiation within British India—Suit on the note without payment of stamp—Maintainability in British Indian Courts—Original consideration—Suit when maintainable on—Object of promissory note—Evidence Act, S. 91, Ill. (b)—Negotiable Instruments Act, S. 64.

An entry in the plaintiff's account books signed by the defendant in Russian Territory ran in the following terms—'.....Russian gold sums four thousand agreed to be paid with interest at eight annas per cent., at Shikarpur.....'

Held that the words 'agreed to be paid' amounted to an undertaking to pay and that the writing constituted a promissory note (a).

Held also that, there being no conditions or stipulations in excess of the bare agreement or undertaking to pay, the writing is chargeable as a promissory note and not as an agreement.

Held, further, that as the promissory note was made out of India, duty is chargeable under Ss. 3 and 19, Stamp Act, only when the note is presented, paid or negotiated in British India, and that, as none of these events happened, no duty is chargeable, and the note is not excluded by S. 35 and is admissible in evidence (b).

The object of a promissory note is to show that the particular transaction represented by the note is a separate transaction and it is intended that the remedies in respect of that transaction shall be separately pursued (c).

An instrument may be promissory note although it would not pass current as such among merchant. The test is not mercantile as has been suggested by the terms of the statutory definition (d).

Held, also, that the entry is not an acknowledgment of an existing liability but a promise to pay. Moreover the provision as to future interest takes it out of the definition of acknowledgment in the Stamp Act (e).

Held further that the plaintiff cannot sue on the original consideration because the promissory note itself is the agreement of loan and the promissory note must be proved. (Evidence Act, S. 91, Ill. (b), (f).)

The question whether a document is chargeable as an agreement under Art. 5 (c) or as a promissory note under Art. 49 of the Stamp Act, depends on the matter in the writing in excess of that included in the definition. If this excess matter is mere surplusage it does not

Stamp Act (II of 1899)—(Continued).

alter the character of the document and it is a promissory note. *Ramsing alias Ramlal son of Begal v. Perumal*, 9 S.L.R. 150=32 Ind. Cas. 592.

PRATT, J.C. and BOYD, A.J.C.

References:—(a) (1900) L.J. 69 Q.B. 331, R. (b) 22 M. 337; 34 B. 247, R. (c) 30 C. 627, R. (d) 20 Q.B.D. 645; 7 Q.B.D. 165; 21 Q.B.D. 352; (1907) 1 K.B. 246, R. (e) 35 C. 111, R. (f) 24 B. 360, R.

(4) S. 2 (5) (c), Sch. I, Arts. 5, cl. (a) of exemptions and 15—Attested agreement to deliver merchandise with a penal clause not bond.

An agreement to deliver merchandise for consideration under a penal clause providing against breach of the covenant is not a bond as defined in S. 2 (5) (c) of the Stamp Act so as to be chargeable *ad valorem* under Art. 15 of the 1st schedule, even though it be attested by witnesses. Such an instrument is an agreement under Art. 5 (c) and falls within exemption (a) of that article.

The distinction between a "bond" and a covenant with a penal clause is that the former creates an "obligation" the latter does not, and a breach of an obligation under bond does not "sound in damages," whereas breach of a covenant must be compensated in damages. The fact that it contains a penal clause will not of itself convert an ordinary agreement into a bond. *Collector of Rangoon v. Maung Aung Ba*, 9 Bur. L.T. 111=8 L.B.R. 382=33 Ind. Cas. 920.

FOX, C.J. and TWOMEY, J.

(5) Ss. 2 (22), 35, Sch. I, Arts. 13, 49—Promissory note—Payable otherwise than on demand—Agreement—Court Fees Act, S. 13—Court-fees, refund of. *Katchi Rowther v. Naina Mohamed*, 28 Ind. Cas. 300=8 L.B.R. 155. See Final Part, 1915, Col. 1266.

(6) S. 3—Mortgage deed executed by Collector—No exemption from stamp duty. See U.P. ACT II OF 1903 (BUNDELKHAND ALIENATION OF LAND), No. 3, 14 A.L.J. 422.

(7) S. 3. See No. 3, *supra*.

(8) S. 19. See No. 3, *supra*.

(9) Ss. 26, 35, 61 and Art. 35—Document leasing land for 10 years for casuarina plantation—Construction—Document unstamped but registered—Liability for stamp duty—Unstamped instrument admitted in evidence—Effect—Procedure.

Under an instrument called a lease, the defendant was entitled to the exclusive possession of a certain land for 10 years. His obligation was to plant and rear at least fifty thousand casuarina trees. The trees when grown were to be cut at the expense of both the parties and the plaintiff was entitled to a moiety of the sale-proceeds. There was no date or period or periods fixed for that cutting.

The instrument was not stamped though registered. Plaintiff sued for damages for breach of the terms of the instrument. Defendant

***Stamp Act (II of 1899)—(Continued).**

contended the instrument being unstamped, plaintiff could get nothing by reason of S. 26, Stamp Act. *Held* that the value of the subject-matter of the instrument was not one which could not be ascertained at the date of its execution, and S. 26 of the Stamp Act did not apply.

Per Abdur Rahim, J.—The cases which were interpleaded to be covered by S. 26 are like that of the produce of mines which is expressly mentioned in that section, where what will be realised is altogether uncertain; not merely the market value, but also the quantity of the article bargained for.

Per Srinivasa Aiyangar, J.—The document is really an assignment of the land for a term in consideration of recovering half the proceeds of the trees reared on the land when they were fit for cutting.

S. 26 applies only to cases where the instrument is chargeable with an *ad valorem* duty, and where no duty is payable at all, there is no question of any *ad valorem* duty payable on the instrument.

Where an unstamped document has been admitted in evidence, it cannot be called in question in appeal, except under S. 61 of the Stamp Act.

It is even doubtful whether Art. 35 of the Act applies to all leases. *Kondapi Seshayya v. Grandhi Yenkata Subbayya Chetty*, 31 M. L.J. 231.

ABDUR RAHIM and SRINIVASA AIYANGAR, JJ.

References:—3 M. 342; 4 M.L.J. 201; (1897), Bom. P.J. 382, R.

(10) S. 26, Sch. I, Arts. 5, 6 and 40. See TRANSFER OF PROPERTY ACT, No. 82, 31 M.L.J. 347.

(11) S. 35—Promissory Note—Insufficiency of stamp—Admissibility in evidence.

The defendants passed to the plaintiff on an eight-annas stamp paper an instrument which ran as follows:

"We have this day received from you Rs. 25,000 in cash. Interest thereon has been fixed at the rate of 12 annas per cent. per mensem. The said interest is to be paid every month as it accrued due, and the period fixed in respect of the above written amount is three years."

The plaintiff having sued on the instrument, the defendants contended that it could not be admitted in evidence for insufficiency of stamp.

Held, that the instrument was not a promissory note nor did it fall under the absolute prohibition of S. 35, Stamp Act.

Ordinarily where a person acknowledges to have received a definite sum of money on a certain date for a certain term, there can be no reasonable doubt but that what he means is that on the expiration of that term he is willing to repay the money on demand. *Pratapchand Gulabchand v. Parushotamdas Malji*, 18 Bom. L.R. 124=33 Ind. Cas. 366.

BEAMAN, J.

(12) S. 35. See Nos. 3, 5, 9, *supra*.

Stamp Act (II of 1899)—(Continued).

- (13) *Ss. 35 and 36—Duty of Appellate Court where a document not stamped or not sufficiently stamped is admitted by lower Court—Admission of unstamped instrument*

Held that the Legislature forbade the Courts acting upon an unstamped document when it is not produced before it, but did not forbid the giving of a decree upon an unstamped document which had been wrongly admitted in evidence, because the duty and penalty could be levied by the Collector.

Held further that the provisions of S. 35 are evidently intended to prevent injustice and it would be obviously unjust for an Appellate Court to dismiss a suit on the ground that a document, which the first Court had admitted in evidence, was unstamped or insufficiently stamped, seeing that if the objection had been taken in the first Court the document could have been properly admitted in evidence on payment of stamp duty and penalty. *M. M. v. Sohan Singh*, 8 Bur. L.T. 290 = 33 Ind. Cas. 595.

MCCOLL, J.C.

- (14) S. 36. See No. 13, *supra*.

(15) S. 44, *scope of—Stamp duty and penalty—Joint-executants—Contribution. Raman Chetty v. Nagappa Chetty*, 2 L.W. 1024 = 31 Ind. Cas. 285. See Final Part, 1915, Col. 1268.

- (16) S. 61. See No. 2, *supra*.

- (17) S. 62. See No. 23, *infra*.

- (18) *Sch. I, Art. 5 (c)—Hire-purchase instrument—Agreement or conveyance—Stamp-duty.*

An instrument described as a hire-purchase contract was entered into between A and B whereby one Linotype Machine was hired by the latter for 27 months upon terms and conditions set forth in the document. The question arose whether this is to be stamped as an agreement or a conveyance.

Held, upon the construction of the document, that it is simply an agreement to hire the machinery in question, with an option on the part of the hirer to purchase, and as such it is liable to be stamped as an agreement within the meaning of Art. 5, cl. (c) of *Sch. I* to the Stamp Act and not as a conveyance. *In re Linotype and Machinery Co.*, 24 C.L.J. 93 = 20 C.W.N. 1252 = 44 C. 72.

SANDERSON, C.J., MOOKERJEE and CHAUDHURI, JJ.

- (19) Art. 5. See Nos. 3, 4, 10, *supra*.

- (20) Art. 6. See No. 10, *supra*.

- (21) Art. 13. See No. 5, *supra*.

- (22) Art. 35. See No. 9, *supra*.

- (23) *Sch. I, Art. 35 and S. 62 (b)—Amaldustak, whether it requires stamp—Conviction under S. 62 (b), if maintainable—Schedule of Stamp Act, if exhaustive.*

The schedule attached to the Stamp Act must be treated as exhaustive.

An agreement for a lease, whereby no rent is reserved and no premium paid or money advanced, is not included in the schedule and does not require a stamp.

Stamp Act (II of 1899)—(Concluded).

Held, on a construction of *amaldustak* which was for a term of seven years but wherein no rent was fixed, that the document did not require stamp, and so the conviction of the executant of the document under S. 62 (b) of the Stamp Act was set aside. *Musammatt Sunder Kuer v. King Emperor*, 20 C.W.N. 923.

ROE and JWALA PRASAD, JJ.

- (24) Art. 40. See No. 10, *supra*.

- (25) Art. 49. See Nos. 3, 5, *supra*.

(26) *Sch. I, Art. 55—Stamp duty Release. Jiban Kuar v. Gobind Das*, 13 A.L.J. 1109 = 38 A. 56 = 31 Ind. Cas. 404. See Final Part, 1915, Col. 1269.

Stamp Duty.

Redemption of mortgage—Appeal from decree of lower Court—Payable on memorandum of appeal. See COURT-FEES, No. 4, 30 Ind. Cas. 322.

Standing Timber.

Immoveable property — "Standing trees." See REGISTRATION ACT (1908), No. 2, 35 Ind. Cas. 713.

Standing Trees.

Immoveable property—"Standing timber." See REGISTRATION ACT (1908), No. 2, 35 Ind. Cas. 713.

Stani.

(1) Malabar Tarwad—Karnavan becoming a—Succeeding karnavan incapable of business management—Karar resting management in stani. See MALABAR LAW (TARWAD), No. 39 M. 918.

St. 6 and 7 Vict., c. 73 (Solicitors Act).

S. 48. See LEGAL PRACTITIONERS, No. 24 C.L.J. 382.

St. 11 and 12 Vic., c. 21 (Insolvency Act, 1846).

See ACT III OF 1909 (PRESIDENCY TOWNS INSOLVENCY), No. 3, 20 M.L.T. 311.

St. 24 and 25 Vic., c. 67 (Indian Council's Act, 1861).

S. 43. See BEN. ACT V OF 1911 (CALCUTTA IMPROVEMENT), No. 1, 24 C.L.J. 246.

St. 24 and 25 Vict., c. 104 (Charter Act).

(1) *Ss. 8, 11 and 15—Effect of, on the pre-existing judicial system. See VAKIL, No. 1, 31 M.L.J. 698.*

- (2) S. 11. See No. 1, *supra*.

(3) S. 15—Power under, when and how to be exercised. See ABATEMENT, No. 2, (1916) M.W.N. 301.

(4) S. 15—Decision of Revenue Court—Revision to High Court if competent. See MAD. ACT I OF 1908 (ESTATES LAND), No. 42, 3 L.W. 158.

(5) S. 15. See REVISION, No. 4, 34 Ind. Cas. 503.

- (6) S. 15. See No. 1, *supra*.

St. 46 and 47 Vic., c. 52 (Bankruptcy Act, 1883).

(1) *Ss. 27 (1) and 102. See ACT III OF 1909 (PRESIDENCY TOWNS INSOLVENCY), No. 2, 20 M.L.T. 311.*

(2) *S. 102. See No. 1, supra.*

St. 5 and 6 Geo. V, ch. 61 (Government of India Act, 1915).

(1) *S. 107—High Court's power of interference in revision. See ACT IX OF 1887 (PROVINCIAL SMALL CAUSE COURTS), No. 7, 20 C.W.N. 1080.*

(2) *S. 107. See LEGAL PRACTITIONERS ACT (1879), No. 10, 1 Pat. L.J. 576.*

Statutes, Construction of.

See LEGAL PRACTITIONERS' ACT (1879), No. 1, 31 M.L.J. 698.

Stay of Execution.

(1) *Duty of Court of appeal. See APPEAL (GENERAL), No. 6, 23 C.L.J. 310.*

(2) *Application for setting aside of ex parte decree—Time allowed to pay the decree amount—Order whether operates as a stay of execution of ex parte decree. See CIV. PRO. CODE (1908), No. 1-a, 3 L.W. 35.*

Stay of Proceedings.

Pendency of appeal against an order refusing to set aside ex parte decrees, in execution—Discretion of Court. See CIV. PRO. CODE (1908), No. 498, 35 Ind. Cas. 443.

Stay of Suit.

(1) *Reference to arbitration—Suit filed after reference—Court's power to stay suit. See SCT IX OF 1899 (ARBITRATION), No. 1, 10 A.L.R. 1.*

(2) *See CIV. PRO. CODE (1908), No. 16, 24 C.L.J. 514.*

(3) *See CIV. PRO. CODE (1908), No. 15, 12 N.L.R. 174.*

(4) *Two suits in Karachi Court and in Calcutta High Court in respect of same subject-matter—Stay of proceedings—Jurisdiction upon what depends. See CIV. PRO. CODE (1908), No. 14, 43 C. 144.*

Step-in-aid of Execution.

(1) *Execution application, not giving dates of prior applications—Return for amendment—Representation not made—Step-in-aid of execution—Limitation Act (1908), Art. 182—Applying in accordance with law, construction of, if affected by O. XXI, r. 17, Civ. Pro. Code—Practice. See CIV. PRO. CODE (1908), No. 441, 4 L.W. 103.*

(2) *See EXECUTION OF DECREE, No. 19, 24 C.L.J. 462.*

(3) *Application by decree-holder for extension of time—Whether a. See EXECUTION OF DECREE, No. 10, 14 A.L.J. 890.*

(4) *Application by decree-holder to realize money deposited in Court is a step. See EXECUTION OF DECREE, No. 5, 18 O.C. 359.*

Step-in-aid of Execution—(Concluded).

(5) *Application to transfer decree to another Court for execution is a. See EXECUTION OF DECREE, No. 4, 14 A.L.J. 415.*

(6) *Batta memo, for issue of notice to judgment-debtor under S. 248, Civ. Pro. Code (1882), whether a step-in-aid. See EXECUTION OF DECREE, No. 1, 3 L.W. 34.*

(7) *Application for adjournment—When save limitation. See LIMITATION ACT (1908), No. 389, 33 Ind. Cas. 79.*

Stifling Criminal Prosecution.

See CONTRACT ACT, No. 12, 31 M.L.J. 264.

Straits Settlements Bankruptcy Ordinance.

S. 30, cl. (4) — Bankruptcy — Discharge by Singapore Court—Whether operates as discharge from debts in India—Discharge of father — Liability of sons in a joint Hindu family.

The first defendant and his undivided brother, the 3rd defendant, who were trading in Singapore were adjudicated bankrupts under Straits Settlements Bankruptcy Ordinance by the Singapore Court. They had some family property in India. The plaintiffs who were also trading in Singapore proved their debts, which were contracted by the bankrupts (defendants) at Singapore and were payable there, and received dividends. Finally the bankrupts were discharged under the Ordinance. The plaintiffs now wanted to make them liable in India since they had their domicile in India and possessed some properties there.

Held, that the discharge under the Ordinance operated as a discharge from the debts in this country.

Held also, that the sons of the bankrupts were not liable for such debts.

A Hindu son is not jointly bound with his father to pay his debts within the meaning of S. 30, cl. (4) of the Ordinance.

Adjudication and assignment of the bankrupts' property under the Ordinance does not operate as an assignment of immovables or moveables in India. *Narayanan Chettiar v. Yeerappa Chettiar*, 31 M.L.J. 386 = 20 M.L.T. 318 = (1916) 2 M.W.N. 271 = 4 L.W. 422 = 35 Ind. Cas. 918.

AYLING and SRINIVASA AIYANGAR, JJ.

Straits Settlements Limitation Ordinance.

(1) *Ss. 17 (1) and 22 — Death of partner leaving will—Executor if competent to sue for dissolution before probate obtained—Probate applied for in Court of domicile in India—Suit by administrator pendente lite, if may be brought more than three years after testator's death — Substitution of executor in place of administrator pendente lite—Suit if to be regarded as instituted on date of substitution—Civ. Pro. Code, Ss. 133, 169—Order competent only under latter section, drawn up erroneously, if may enable defendant to escape liability.*

S., one of two executors named in a will left by a person who was a native of and domiciled

Straits Settlements Limitation Ordinance
—(Continued).

in British India (his co-executor having renounced probate), applied in August 1907 in the Court of the District Judge of Madura in the Madras Presidency for proof of the will in solemn form (in view of caveats entered against the proof of the will) and probate was not granted till 10th March 1912. Meanwhile on the 7th March 1910, letters of administration *pendente lite* were granted to P by the Supreme Court of the Straits Settlements to the estate of the testator situate within the jurisdiction of that Court, and on 23rd October 1911, P instituted a suit for dissolution of partnership against S. N., with whom the testator for some years prior to his death (which took place on 11th November 1904) carried on a money-lending business in Singapore. The defence was that the suit was time-barred, having been instituted more than three years from the date of the dissolution. Pending the suit, letters of administration *pendente lite* granted to P were cancelled and in lieu thereof letters of administration with the will annexed were granted to S, and on 14th April 1913, an order was made in the suit striking out P and substituting S as the plaintiff, whereupon it was further contended in defence that the suit must be deemed to have been instituted on 14th April 1913 under S. 22 of the Limitation Ordinance and so was time-barred.

Held—that the suit was time-barred when it was instituted by P on 23rd October 1911, S. 17 (1) of the Ordinance not being applicable to the case to save limitation.

That, if it had been within time when instituted by P on 23rd October 1911, the suit would not have been barred by reason of the substitution made on 14th April 1913 and necessitated by a change or devolution of interest pending the suit.

An executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vest in him before the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot obtain a decree before probate, not because his title depends upon the probate, but because the production of probate is the only way in which, by the rules of the Court, he is allowed to prove his title.

An administrator, on the other hand, derives title solely under his grant and cannot institute an action as administrator before he gets his grant.

In the case of a cause of action arising in favour of the estate of a deceased person at or after his death, time will at once begin to run, if there be an executor, even though probate has not been obtained; but if there be no executor, time will run only from the actual grant of letters of administration.

S. 17 (1) of the Limitation Ordinance was probably intended to apply this rule.

There is nothing in the Ordinance to confine "legal representative" to a person to whom the

Straits Settlements Limitation Ordinance
—(Concluded).

Court has actually made a grant. But the words "capable of instituting an action" mean capable of instituting an action in which a decree might be obtained. The will under which the executor claims must be capable of probate.

According to English practice (which, in the absence of local law, was to be followed and adopted in the Straits Settlements) probate may be granted of a will of a person domiciled abroad upon proof that it is a valid will according to the law of the domicile and that there are assets within the jurisdiction. It is not necessary that it should be first proved in the Courts of the domicile.

That in this case, probate could be granted since August 1907 to S alone (his co-executor having renounced at some time before August 1907) and the suit instituted more than three years after August 1907 was time-barred.

Quære:—Whether one of two joint executors can properly institute proceedings on behalf of the estate.

S. 22 contemplates cases in which an action is defective by reason of the person or one of the persons in whom the right of action is vested not being before the Court. It has no application to cases in which the action was originally properly constituted as to parties, but has become defective because there has been a change or devolution of interest. Such cases do not fall within S. 133 of the Civ. Pro. Code (which provides against the defect of an action on the ground of a defect of the first sort and enables the proper party to be added or substituted) but within S. 169 of the Code, and the proper remedy is by way of an order to carry on proceedings, and not of an order adding or substituting parties. The proviso to S. 22 of the Ordinance may have been inserted *per cautelam* and cannot be relied on as controlling the operative words.

The fact that the order was not drawn up in accordance with S. 169 of the Civ. Pro. Code, the only section under which the order was competent, could not be taken advantage of by the defendant to escape a liability to which he would have been subject, if the order had been made in proper form. *Soona Mayna Kena Roona Meyappa Chitty v. Soona Navana Suppramanian Chitty*, 20 C.W.N. 833 = (1916) M.W.N. 455 = 18 Bom. L.R. 642 = 35 Ind. Cas. 323 (P.C.).

• EARL LOREBURN, LORD ATKINSON,
LORD PARKER and LORD SUMNER.

(2) S. 22. See No. 1, *supra*.

Striking off Application.

Execution application struck off—Restoration—Objection as to limitation—Jurisdiction. See CIV. PRO. CODE (1908), No. 372, 35 Ind. Cas. 337.

Sub-lease.

(1) *Bengal Tenancy Act* (VIII of 1885), S. 85—*Admissibility in evidence—Oral evidence of the terms of agreement—Evidence Act* (I of 1872), S. 91.

Sub-lease—(Concluded).

Where a sub-lease has been registered in contravention of the terms of S. 85 of the Bengal Tenancy Act and has been followed by possession, the sub-lessee, if dispossessed, is entitled to recover possession (a). **Goneah Mondol v. Thanda Namasundrani**, 24 C.L.J. 539.

* **FLETCHER** and **RICHARDSON, JJ.**

References:—(a) 13 C.L.J. 649, F; 16 C.L.J. 144; 17 C.W.N. 59, D.

(2) *Validity, who can question—Bengal Tenancy Act (VIII of 1885), S. 85 (1).*

Where a sub-lease created by a raiyat for a term exceeding nine years was the only title on which the grantees relied so that he could not fall back on prior possession as tenant or otherwise, his suit to recover *khas* possession was dismissed (a). **Balanab Charan De v. Sarat Chandra Kar**, 24 C.L.J. 538.

D. CHATTERJEE and **CHAPMAN, JJ.**

References:—(a) 16 C.L.J. 144; 17 C.W.N. 59, F.

Submersion.

(1) See **ADVERSE POSSESSION**, No. 5, 19 O.C. 374.

Sub mortgage.

Mortgagor paying off mortgage amount without notice of the sub-mortgage—Good faith of mortgagor—Sub-mortgage, if extinguished—Right of sub-mortgagee, to enforce mortgage security. See **MORTGAGE (GENERAL)**, No. 26, 4 L.W. 502.

Subordinate Judge.

Decision of, on the Small Cause side—Appeal—Revision—Procedure. See **ACT III OF 1907 (PROVINCIAL INSOLVENCY)**, No. 55, 31 Ind. Cas. 15=5 L.W. 120.

Subordination of Courts.

Power to make comment upon judgment of superior Court—Duty of Lower Court to treat such judgment with proper deference.

It is the duty of a Court of inferior jurisdiction to treat the decision of a superior Court with proper deference. A Judge however brilliant and well trained a lawyer he may be, is not entitled to refuse to follow the decision of the High Court to which his Court is subordinate, still less is he entitled to sit in judgment upon the decision of such a High Court and declare it to be erroneous. **Habib Ullah Shah v. Bakht Ball Singh**, 20 Ind. Cas. 292.

LINDSAY, J.C., and **KANHAIYA LAL, A.J.C.**

References:—2 A.L.J. 498=A.W.N. (1905), 184=2 Cr. L.J. 395=28 A. 62, R.

Subrogation.

(1) Stranger paying off a subsisting mortgage—Subrogation to mortgagee's position. See **CONTRACT ACT**, No. 77, 18 Bom. L.R. 700.

(2) Payment of prior mortgage with money borrowed—Right of lender. See **MORTGAGE (SUBROGATION)**, No. 2, 36 Ind. Cas. 992.

(3) Salvage lien—Prior and subsequent mortgage. See **SALVAGE LIEN**, No. 1, 14 A.L.J. 953.

Subscriptions.

Public institutions—Committee's power to collect subscription—Obligation of Committee to general public to accept subscription offered. See **PUBLIC INSTITUTIONS**, No. 1, 19 O.C. 15.

Sub-Settlement Act.

See **ODDH ACT XXVI OF 1866**.

Substituted Service.

Sufficiency of—Refusal to set aside *ex parte* decree—Appeal. See **CIV. PRO. CODE (1908)**, No. 349, 20 O.W.N. 173.

Sub-tenant.

(1) Suit for rent by tenant against trespasser treating him as, maintainability of—Tenant and sub-tenant, nature of their relationship. See **ODDH ACT XXII OF 1866 (ODDH RENT)**, No. 40, 19 O.C. 370.

Succession.

(1) See **LANDLORD AND TENANT**, No. 44, 53 Ind. Cas. 236.

(2) To office of *darago*—Custom. See **RELIGIOUS ENDOWMENTS ACT**, No. 3, 1 Pat. L.J. 437.

Succession Act.

See **ACT X OF 1865**.

Succession Certificate.

(1) *Application for succession certificate—Security demanded—Rejection of application for furnishing inadequate security—Second application not barred.*

Held that the mere fact that previous grant of succession certificate was subject to conditions which were not complied with is no ground for refusing a second application. **Porna Koer v. Chunni Lal**, 14 A.L.J. 654=35 Ind. Cas. 718.

WALSH and **SUNDER LAL, JJ.**

(2) *Failure of plaintiff to produce certificate in first Court—Duty of Appellate Court to permit him to do so in appeal.*

Where a succession certificate necessary for the purpose of a suit was not produced in the Court of first instance, the Appellate Court before whom the certificate was produced should permit the plaintiff to do so, making such order as to costs as is proper by reason of the non-production of the certificate in the Court of first instance. **Muralidhar Roy v. Mohini Mohan Kor**, 30 Ind. Cas. 510.

WOODROFFE and **COXE, JJ.**

(3) Position of person who has obtained a—Question of law—Appeal to Privy Council. See **CIV. PRO. CODE (1908)**, No. 213, 14 A.L.J. 143.

(4) Application for, as heir—Right as legatee not set up—Genuineness of Will not gone into—Registration. See **LIMITATION ACT (1908)**, No. 165, 32 Ind. Cas. 99.

Succession Certificate Act (VII of 1889).

(1) *Muhammadian family governed by Marumakkhatayam Law—Kazari—Construction of.*

Succession Certificate Act (VII of 1889)
—(Continued).

Where a *kazar* or family settlement in a Mahomedan family governed by the Marumakkattayam Law contained the following, *vis.*—"The properties acquired by members of each *Tavazhi* as their own as well as those that may be so acquired, shall, on the death of such acquirers, lapse only to their *Td-ras-i*," held that there was nothing in the language to show that the acquirer of the property debarred himself from dealing with it during his life-time either by alienation *inter vivos* or by means of a will. So a legatee claiming under such a will of such a member has a *prima facie* title under the will to a succession certificate. **Koyattil Haji v. Koyaman Kuttil Haji**, 31 Ind. Cas. 446.

ABDUR RAHIM and SPENCER, JJ.

- (2) Ss. 1 (4), 5—*Residential abadi and place of business of deceased within jurisdiction*—*Authority to hear application for grant of succession certificate*—*Dispute between parties capable of being settled in administration proceedings*—*Application, whether barred*—*Grant of succession certificate, effect of*—*Elaborate enquiry, whether necessary*

The grant of succession certificate does not establish the title of the grantee as the heir of the deceased, but only furnishes him with an authority to collect the debts and allows the debtors to make payments to him without incurring any risk.

Two rival claimants applied for the grant of a succession certificate in order to collect debts due to the deceased. Each one based his claim on an alleged adoption by the deceased. On appeal by the one, whose claim was negatived, the objection was taken as to the jurisdiction of the trying Court.

Held: (1) that, inasmuch as the deceased at the time of his death had his ordinary place of residence within the jurisdiction of the trial Court and did his business there, the Court had sufficient authority under S. 5 of the Succession Certificate Act to dispose of the proceedings;

(2) that the application could be entertained even though the dispute between the parties as to the entire estate could be easily settled in proceedings taken under the Probate and Administration Act, and that S. 1 (4) did not offer any impediment to the grant of the certificate. **Ram Saran v. Gappu Ram**, 71 P.W.R. 1916—33 Ind. Cas. 603.

SHADI LAL, J.

- (3) Ss. 3, 4—*Insurance policy—Unascertained sum of money due thereunder—Whether forms part of estate of deceased—Not a debt for which succession certificate can be issued*—*Certificate if necessary for realising the same—Nominee under policy—No transfer nor trust in his favour.*

An unascertained sum of money in insurance is part of the estate of the deceased (a).

A nomination by the deceased for insurance money does not operate as a personal transfer and it creates no trust in favour of the nominee.

Succession Certificate Act (VII of 1889)
—(Continued).

An unliquidated sum of money due under an insurance policy cannot be described as a debt accruing due to the estate (b).

An insurance policy is not contemplated by S. 3 of the Succession Certificate Act and the Act does not give any general power of administration of the estate of the deceased. It is confined and absolutely confined to the collection of debts which were existing in the lifetime of the deceased and have accrued due prior to his death. **Charulla Das v. Jyotish Chandra Sirkar**, 33 Ind. Cas. 157.

HOLMWOOD and IMAM, JJ.

References:—(a) (1892) 1 Q.B. 147; 35 M. 162 (167); 37 B. 471; 40 C.L.J. 44=18 C.W.N. 1335=25 Ind. Cas. 236, K. (b) 36 C. 936; 1 El. Bl. & El. 63; 120 E.R. 430=113 R.R. 545, R.

- (4) S. 4—*Assignment of debt by certificate-holder—Right of assignee—Fresh certificate unnecessary.*

A decree for possession of certain property and for mesne profits was passed in favour of A and his wife. The wife died after the date of the decree. A had obtained letters of administration in respect of the estate of his wife. He transferred his own rights under the decree, as also those of his wife to H. H applied for execution of the decree. The judgment-debtors objected, *inter alia*, that the decree could not be executed without either letters of administration or a succession certificate being granted to the transferee.

Held, that H could execute the decree without any fresh letters of administration being granted to him.

Per Walsh, J.—A person claiming as an assignee of a debt which was due to the estate of a deceased person is not claiming "the effects of the deceased." From the date of assignment, the debt due to the deceased ceases to be part of the deceased's effects.

The claim contemplated by sub-S. 1 of S. 4 of the Succession Certificate Act is a claim made by a person in the capacity of, and as a personal representative of, a deceased person.

Per Sundarlal, J.—An enquiry as to the validity of transfers made by a certificate-holder is foreign to the scope and object of Act VII of 1889. **Goswami Sri Raman Lalji v. Hari Das**, 14 A.L.J. 677=38 A. 474=34 Ind. Cas. 364.

WALSH and SUNDAR LAL, JJ.

- (5) S. 4. See No. 3, *supra*.

- (6) S. 4 (a)—*Representative title—Hindu Law (Joint family)—Survivors, right of, on death of member if to get succession certificate—Partnership—Surviving partner if can get succession certificate—Contract Act IX of 1872, Ss. 45, 263.*

Where one member of a joint undivided Hindu family dies, the other members succeed to him by survivorship and do not require any succession certificate in order to sue for debts due to the family.

Succession Certificate Act (VII of 1889).
—(Continued).

A partner having died the surviving partner does not succeed to the dead partner by survivorship. So if a surviving partner claims to be entitled to the effects of the deceased partner as due to himself alone, a succession certificate is necessary. *Gurditta Mal v. Dharl Mal*, 31 Ind. Cas. 904.

JOHNSTONE, C.J.

(7) S. 4 (1) (d)—*Married Women's Property Act* (III of 1874), S. 6—*Policy payable to assured in 1933 or to his wife, if he died previously*—*Jurisdiction to grant certificate.*

R insured his life in S. Co. and died in 1914. Under the terms of the Policy the amount assured was payable to R in 1933 or to his wife in case of his death earlier. The wife having applied for a succession certificate in respect of the insurance amount, held that the Insurance Company was not the debtor of the deceased in respect of the sum insured; that the widow was not entitled to that sum as part of the effects of the deceased person; that the said sum did not form part of the deceased's estate but that the widow was the beneficiary who became entitled to the beneficial interest in that sum on her husband's death; and that consequently the application for the succession certificate was misconceived. *R Srinivasa Charlar v. S. P. Ranganayaki Ammal*, 3 L.W. 466=32 Ind. Cas. 991.

SADASIVA AIYAR and NAPIER, JJ.

(8) Ss. 4, 6—*Title of predecessor-in-interest—Recoverability of the debt—Matters which the Court should consider before granting certificate.*

A Government Promissory Note was transferred by a registered deed of assignment and the transferee applied for a succession certificate in respect of the note. The Court found that the applicant was the representative of his assignor, but being of opinion that it was not established that the assignor himself had a good and subsisting title to the note at the date of the assignment, the Court refused to grant the certificate.

Held, whether the assignor of the applicant had a valid title or not or whether the assignment conveyed any title to the applicant, or whether the debt secured by the promissory note was recoverable or not, were not matters which the Court had to determine upon an application for a certificate. The only question which the Court had to decide was whether the applicant was the representative of the person to whom the debt was alleged to have been due. *Radhika Prasad Bapull v. Secretary of State*, 14 A.L.J. 650=38 A. 438=35 Ind. Cas. 711.

PIGGOTT and BANERJI, JJ.

(9) S. 5. See No. 2, *supra*.

(10) S. 6. See No. 8, *supra*.

(11) S. 14—*Succession certificate—Grant to widow—Death of widow—Fresh certificate, application by daughter for—Court-fee if must be paid again—Analogy of administration de bonis non, if applies—Fiscal statute, Interpretation of—Court Fees Act, S. 1, Art. 12.*

Succession Certificate Act (VII of 1889)
—(Concluded).

Whenever a fresh succession certificate is taken, even though it is to collect debts for which a succession certificate has already been taken out and the duty paid, the duty prescribed by the Court Fees Act must be paid.

R, the widow of a deceased Hindu, took out a succession certificate in respect of certain debts due to the deceased. After her death, S, the daughter of the deceased, applied for succession certificate in respect of the same debt and urged that stamp duty upon the debts having once been already paid by R, she was not bound to pay duty again:

Held—That it was an application for a certificate within the meaning of S. 14 of the Succession Certificate Act and Court-fee was payable on it as such.

One fiscal Act cannot be construed by another fiscal Act. *In re Saroje Bashini Debi*, 20 C.W.N. 1125=36 Ind. Cas. 125.

FLETCHER and TRUNON, JJ.

Succession Property Protection Act.

See ACT XIX OF 1841.

Sudra.

Hindu Law—Religious order. See RELIGIOUS ENDOWMENTS, No. 4, 35 Ind. Cas. 630.

Suit.

(1) A revision is no essential or inevitable portion of a suit, and there is no authority for holding that a suit and a revision are synonymous terms. *Milawa Ram v. People's Bank of India*, 91 P.R. 1916=36 Ind. Cas. 618.

CHEVIS and LE ROSSIGNOL, JJ.

(2) Whether includes 'Miscellaneous proceedings.' See BEN. ACT IX OF 1879 (COURT OF WARDS), No. 2, 34 Ind. Cas. 86=20 C.W.N. 852.

Suit of a Civil Nature.

Right to exclusively conduct a Mandapapadi, if of a Civil nature—Competency of temple trustees to grant such exclusive right. See CIV. PRO. CODE (1908), No. 11, (1916) 2 M.W. N. 327.

Suits Valuation Act.

See ACT VII OF 1887.

Summary Settlements.

Oudh settlements—Effect of—Proprietary rights, proof of—Presumption.

In Oudh no inference can be drawn as to the proprietary right of a person from the mere fact that the Summary Settlement was made with his family.

A person can establish his title as under-proprietor by proving that his predecessors-in-interest had formerly been proprietors, that the suit land had been held by his predecessors-in-interest at some time since 13th February 1844 and that it had been held by such persons as *sir* or *nankar* when they were in proprietary possession or there had been a specific grant of under-proprietary right or an acknowledgment

Summary Settlements—(Concluded).

by the *talukdar*. *Bhishnar Singh v. Tirbha-wan Bahadur Singh*, 34 Ind. Cas. 768.

STUART, A.J.O.

Reference:—8 O.C. 145, *Appr.*

Summons.

- (1) *Suit, maintainability of—Summons, non-service of, effect of—Personal judgment against defendant, if can be set aside—Civ. Pro. Code, 1908, O. IX, r. 3—Decree indivisible—Effect of order setting aside decree on prior suit.*

The law never acts by stealth, it condemns no one unheard so that a personal judgment rendered against a defendant without notice to him or an appearance by him is vitiated by the same infirmity as a judgment without jurisdiction. A judgment made under such circumstances may be set aside on the ground that the defendant must in essence be a party to the suit before the plaintiff can have judgment against him.

The first three defendants in the present suit instituted a suit against the present plaintiff and the fourth defendant for dissolution of partnership, for adjustment of accounts, for appointment of a receiver and for other incidental reliefs. At that time the plaintiff, who was then the second defendant, was resident beyond the limits of British India, namely, at Somaser in Rajputana. The summons was sent to the Political Agent at Rajputana. No attempt was made by him to serve the defendant, but the summons was returned to the Court. A decree was passed in that suit directing both the defendants to pay the plaintiff a certain sum with costs by six monthly instalments on the dates specified, subject to the proviso that, if default was made in the payment of a single instalment, the plaintiff would be at liberty to enforce the entire decree by execution:

Held, that the plaintiff's position in that suit in substance was the same as if no summons had ever been issued for service. Under these circumstances, a decree made against him could not bind him. That as the decree was indivisible and could not be set aside in part, the whole decree was set aside. The effect of the order was to discharge the entire decree in that suit and to revive it for re-trial. That as the second defendant (that is, the present plaintiff) was not served, he would have to be served, unless he chose to enter appearance voluntarily. *Chatterjee Brahmia v. Durgadutt Agarwalla*, 23 O.L.J. 496=20 C.W.N. 943=34 Ind. Cas. 394.

MOOKERJEE and N.R. CHATTERJEE, JJ.

- (1-a) *Refusal of Collector to serve summons, effect of—Defendant a resident of Aminidivi Island, how served.*

The mere fact that the Collector refuses to serve the summons is not a sufficient ground for dismissing the suit.

Service on a defendant who at first resided in British India but at the time of suit resided in Aminidivi Island, should be effected by affixing the summons to the last-known-place

Summons—(Concluded).

of residence in British India and by registered post. *Abdul Kadya BearP v. Shahyode Kunhl Ahmet*, 32 Ind. Cas. 820.

KUMARASAMI SASTRI, J.

- (2) *Duty of Courts and settlement officers to follow the law relating to issue and service of.* See CIV. PRO. CODE (1908), No. 394, 20 C.W.N. 511.

- (3) *Sufficiency of substituted service—Refusal to set aside ex parte decree—Appeal.* See CIV. PRO. CODE (1908), No. 349, 20 C.W.N. 173.

- (3-a) *Service of.* See CIV. PRO. CODE (1908), No. 349-a, 32 Ind. Cas. 826.

- (4) *Service of, when not sufficient.* See EXECUTION OF DECREE, No. 12, 90 P.L.R. 1916.

- (5) *Information given to pleader as to date of hearing—Notice not served on party—Appearance by pleader without instructions—Dismissal for default, legality of.* See SERVICE OF NOTICE, No. 1, 30 Ind. Cas. 199.

Superior Court.

Power to make comment upon judgment of—Duty of lower Court to treat such judgment with proper deference. See SUBORDINATION OF COURTS, No. 1, 30 Ind. Cas. 292.

Support.

See EASEMENT, No. 2, 33 Ind. Cas. 90.

Surety.

- (1) *Liability, discharge of—Dealings, pre-judicial—Contract Act, Ss. 133, 139—Guarantor, if can control appropriation—New account, when to be opened—Departure from rule of appropriation—Agreement between principals with reference to contract guaranteed—Detention of money—Interest, liability to pay, after date of agreement.*

Per Sanderson, C.J.—The rule in *Clayton's case* (a) applies only to the items in one current account and when there is no specific appropriation of the debtor.

Under S. 139 of the Contract Act, in order to discharge the surety, it must be shown that not only has the creditor omitted to do some act which his duty to the surety required him to do, but also that the eventual remedy of the surety himself has thereby been impaired.

A guarantor entered into an agreement with the Bank to the effect that he would pay to the latter on the 30th September, 1913, to the extent of Rs 3,00,000, all money then due from B on current account or otherwise howsoever, including all interest, charges and other expenses, which he might charge against B:

Held, under the circumstances of the case, that the Bank could claim interest at the rate agreed upon between them and the debtor before the closing of the contract.

Held also by Woodroffe and Mookerjee, JJ., that the Bank could claim interest by way of damages for the detention of the money due to them at the rate agreed upon between them and the debtor before the closing of the contract (b).

Surety—(Continued).

Per Mookerjee, J.—In the absence of special agreement a guarantor has no right to control the appropriation, by customer or banker of moneys paid in, subject to the qualification that the banker is bound to deal with the accounts in the ordinary way of business (c).

Thus, payments in may be appropriated to a pre-existing debt which is not covered by the security and of which the surety had no knowledge (d).

On the termination of the guarantee, the account may be closed and a new one opened to which all payments in may be carried, though the banker is not entitled, where an account is guaranteed to a limited extent, to split that account during the continuance of that guarantee and attribute all payments into the in-secured balance (e).

So long as an account is unbroken, a surety should not be prejudiced by any departure from the rule of appropriation of items in order of date (*Clayton's case*) unless his consent to such departure is expressed or can be implied from the character of his engagement (f).

It is contrary to ordinary business and good faith to open a new account during the currency of the guaranteed one and carry all payments into the new account.

If there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and if there is any alteration, which is not obviously either unsubstantial or for the benefit of the surety, he is to be the sole judge whether he will remain liable. *A K A Khan Ghuznavi v. National Bank of India, Ltd.*, 23 C.L.J. 256 = 20 C.W.N. 662 = 33 Ind. Cas. 34.

SANDEBSON, C.J., WOODROFFEE and MOOKERJEE, JJ.

References:—(a) (1816) 1 Mer. 572, R. (b) 22 L.A. 199 = 17 A. 511; 15 C.L.J. 684; 16 C.L.J. 264 (270), R. (c) (1813) 2 M. & S. 18; (1831) 5 Bligh. N.S. 1, R. (d) (1825) 3 Bing. 71, R. (e) (1874) L.R. 7 C.P. 372; (1911) 18 Ves. 232, R. (f) (1907) A.C. 286 (295), R.

(2) Ss. 55, 47, 145, 115, Civ. Pro. Code—Judgment-debtor released on security in order to enable him to apply to be adjudged insolvent—Failure of judgment-debtor to so apply—Application by decree-holder to forfeit security bond refused—Appeal whether lies—Revision. See CIV. PRO. CODE (1908), No. 130, U.B.R. (1916), 1st Qr., 103.

(3) Liability of—Termination of liability—Surety if may waive previous notice to judgment-debtor. See CIV. PRO. CODE (1908), No. 131, (1916) 2 M.W.N. 273.

(3-a) Death of decree-holder—Discharge of surety—Security—Contract Act, 1872, S. 130. See CIV. PRO. CODE (1908), No. 64-a, 32 Ind. Cas. 807.

(4) Negotiable instrument—Surety—Contract of guarantee—Drawer not party—Dis honour—Payment by surety—Suit by surety on the negotiable instrument—Rights of surety. See CONTRACT ACT, No. 128, 30 M.L.J. 369.

Surety—(Concluded).

(5) Surety bond when may be forfeited. See EXECUTION OF DECREE, No. 12, 90 P.L.R. 1916.

(6) 'Joint contract', if includes a. See LIMITATION ACT (1908), No. 81, 32 Ind. Cas. 608.

Suretyship.

See CONTRACT ACT, No. 119, 36 Ind. Cas. 1000.

Surrender.

(1) Abandonment—Whether sufficient to extinguish rights of lessee's transferee, and abandonment—Difference between—Transfer of Property Act, Ss. 3, 117. See BEN. ACT VIII OF 1884 (TENANCY), No. 43, 33 Ind. Cas. 98.

(2) See U.P. ACT II OF 1901 (AGRA TENANCY), No. 32-a, 36 Ind. Cas. 1007.

(3) Joint holding—By one tenant—Deed stamped and registered as conveyance—Effect. See LANDLORD AND TENANT, No. 66, 32 Ind. Cas. 232.

Survey.

(Of maps) as evidence of title, value of. See ACT XXIII OF 1863 (WASTE LANDS), No. 1, 14 A.L.J. 1205 (P.C.).

Surveys and Boundaries Act.

See MAD ACT XXVIII OF 1860.

Survival of Trust.

To co-trustees—Instrument of trust vesting management of temple in five trustees—Suit by four and death of one of them pending appeal—Effect. See TRUST ACT, No. 6, 32 Ind. Cas. 97.

Survivorship.

(1) Two persons acquiring jointly ex-proprietary rights—One dying without heirs—Succession by. See U.P. ACT II OF 1901 (AGRA TENANCY), No. 16, 31 Ind. Cas. 864.

(2) In regard to property inherited collaterally. See HINDU LAW (JOINT FAMILY), No. 30, 32 Ind. Cas. 291.

Syndicate

(1) Senate and the functions of—Reg. LXIV, if *ultra vires* of the Senate—Power of Senate to impose veto of Government on matters reserved for itself by Statute. See ACT VIII OF 1904 (UNIVERSITY), No. 1, 31 M.L.J. 634.

(2) See SPECIFIC RELIEF ACT, No. 46, 31 M.L.J. 634.

Tahsildar.

Reference to arbitration by—Award invalid. See U. P. ACT III OF 1901 (LAND REVENUE), No. 3-b, 32 Ind. Cas. 573.

Talab-i-Ishtishad.

Pre-emption—Mohammedan Law—Performance of talabs—Not unnecessary. See MAHOMEDAN LAW—PRE-EMPTION, No. 3, 14 A.L.J. 4141.

Talabs.

Pre-emption—Mohammadan Law—Performance of — Talab-i-ishtishad not unnecessary. See **MAHOMEDAN LAW—PRE-EMPTION**, No. 3, 14 A.L.J. 1141.

Talukdar.

(1) See **ADVERSE POSSESSION**, No. 8-a, 36 Ind. Cas. 725.

(2) Suit by—Plea of under proprietary right—Adverse possession—Decision of Revenue Court. See **BURDEN OF PROOF**, No. 6-c, 32 Ind. Cas. 376.

(3) **Primogeniture—Presumption of custom as to non-talukdari property arising from inclusion of estate in list 2.** See **MUHAMMADAN LAW—INHERITANCE**, No. 1, 20 M.L.T. 362.

(4) Position of hathrakhidar, and tarraddakhkar. See **WASTE LANDS**, No. 1, 36 Ind. Cas. 634 = 2 P.R. 1917.

Talukdars (Guzerat) Act.

See **BOM. ACT VI OF 1888**.

Tankbed Land.

If can be leased for cultivation. See **REGISTRATION ACT (1908)**, No. 8, 35 Ind. Cas. 108.

Tank Land.

Acquisition of right of occupancy—Continuous occupation for twelve years. See **U. P. ACT II OF 1901 (AGRA TENANCY)**, No. 1, 31 Ind. Cas. 458.

Tarraddakhkar.

(1) Mere cultivation by, of shamilat—No objection—No estoppel. See **SHAMILAT**, No. 2, 36 Ind. Cas. 601 = 3 P.R. 1917.

(2) Position of hathrakhidar, taluqdar and, See **WASTE LANDS**, No. 1, 36 Ind. Cas. 634 = 2 P.R. 1917.

Tarwad.

(1) **Malabar Law—Partition, right to—Karar—Family arrangement—Junior members, when bound by acts of Karuavan—Minor member, right of, to impeach karar.** See **MALABAR LAW (PARTITION)**, No. 1, 31 M.L.J. 879.

(2) **Muhammadans following Marumakkatayam Law—Custom of affiliation of strangers to.** See **MUHAMMADANS**, No. 1, 31 Ind. Cas. 385.

Taxation.

See **BEN. ACT V OF 1911 (CALCUTTA IMPROVEMENT)**, No. 1, 24 C.L.J. 246.

Tax (Income) Act.

See **ACT II OF 1886**.

Temple.

(1) Caste or section of caste, whether can own. See **CIV. PRO. CODE (1908)**, No. 165, 4 L.W. 228.

(2) Public and private—Scheme suit. See **CIV. PRO. CODE (1908)**, No. 165, 4 L.W. 228.

(3) Application for temporary injunction restraining plaintiffs from preventing defendants entering and worshipping certain temples

Temple—(Concluded).

—Not maintainable. See **CIV. PRO. CODE (1908)**, No. 627, 1 Pat. L.J. 560.

(4) And its lands originally subject to the Devasthanam Committee of one taluq—Lands assigned to another taluq in another district—Revenue redistribution—The Committee to appoint Darmakartha of such temple is the former committee. See **RELIGIOUS ENDOWMENTS**, No. 3, 31 M.L.J. 360.

(5) Survival of trust to co-trustees—Instrument of trust vesting management of, in five trustees—Suit by four and death of one of them pending appeal—Effect. See **TRUSTS ACT**, No. 6, 32 Ind. Cas. 97.

(6) Money borrowed by trustee of, without consulting Court trustee—Money spent for benefit of temple—Enforcement of debt against trust fund. See **TRUSTEES**, No. 2, 30 Ind. Cas. 778.

(7) See **TRUSTEES**, No. 1, 35 Ind. Cas. 204.

Temple Committee.

(1) Suit for declaration of supervisorship and for production and inspection of accounts—Limitation—Limitation Act, Arts. 120, 124, 131 and 144—Right to declaration of control lost—Right to production of accounts. See **RELIGIOUS ENDOWMENTS ACT (XX OF 1863)**, No. 1, 4 L.W. 186.

(2) Devasthanam Committee—Alienation of offerings to the deity in favour of Archakas—Suit to declare the invalidity of the alienation—Suit against Committee and Archakas by two worshippers—Trustee not a party—No sanction of the Court or Advocate-General—Maintainability. See **RELIGIOUS ENDOWMENTS ACT (XX OF 1863)**, No. 6, 31 M.L.J. 777.

(3) Suit by two out of three members of a Committee—Bad for non-joinder of parties. See **RELIGIOUS ENDOWMENTS ACT (XX OF 1863)**, No. 3, 1 Pat. L.J. 437.

Temple Properties.

See **MALABAR LAW—ALIENATION**, No. 1, (1916) 2 M.W.N. 312.

Temple Trustees.

(1) Right to exclusively conduct a Mandapapadi, if of a Civil nature—Competency of, to grant such exclusive right. See **CIV. PRO. CODE (1908)**, No. 11, (1916) 2 M.W.N. 327.

(2) See **EVIDENCE ACT**, No. 84, 4 L.W. 611.

Temporary Injunction.

(1) Application for, restraining plaintiffs from preventing defendants entering and worshipping certain temples—Not maintainable. See **CIV. PRO. CODE (1908)**, No. 627, 1 Pat. L.J. 560.

Tenancy.

(1) Determination of question as to nature of—Admissions as to non-existence of certain right—Estoppel. See **U.P. ACT III OF 1901 (LAND REVENUE)**, No. 18, 30 Ind. Cas. 207.

(2) Presumption of monthly. See **TRANSFER OF PROPERTY ACT**, No. 135, 9 Bur. L.T. 80.

Tenancy Act.

See BEN. ACT VIII OF 1885.
See C. P. ACT X OF 1859.
See C. P. ACT IX OF 1883.
See C. P. ACT XI OF 1898.
See U. P. ACT II OF 1901.
See PUN. ACT XVI OF 1887.

Tenancy Amendment Act.

See BEN. ACT III OF 1898.
See BEN. ACT I OF 1907.

Tenancy (Chota Nagpur) Act.

See BEN. ACT VI OF 1908.

Tenancy (Validation and Amendment) Act.

See BEN. ACT I OF 1903.

Tenant.

(1) Suit for rent by, against trespasser treating him as sub-tenant, maintainability of—Tenant and sub-tenant, nature of their relationship. See OUDH ACT XXII OF 1886 (RENT), No. 40, 19 O.C. 370.

(2) Judi, payment of—Liability of, to pay customary rent to Inamdar. See INAM, No. 4, 18 Bom. L.R. 950.

Tenant-at-will.

Tenant-at-will, transferability of the rights of—Oudh Rent Act.

Held, that the rights of an ordinary tenant in Oudh are non-transferable. *Tika v. Sheo Narain*, 19 O.C. 117=34 Ind. Cas. 426.

STUART, A J.C.

Tenants' Improvements, Compensation for (Malabar) Act.

See MAD. ACT I OF 1900.

Tenants-in-common.

(1) See LEASE, No. 7, 39 M. 1049.

Tender.

(1) *Tender of lease at prevailing rate—Refusal of valid tender by tenant—Ejectment, liability to.*

A *kabuliat* contained a provision that on the expiry of the term, the under-ryot would possess the land on taking a fresh settlement at the rate prevailing for surrounding lands: *Held*, that the only question in the case was, whether the tender made by the landlord was the tender of a lease at the prevailing rate and that if it was, and the under-ryot had refused a valid tender, then he was liable to ejectment. *Rasul Gazi v. Abdul Jalil Khan*, 33 Ind. Cas. 450.

NEWBOULD, J.

References.—16 C.W.N. 618; 16 C.W.N. 620 (N), R.

(2) *Mortgagor and mortgagee—Tender—Payment into Court—Withdrawal of petition—Running of interest—Transfer of Property Act*, S. 83. *Yenkateswarudu v. Bala Tripurasundari*, (1915) M.W.N. 763=30 Ind. Cas. 769. See Final Part, 1915, Col. 1276.

(3) Sale of goods—Vendor's duty to afford facilities for analysis, drawing samples, etc.—

Tender—(Concluded).

Tender—Proper time. See CONTRACT ACT, No. 39, 9 S.L.R. 160.

(4) Of payment without interest of instalments overdue. See INSTALMENT BOND, No. 1, 31 Ind. Cas. 304.

(5) Of amount due on the mortgage—What constitutes tender—Cessation of interest—Account for gross receipts. See MORTGAGE—REDEMPTION, No. 16, 9 Bur. L.T. 117.

(6) Bill of Exchange—Acceptance of the bill—On due date, the acceptor claiming set off of amounts owing to him by the bank—Of the balance—Release of the drawer by such tender. See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), No. 1, 18 Bom L.R. 689.

(7) Of money on the last day of payment in the Court, application made for permission to make payment—Money tendered though not deposited on that date through mistake of Court or its officers—Next day holiday—Payment made on the next first opening day of the Court, whether such a payment within time and sufficient compliance with the terms of the decree. See PRE-EMPTION, No. 12, 123 P.W.R. 1916.

(8) And deposit, difference between. See TRANSFER OF PROPERTY ACT, No. 117, 31 M. L.J. 548.

(9) Validity of—Effect of. See TRANSFER OF PROPERTY ACT, No. 113, 34 Ind. Cas. 690.

(10) Mortgage—No. of amount—Right to interest. See TRUST ACT, No. 6, 32 Ind. Cas. 97.

Testamentary Capacity.

(1) Will—Testator suffering from plague at the time of execution—Mental incapacity. See HINDU LAW (ADOPTION) No. 12, 123 P.R. 1916.

Thak Maps.

Of 1853 if to be presumed as unreliable—Value of, as evidence. See BEN. ACT XI OF 1859 (REVENUE SALE LAW), No. 6, 20 C.W.N. 1048.

Thavanal Account.

Suit for money on—Custom of Natukottai Chetties Fixing of rate of interest. See LIMITATION ACT (1905), No. 130, 36 Ind. Cas. 497.

Thekadar.

(1) *Thika taken by a cultivating raiyat—Converting into tenure-holder—Merger—Bengal Tenancy Act (VIII of 1885), S. 22—Liability to eviction after expiry of the period of thika—Construction of lease.*

A *thikadar* is liable to eviction after the expiry of the period of his lease, even though it is found that he was a cultivating raiyat with respect to the lands of which he took the *thika* prior to it. His interests as a raiyat became merged into the rights he acquired under the lease. *Mr. Mannars v. Satroghau Dass*, 20 C.W.N. 800=36 Ind. Cas. 178.

SHARFUDDIN and ROE, JJ.

Thekadar—(Concluded).

(2) See BEN. ACT VIII OF 1885, No. 9, 35 Ind. Cas. 622.

(3) Position of. See OUDH ACT XXII OF 1886 (RENT), No. 8, 34 Ind. Cas. 861.

(4) Renewal of lease by—Thekadar's powers, absence of definite restriction on—Onus of proof on landlord. See LEASE, No. 15, 33 Ind. Cas. 203.

Thirmalligais.

Whether private properties or trust properties. See HINDU LAW (GUARDIANSHIP), No. 2, 30 M.L.J. 504.

Time.

(1) Question of granting time—Discretion of Court—Duty of party applying for time—Delay in filing process fee—Effect. See ADJOURNMENT, No. 1, 1 Pat. L.J. 173.

(2) Contract of sale—Suit for specific performance—Time fixed for payment of price—Appeal—Decree of first Court confirmed—Subsequent application to appellate Court to extend time for payment of price—Power of appellate Court. See CIV. PRO. CODE (1908), No. 294, 3 L.W. 29.

(3) Contract—As of the essence of contract—Construction—Consent decree. See CONTRACT, No. 14, 18 Bom. L.R. 803.

(4) Time when essence of the contract—Sale—Immoveable property. See CONTRACT, No. 12, 9 S.L.R. 137.

(5) Ss. 62, 63, Contract Act—Agreement to give time—Validity. See LIMITATION ACT (1908), No. 149, 3 L.W. 38.

(6) When time may be deemed to be of the essence of the contract. See SALE, No. 4, 30 M.L.J. 186.

Time Essence of Contract.

Courts of Equity—Time, stipulation as to—Jurisdiction, exercise of—Vendor and purchaser. See VENDOR AND PURCHASER, No. 3, 33 Ind. Cas. 323 (P.C.).

Time, Extension of.

Bengal Tenancy Act (VIII of 1885), S. 155—Tenancy continues how long. See EXECUTION OF DECREE, No. 18, 24 C.L.J. 523.

Title.

(1) Pleadings—Burden of proof—Duty of plaintiff to establish title set up by him.

Where, in a suit for injunction, the plaintiff set up his title as owner of a piece of land, but failed to establish ownership, and it appeared that he was only a non-proprietor in the village and was in possession of a portion of the land as a tenant of the defendants on payment of the customary rate:

Held, that, having failed to establish title set up by him, his suit must be dismissed. *Kidar Nath v. Hari Singh*, 75 P.L.R. 1916—36 Ind. Cas. 55.

SHAH DIN, J.

Title—(Continued).

(2) A suit for rent is not a suit for determination of title to immoveable property. *K. P. Mahomed Ebrahim v. K. E. Mahomed*, 9 Bur. L.T. 110—35 Ind. Cas. 337.

U KIN, J.

(3) *Execution and registration of lease deed—Passing of title—Intention of parties.*

The execution and registration of a document are not always sufficient to pass title. It is a matter of the intention of the parties. Where it was found that there was no payment of consideration, no delivery of possession and no delivery of the document, the fact that the document was executed and registered, did not make the transaction complete so as to effect the transfer of title. *Nilmoni Behara v. Rukuna Bewa*, 30 Ind. Cas. 210.

D. CHATTERJEE and MULLICK, JJ.

Reference:—27 C. 7, R

(4) *Suit for possession—Plea of jus tertii by defendant—Statement of such third person disclaiming title—Effect of such disclaimer on plaintiff's right.*

In a suit for possession the defendant contended that the suit property belonged to a third person and not to the plaintiff. The said third party was examined by the plaintiff on his side and he disclaimed, as plaintiff's witness, all rights in the suit property. Held that the mere fact that the third party stated in his evidence that he made no claim to the property did not necessarily vest the title to the property in the plaintiff. A mere declaration on the part of such third person, that he did not want the property could not operate as a conveyance of the property to the plaintiff, in the absence of some act within the law having the effect of transferring the estate to the plaintiff. *Tilak Ram v. Sita Ram*, 30 Ind. Cas. 503.

LINDSAY, J.C.

(5) Survey (of maps) as evidence of, value of. See ACT XXIII OF 1863 (WASTE LANDS), No. 1, 14 A.L.J. 1205 (P.C.).

(6) Setting up title by the defendant in himself, whether involves a question of, in land between parties having conflicting claims thereto. See BEN. ACT VIII OF 1885 (TENANCY), No. 67, 20 C.W.N. 1352.

(7) Setting aside sale—Nature of interest entitling exercise of right—Proof of title. See BEN. ACT VI OF 1903 (CHOTA NAGPUR TENANT), No. 5-d, 36 Ind. Cas. 829.

(8) Vacant site—Possession follows—Burden of proof. See ADVERSE POSSESSION, No. 3, 116 P.W.R. 1916.

(9) See ADVERSE POSSESSION, No. 5, 19 O. C. 374.

(10) Amendment setting up different, and cause of action if permissible. See AMENDMENT OF PLAINT, No. 1, 30 Ind. Cas. 391.

(11) Attachment—Claim—Evidence of possession not adduced—Decision on. See CIV. PRO. CODE (1908), No. 478, 32 Ind. Cas. 34.

(12) Previous suit for rent—Small Cause nature—Question of, incidentally determined—Later suit for title—Previous determination,

Title—(Concluded).

whether bars trial of the issue in later suit—*No res judicata*. See CIV. PRO. CODE (1908), No. 21, 34 Ind. Cas. 123.

(13) Suit for declaration of right to easement—Conversion of suit with one for declaration of, not allowed. See CIV. PRO. CODE (1908), No. 356, 34 Ind. Cas. 541.

(14) Title to land if 'passes' by admission. See CONTRACT, No. 2, 23 C.L.J. 26.

(15) Delivery order in sale of goods—Goods in existence and ascertained—Document of. See CONTRACT ACT, No. 101, 36 Ind. Cas. 593.

(16) No action for damages on future loss of possession—Loss of title, substantial loss. See INDEMNITY BOND, No. 1, 20 M.L.T. 263.

(17) Adjudication of validity of title deed—Jurisdiction. See JURISDICTION OF CIVIL COURTS, No. 2, 19 O.C. 58.

(18) Island arising in the sea within territorial limits—Title in Crown—Crown opposed by squatters—Crown if must prove that squatters had not acquired, by adverse possession—*Onus*. See LIMITATION ACT (1908), No. 269, 31 M.L.J. 324.

(19) Use of, not authorised—Necessity to take notice of such conduct. See PLEADER, No. 4, 30 Ind. Cas. 517.

(20) Presumption of possession following title when arises—Evidence unworthy of credit on both sides—Effect—Art. 142, Limitation Act (1908). See POSSESSION, No. 5, 1 Pat L.J. 146.

(21) See PROBATE PROCEEDINGS, No. 1, 35 Ind. Cas. 416.

(22) Sale—Proof of title—Non-production of registered deed—Oral evidence if admissible—Vendor's admission—Effect. See SALE, No. 5, 29 C.L.J. 122.

Title-deeds.

Whether include copies where originals are lost. See MORTGAGE—EQUITABLE, No. 1, 31 P.R. 1916.

Tort.

(1) *Suit for damages for injuries caused by animal—Negligence to be proved.*

In a suit for damages for injury caused by the defendant's animal it is for the plaintiff to prove that the damage done to him was caused by the defendant's negligence (a).

In deciding whether the defendant was negligent or not his knowledge or want of knowledge that his animal was of a vicious disposition is an important point.

Where the animal that does the injury is a domestic animal, the burden of proving negligence lies in the first place on the plaintiff. It might be otherwise if the injury were caused by a tiger or a bear. *Ngwe Ya v. Shwe Ye*, 8 L.B.R. 388.

TWOMEY, J.

Reference:—(a) 2 U.B.R. (1907—1901) 570, F.

Tort—(Concluded).

(2) *Suit against Secretary of State—Liability when arises—Test of Sovereign act or private act done by the Government. The Secretary of State v. A. Cookerall*, (1915) M.W.N. 39=27 Ind. Cas. 723=39 M. 351. See Final Part, 1915, Col. 1278.

(3) *Defamation—Act committed outside British India—Jurisdiction of British Indian Courts—Liability when arises—Publication if requires communication to more persons than one—Law applicable to torts in India—Superior officer, direction of, when available as plea—Absolute privilege if available to servants of independent sovereign, acting under his orders and in the course of their official duties—Ss. 19, 20, Civ. Pro. Code (1908). *Govinda Nair v. Achutha Menon*, 2 L.W. 290=28 M.L.J. 310=28 Ind. Cas. 394=39 M. 433. See Final Part, 1915, Col. 1279.*

(4) *Hypothecation of land with trees—Trees sold by mortgagor to third parties and cut and carried away by the purchasers—Remedy against purchasers—Limitation. See LIMITATION ACT (1908), No. 115, 3 L.W. 341.*

Towns and Village Lands (Lower Burma).

See BUR. ACT IV of 1898.

Trade Marks.

(1) *Injunction restraining use of particular marks—Similarity of get-up—Existence of reasonable probability of deception—Proper test for granting injunction.*

Where a trade mark is alleged to have been infringed and the help of the Court is invoked to prevent the continuance of the infringement the Court will not strain its jurisdiction to protect fools and idiots. On the other hand it will not require such minuteness of imitation as to deceive persons of unusual sagacity and information.

The proper test is whether the get-up of the defendant's goods is likely to deceive a purchaser who is acquainted with the plaintiff's get-up, but trusts to his memory. It is to be assumed that the purchaser will look fairly at the goods without distinguishing features being concealed, and the Court must also have regard to the class of purchasers by whom the goods would normally be brought. Some similarity in parts of the "get-up" is not sufficient to justify an injunction (a).

The test is whether an ordinary purchaser purchasing with ordinary caution is likely to be misled, that is to say, whether there is a reasonable probability of deception. *Byramjee Cowasjee v. Vera Somabhai Motibhai*, 36 Ind. Cas. 965.

FOX, C.J., and TWOMEY, J.

References:—(a) (1911) 2 Ch. 572=81 L.J. Ch. 16=28 T.L.R. 65=29 R.P.O. 81, R.

(2) *Proof of actual deception of any person—Misdescription of place of manufacture—'Cologes' water. *Balladin & Alladin firm v. Suranmul Balbehari Lall*, 8 Bur. L.T. 113=30 Ind. Cas. 633. See Final Part, 1915, Col. 1280.*

Trade-names.

Numbers affixed to pieces of cloth by manufacturers—Goods ordered out by middlemen from manufacturers by numbers alone—The use of numbers as applied to the cloth protected—Actual deception of purchasers not necessary to be proved.

The plaintiffs manufactured, in their Mill at Nagpur, a certain quality of black twill cloth, which they put on the market in 1904. Each piece of such cloth was marked with No. 2051/10; it bore also a device of a serpent surrounded by a scroll containing the name of the Mill. It was by the designation of the number that the constituents of up-country middlemen were in the habit of ordering the plaintiffs' goods. In July 1913, the defendants began to manufacture black twill cloth in their Mills on Bombay, and put it on the market. They also affixed the No. 2051/10 on every piece of their cloth. It had a label representing the image of the Sun; and a white label indicating in the English, Gujarati and Urdu languages the places where it was manufactured and where it could be purchased. The plaintiffs having sued to restrain the defendants by injunction from passing off their goods as plaintiffs' and to recover damages, the trial Court passed decrees for injunction and damages. On appeal by the defendants:

Held, (1) that the plaintiffs were entitled to claim an exclusive right to the user of No. 2051/10 when applied to black twill cloth, for the particular mark was an invariable indication of the cloth of the plaintiffs' manufacture (a).

(2) That the relief granted was justified, for, though no actual deception had been proved, it appeared that the defendants were putting into the hands of up-country middlemen a means whereby ultimate purchasers were likely to be defrauded (b). *The Madhavji Dharamsey Manufacturing Co., Ltd. v. The Central India Spinning, Weaving and Manufacturing Co., Ltd.*, 18 Bom. L.R. 206 = 41 B. 49 = 34 Ind. Cas. 529.

SCOTT, C.J., and HEATON, J.

References:—(a) 24 C. 364, D. (b) (1880) 18 Oh. D. 395, 442; (1887) 36 Ch. D. 1, F.

Trading Family.

See EVIDENCE, No. 6, 32 Ind. Cas. 380.

Trading with Enemy.

(1) *Contract becoming illegal after it is made—Effect of accepting bill of exchange.*

Accepting a bill of exchange drawn against goods coming from Germany and payment of their price after the proclamation forbidding any trade in such goods are acts of trading in connection with them.

If after a contract is made it becomes illegal to carry it out, it cannot be enforced (a). *S.K. R. Cama & Co. v. K. K. Shah*, 9 Bur. L.T. 99 = 33 Ind. Cas. 96;

FOX, C.J.

References:—28 Ind. Cas. 433; 17 Bom. L. R. 249; 40 B. 11, F.

Trading with Enemy—(Continued).

(2) *German, secular agent of Basel Mission—Lease by, of land in British India—Whether he can sue for rent—Limitation on alien enemy's right of suit.*

On a declaration of war the citizens or subjects of the belligerents become enemies of each other and political status determines the question of enemy ownership (a).

On a declaration of war the Sovereign has in theory full right to take the persons and confiscate the tangible property of the enemy found within his territory; this right however is said to be a naked and impolitic right condemned by the enlightened conscience and judgment of modern times, and (b) in practice is not likely to be resorted to except in case of public necessity or by way of reprisal; but a declaration of war *per se* does not import a confiscation of enemy property found on land or on the high seas (c).

During war all commercial intercourse and trading between enemies is illegal unless sanctioned by the authority of the Government. Persons in enemy country whatever their nationality are treated as enemies as far as relates to their trade. Their commercial domicile during war or the war domicile determines their enemy character (d).

From this it follows that enemy subjects resident in British Territory who are permitted to remain there are not alien enemies, and can contract like subjects; whether such permission should be express or may be implied by a person being allowed to remain is a point on which there appears to be some diversity of opinion; but the weight of authority appears to favour the view at any rate in the case of aliens who were residing in British Territory before the outbreak of war, who continue to remain after such outbreak, that permission should be presumed, unless they are ordered to remove themselves within a certain time and they do not (e).

The prohibition as regards intercourse between hostile aliens is, on the best authority, confined only to commercial intercourse and does not render illegal all contracts whatever be their nature (f).

The prohibition extended only to intercourse between citizens of the two belligerents which was inconsistent with the state of war between them including any act or contract which tends to increase his resources, and every kind of trading or commercial dealing, but it did not prevent an agreement made in enemy territory to pay money there out of funds accruing there (g).

When a creditor although a subject of the enemy remains in the country of the debtor or has a known agent there, authorised to receive the amount of the debt during war, payment there to such creditor or his agent can in no respect be construed as a violation of the duties imposed by the war (h).

This was a suit to recover rent. The plea was that the lease was granted by and the covenant to pay rent entered into with an alien enemy and that the covenant was therefore

Trading with Enemy—(Concluded).

void and unenforceable. The land leased was in South Canara in British Territory and belonged to the Basel Evangelical Mission. The lease was granted by a German, the then secular Agent of the Mission after war was declared, to the defendant, a British subject. The suit to recover rent was instituted by the present secular Agent of the Mission to whom enemy character was not attributed. Enemy character was also not attributed to the Basel Mission. Held that the suit for rent under the above circumstances was maintainable. **Wuthrik v. David**, 31 M.L.J. 860 = 5 L.W. 275 = (1917) M.W.N. 73.

SRINIVASA AIYANGAR, J.

References:—(a) (1902) A.C. 484 at pp. 493, 494; (1900) 176 U.S.R. 568 at p. 571, *F.* (b) (1867) 6 Wal. 532 at p. 536, *F.* (c) 8 Oranoh. 110, *F.* (d) (1902) A.C. 484 at p. 499, *F.* (e) (1697) 1 Salk. 46; *Ld. Raym.* 282; (1794) 2 Anstruther, 462 = 145 E.R. 936; (1902) A.C. 484; (1869) 100 Mass. 561; 97 Am. Dec. 124; (1916) 1 K.B. 284 at p. 292, *F.* (f) (1869) 100 Mass. 561; 97 Am. Dec. 124, *F.* (g) (1869) 100 Mass. 561; 97 Am. Dec. 124, *F.* (h) (1902) A.C. 484; (1817) 7 Taunt. 439; 8 Wal. 186 at p. 195, *R.*

Transferability.

Lease of land for residential purposes—*Onus* to prove transferability—Presumption of, if arises from long continued possession. See **LANDLORD AND TENANT**, No. 26, 20 C.W.N. 1113.

Transfer of Civil Cases.

(1) See **CIV. PRO. CODE** (1908), No. 72, 35 Ind. Cas. 296.

(2) **Jurisdiction—Transfer of proceedings—Mesne profits excluding pecuniary jurisdiction of Court decreeing suit.**

Proceedings which are without jurisdiction are not proceedings which can be transferred by a superior Court either under the old Civil Procedure Code or the new. **Hiramath Dasaya v. Annanda Prasad**, 32 Ind. Cas. 788. **HOLMWOOD** and **IMAM**, JJ.

References:—37 C. 574; 15 C.W.N. 506, *F.*; 21 C. 550, *Not F.*

Transfer of Decree.

(1) Application by transferee under Civ. Pro Code, O. XXI, r. 16—Nature thereof.—Order on such application—Appeal—Whether lis. See **CIV. PRO. CODE** (1908), No. 100, 33 Ind. Cas. 71.

(2) Decree—Execution—Assignment *benami* for one of the judgment-debtors—Executability of decree—Adjustment See **CIV. PRO. CODE** (1908), No. 426, 4 L.W. 534.

(3) Practice—Execution of decree—By unrecognized transferee. See **EXECUTION OF DECREE**, No. 31, 33 Ind. Cas. 558.

(4) Decree for possession and mesne profits—Assignment of decree with respect to mesne profits. See **MESNE PROFITS**, No. 1, 1 Pat. L.J. 427.

Transfer of Holding.

How far can the acts of the Patwagi be binding on the master. See **PATWARI**, No. 1, 1 Pat.L.J. 414.

Transfer of License.

See **LICENSE**, No. 1, 14 A.L.J. 1035.

Transfer of Property.

Transfers of preliminary and final decrees for foreclosure to different persons—Substitution of names—Transfer of Property Act (IV of 1882), S. 41.

When there is a conflict between the transferees of a preliminary and a final decree of foreclosure on the same land, the transferee of the preliminary decree is entitled to have his name substituted in place of the decree-holder in preference to the subsequent transferee of the final decree. After a transfer of the preliminary decree the decree-holder has no interest or property in the decree, and the transferee cannot get more than the transferor's rights.

Transfer of a decree for foreclosure is not a transfer of land, and the transferee of a decree is not entitled to the benefit of the provisions of S. 41 of the Transfer of Property Act which apply only to transfers by ostensible owners of immoveable property. **K. E. Mahomed v. Ma O**, 9 Bur. L.T. 121 = 36 Ind. Cas. 426.

ORMOND and **TWOMEY**, JJ.

Transfer of Property Act.

(1) *Making of a transfer and proving a transfer, difference between—Sale of immovable property, how made—Proof and incidents of—Evidence Act, S. 91.*

The difference between the making of a transfer, and the proving of a transfer made, is not always appreciated. A registered deed of sale makes the transfer; it is not merely evidence of it. An unregistered deed of sale can never make a transfer, but, where it is not excluded from evidence by the Registration Act, it will always be evidence of a transfer made by any other legal method. When parties agree and execute a deed of sale the contract to sell is complete. If the sale is for more than one hundred rupees, the deed must be registered, otherwise no transfer ensues, and the Registration Act read with S. 91 of the Evidence Act will effectually prevent proof even of the contract to sell. But, if the sale is for less than one hundred rupees, then the deed is admissible in evidence to prove the contract; yet the sale will still be incomplete unless execution of the deed is followed either by registration thereof or by delivery of the property sold. A mere delivery of property does not of itself amount to a sale. It must be made in pursuance of a contract to sell, and the Transfer of Property Act merely uses it as a substitute for registration. The delivery is a publication of the transaction, and a symbol of its reality in lieu of registration; but, whether the delivery completes a sale or a mortgage, depends upon the contract in pursuance of which it is made. There is no law which prohibits the embodiment of a such a contract in a document, or which excludes such document from evidence

Transfer of Property Act—(Continued).

where the consideration is under one hundred rupees. *Dina Nath v. Manbodhi*, 12 N.L.R. 189=36 Ind. Cas. 547.

STANON, A.J.C.

(2) Whether question of "intention" with which a, has been made is one of law or fact. See ACT III of 1907 (PROVINCIAL INSOLVENCY), No. 4, 102 P.R. 1916.

(3) Permanent tenure created before—Transferability—Decree for rent against registered tenant—Sale of tenure in execution—Rights of prior purchaser. See LANDLORD AND TENANT, No. 56, 33 Ind. Cas. 502.

(4) See LEASE, No. 14, 34 Ind. Cas. 516.

(5) See MAHOMEDAN LAW (GIFT), No. 1, 31 M.L.J. 607.

(6) Validity of equitable mortgage in places where Transfer of Property Act does not obtain—Priority of such mortgage over subsequent registered mortgage with or without notice—S. 48, Registration Act (1877)—Applicability—Title-deeds whether include copies where originals are lost—Intention to keep alive prior mortgage—Presumption—Merger. See MORTGAGE (EQUITABLE), No. 1, 31 P.R. 1916.

(7) Mortgages in India before the—No writing required. See STAMP, No. 1, 18 Bom. L. R. 904.

(8) Ss. 2 (c), 58, 67—Mortgage executed before the Transfer of Property Act—Document not purporting to sell the property but containing covenant to relinquish all rights therein—Construction—Document whether mortgage by conditional sale—Law applicable—Remedies under the Transfer of Property Act, if available—Scope of S. 2 (c) of that Act—Suit for foreclosure—Limitation Act (1908), S. 31, Arts. 132, 135.

A mortgage document of the year 1879 did not purport to sell the mortgaged property, but provided "in default of payment of any instalment, the entire mortgaged property shall be relinquished as if I had sold it to you." Held that this document should be construed with reference to the law as it stood before the Transfer of Property Act, and the document must be deemed to be a mortgage by conditional sale (a).

Held also that the remedy given by S. 67, Transfer of Property Act can be availed of by the parties to the document.

The right to a relief arising from a certain relation existing between parties is a matter of adjective law, and consequently the parties are entitled, when a new remedy has been provided by a new Act at the time when the relation subsists, to take advantage of that remedy, in a Court of law (b).

If the right to sue is subsisting on the date of the new or amending Act, the remedy provided by it is available to the parties, though the new Act cannot be applied to take away any vested rights to relief existing under the repealed Act (c).

There is nothing in S. 2, cl. (c) of the Transfer of Property Act to disentitle the parties from seeking the relief given by that Act. *It

Transfer of Property Act—(Continued).

is a provision intended to preserve existing rights and not a disabling provision. That section appears to have been intended to preserve the earlier remedies if the parties chose to avail themselves of them and not to take away the remedy given under the Act.

Held further that the article of the Limitation Act applicable to a suit for foreclosure of the suit mortgage was not Art. 135, but Art. 132 read with S. 31 of the Limitation Act, and consequently the suit was not barred. *Bikkina Ramayya v. Adabala Seshayya*, 30 M.L.J. 338=34 Ind. Cas. 475.

COUTTS-TROTTER and SESHAGIRI AIYAR, JJ.

References:—(a) 38 M. 667; 18 M.L.T. 209; 13 M.I.A. 560; 2 I.A. 241, B. (b) 11 O. 582; 12 C. 583; 10 M. 129; 16 M. 64; 13 A. 432, Rel.; 6 A. 262; 33 A. 356; 37 B. 393, R.; 16 C. 693, D. (c) 36 M. 675; 35 A. 227; 41 C. 1125, R.

(9) Ss. 2 (c) and 108 (j)—Lease from year to year in existence from before 1882—Transferability—Custom—Onus—Sub-lease, transfer by way of—Landlord if may recover khas possession.

A lease of homestead land from year to year which was in existence before the passing of the Transfer of Property Act is not governed by that Act, and S. 108, cl. (j) of that Act does not make it transferable absolutely or by way of sub-lease.

Such leases are not transferable except by custom, the burden of proving which is on the party who sets it up.

Whether a tenant from year to year had power before the Transfer of Property Act to transfer the holding by way of sub-lease or not, where it appeared that the tenant had abandoned the lands without arranging for payment of rent, and no rent had been paid by him since the *ijara*, and that the transaction was in substance though not in form an assignment.

Held—that the landlord was entitled to recover khas possession of the land. *Ananda Mohan Saha v. Govinda Chandra Ray Choudhury*, 20 C.W.N. 322=33 Ind. Cas. 565.

N.R. CHATTERJEE and MULLICK, JJ.

(10) Ss. 2 (d) 14, 40, 54—Agreement to convey land by gift to Sitambari Jain Society—Construction—Agreement whether void for remoteness—Hindu Law—Specific performance of the covenant whether can be granted—S. 22, Specific Relief Act. See AGREEMENT, No. 2, 1 Pat. L.J. 238.

(11) Ss. 3, 6 (e), 54, 123—Easement if immoveable property—Creation of easement if must be in writing registered. See EASEMENTS, No. 1, 20 C.W.N. 1158.

(12) Ss. 3, 40, 54—Circumstances under which a person is said to have notice under S. 3. See KANOM, No. 1, (1916) 2 M.W.N. 31.

(13) Ss. 3 and 78. See MORTGAGE (GENERAL), No. 29, 43 C. 1052.

(14) Ss. 3, 117—Abandonment—Whether sufficient to extinguish rights of lessee's transferee. See BEN. ACT VIII OF 1855 (TENANCY), No. 43, 33 Ind. Cas. 98.

Transfer of Property Act—(Continued).

(15) Ss. 4, 137. See CONTRACT ACT, No. 106, 20 C.W.N. 1182.

(15-a) S. 5. See No. 21, *infra*.

(16) S. 6—*Rent—Assignment—Debt—Simple mortgage and subsequent lease of the hypotheca to mortgagee—Mesne profit.*

The rent is undoubtedly a debt and it is included in the definition of the term "choses-in-action" and consequently there can be no objection to its assignment. The definition of the term "mesne profits" presupposes that the person liable to pay it, is a trespasser and consequently it being a claim in tort, is not assignable under S. 6 of the Transfer of Property Act (a).

A simple mortgage and a subsequent lease of the same property in favour of the same mortgagee with a direction to apply the rent payable under the lease towards the interest due under the mortgage must be deemed to be independent of each other and the simple mortgage could be held to be converted into a usufructuary mortgage on the execution of the lease (b). *Chidambaram Pillai v Doraisami Chetty*, 31 Ind. Cas. 473.

SESHAGIRI AIYAR, J.

References:—(a) 38 M. 308, D. (b) 6 Ind. Cas. 336, F.

(17) S. 6—*Lease from year to year—Legality of transfer.*

A lease from year to year is heritable and transferable under S. 6, Transfer of Property Act, unless there is anything to the contrary in the contract. *Bandhu Lall Munshi v. Sreemathy Lagin*, 36 Ind. Cas. 1006.

CHATTERJEE and NEWBOULD, JJ.

(18) S. 6—*Executory contract to convey land—Assignment—Validity*—'Mere right to sue,' what is—Transfer of Property Act whether exhaustive of the topic of assignability. See CONTRACT, No. 9, 3 L.W. 435.

(18-a) S. 5. See No. 11, *supra* and 62, *infra*.

(19) S. 6 (a)—*Hindu temple, offerings to—Pujari's right to a share if alienable—Estoppel—Res extra commercium.* *Puncha Thakur v. Bindeshri Thakur*, 19 C.W.N. 580—28 Ind. Cas. 675—43 C. 28. See Final Part, 1915, Col. 1282.

(20) S. 6.(a)—*Relinquishment of reversionary right, whether valid—Family arrangement.* *Barati Lal v. Salik Ram*, 13 A.L.J. 1141—38 A. 107—31 Ind. Cas. 919. See Final Part, 1915 Col. 1282.

(21) Ss. 6 (a), 5—*Contract by reversioners to sell estate to plaintiff when it should devolve upon them—Validity—Specific performance*—S. 23, *Contract Act.* *Lakshmi Narayana Jagannadha Raju v. Balasuraya Prasad Rao* 17 M.L.T. 419—(1915) M.W.N. 626—29 Ind. Cas. 241—39 M. 554. See Final Part, 1915, Col. 1283.

(22) S. 6 (c) and S. 54—*Easements—Distinction between creation of an easement and transfer of an easement—Registration.*

The creation of an easement is not a transfer of ownership of land within the meaning of S. 54 of the Transfer of Property Act and it must be in writing.

Transfer of Property Act—(Continued).

A right of way can be created by a verbal agreement. There is a difference in this respect between the transfer of a pre-existing easement and the creation of a new easement (a). *Gum Bone v. Cassim Datta*, 9 Bur. L.T. 222.

U KIN, J.

Reference:—(a) 31 A. 612, F.

(23) S. 6 (d) and (h)—*Right to receive future maintenance whether alienable.* See CIV. PRO. CODE (1908), No. 137, 30 M.L.J. 361.

(24) S. 6 (e). See MESNE PROFITS, No. 1, 1 Pat. S.J. 427.

(25) Ss. 6 (h), 54—*Sale deed in minor's favour—Contract Act, 1872, S. 11.*

S. 6 (h) of the Transfer of Property Act does not state that a transfer cannot be made to a minor. Nowhere in that Act is it provided that a minor is incapable of being a transferee of property. So a sale-deed of a house executed in favour of a minor being a valid transaction the minor can sue for possession of the same after the transaction is complete. *Munni Koer v. Madan Gopal*, 31 Ind. Cas. 792.

RICHARDS, C.J., and RAFIQUE, J.

References:—30 C. 539 (P.C.); 33 M. 312; 33 A. 657, R.

(26) Ss. 6, 116—*Holding over—Claim for use and occupation—Transferability—Assent to tenant's continuance if inferable from passive failure to eject—Intention to hold adversely if necessarily follows holding over.* See LANDLORD AND TENANT, No. 10, 3 L.W. 408.

(27) S. 8—*Tree reserved by the lessor—Lessor if can cultivate shellac on the trees.* See LEASE, No. 5, 24 C.L.J. 21.

(28) S. 8. See MAHOMEDAN LAW-WAKF, No. 10, 32 Ind. Cas. 205.

(29) S. 10, 108 (j), 111 (g)—*Stipulation against sub-letting—Whether a covenant or a condition—Breach of stipulation—Remedy—Damages.* See LEASE, No. 2, 1 Pat. L.J. 1.

(29-a) S. 14. See No. 10, *supra*.

(30) S. 37—*Rent, apportionment of—Patnidar agreeing to pay into the Collectorate the amount of revenue payable by the landlords on their account—Suit for apportionment by some of the co-sharer landlords.*

Where in consideration of a patni tenure granted by the landlords, the patnidar had undertaken to pay year by year into the Collectorate a certain sum to be credited to the Government revenue payable by the landlords, the yearly sum is one payable in consideration of the patnidar's use and occupation of the land, and though payable into the hands of the Collector is agreed to be paid on account and to the credit of the landlords and therefore it is rent paid to the landlords and it can be apportioned as between the several landlords. *Gour Gopal Sinha v. Goura Behari Pramanick*, 34 Ind. 409.

TEUNON and CHOWDHURI, JJ.

References:—1 C.L.R. 459; 5 C. 902; 27 O. 479, F.; 33 C. 140 (P.C.), D.

(31) S. 40. See TRUSTS ACT, No. 14, 3 L.W. 457.

(31-a) S. 40. See Nos. 10, 12, *supra*.

Transfer of Property Act—(Continued).

(32) S. 41—*Exercise of right under section—Necessity of previous enquiry as to alienor's power—Alienee—Good faith.*

Before a person can, rely upon S. 41 of the Transfer of Property Act to support his title he must show that he took reasonable care to ascertain that the alienor had power to make the transfer and that he the alienee has acted in good faith. *Rahimah Beebi v. Khathoon Bee*, 4 L.W. 193=35 Ind. Cas. 569.

AYLING and NAPIER, JJ.

(33) S. 41—*Court auction purchase—Knowledges that the property did not belong to the judgment-debtor.*

Though S. 41 of the Transfer of Property Act does not directly apply in favour of a Court auction-purchaser (the Transfer of Property Act dealing only with transfers by acts of parties) the principle of that section applies in favour of a Court auction-purchaser. Where the purchaser knew that the property did not belong to the judgment-debtor as his private property there is no basis for the application of S. 41. *Nara Prath Kummali Kandungo Kurup v. Paramboli Kandi Thavazhayil Ayavatan Krishna Kurup*, 34 Ind. Cas. 494.

SADASIVA AIYAR and MOORE, JJ.

Reference:—17 C.L.J. 209, F.

(34) S. 41—*Transfer by ostensible owner—Consent of real owner—Purchaser for value in good faith—Reasonable care.*

Where a property is registered in the Revenue Records in the name of a person with the express consent of the real owner and it is also proved that the real owner took an active part in bringing about a transfer of the property by the person in whose name it was registered.

Held that a bona fide purchaser for consideration who purchased the properties after satisfying himself by enquiries that the property was registered in the name of his vendor with the express consent of the real owner is protected by S. 41 of the Transfer of Property Act and that his sale cannot be avoided by the real owner. *Ram Samraj Pande v. Ramjee*, 34 Ind. Cas. 773.

KENDALL, A.J.C.

(35) S. 41—*Husband's property sold by wife—Bona fide purchaser for value, "without notice"—His rights—"Without notice"—Significance of the expression—Husband's right to redemption, Niras Purbe v. Musat, Tetri Palla*, 20 C.W.N. 103=32 Ind. Cas. 82. See Final Part, 1915, Col. 1284.

(36) S. 41—*Real owner holding out another—Transfer by latter—Notice—Burden of proof, whether lies on the purchaser or owner—Benamidar having interest in property, if notice or shifts onus. See LIMITATION ACT (1908), No. 182, 4 L.W. 200.*

(37) S. 41—*Transfer by ostensible owner when binds real owner. See RES JUDICATA, No. 1, 20 C.W.N. 265.*

(38) S. 43—*Mortgage by person having no transferable interest in property mortgaged—Subsequent acquisition of transferable*

Transfer of Property Act—(Continued).

interest—Mortgagee's option—Rights of bona fide transferee—Second appeal—Points not raised in lower Courts, inadmissibility of.

A representing that he had a transferable interest in a property in which he had no such interest mortgaged it for good consideration to B. Subsequently A acquired a transferable interest therein, which after his death was transferred by his sons to C and D who had no notice of B's mortgage. In a suit brought by B to enforce the mortgage:

Held (i) that under S. 43 of the Transfer of Property Act the mortgage took effect on the interest acquired by A subsequent to the mortgage, (ii) but that under the last clause of that section the mortgage was subject to the rights of C and D, and that the plaintiff could not be allowed to urge in second appeal that he had exercised the option given by S. 43 before the transfer in favour of C and D, inasmuch as he had not urged that point in the lower Courts but had merely allowed the case to proceed on the assumption that the institution of the suit itself was to be regarded as the exercise of the option. *Beni Rai v. Natabar Sirkar*, 33 Ind. Cas. 975.

LANCELOT SANDERSON, C.J., and ASUTOSH MOOKERJEE, J.

(39) S. 43—*Applicability to transactions before 1872. See ESTOPPEL, No. 2, 23 C.L.J. 501.*

(40) S. 44—*Mortgage by two out of three brothers, members of joint Hindu family—Death of one executant—Suit against other executant and the non-executing brother only as representing the deceased executant—Ex parte decree and sale in execution and purchase by mortgagee—Non-executing brother's original share if passed by the sale—Decree for joint possession if can be made. See MORTGAGE (GENERAL), No. 8, 20 C.W.N. 676.*

(41) S. 44—*Hindu family—Alienee from coparcener whether entitled to joint possession—His position and rights. See HINDU LAW (ALIENATION), No. 13, 4 L.W. 99.*

(42) S. 52—*Mortgage by agent under power of attorney—Act done by agent fraudulently—Liability of principal—Burden of proving good faith—Right of mortgagee to lien on money deposited under decree for specific performance.*

Where a contract is entered into by an agent fraudulently in furtherance of the agent's own interest, and contrary to the interests of the principal, the latter is bound by the contract only, if the person dealing with the agent acts in good faith (a). The burden of proving good faith lies on those persons who enter into transaction with the agent.

Plaintiffs sued the defendants on a mortgage deed. The suit document was executed by the second defendant as the constituted attorney of the first defendant. The circumstances which led to the execution of the mortgage were as follows: A suit had been brought against the

Transfer of Property Act—(Continued).

first defendant to enforce the specific performance of a contract to sell the suit property. The first defendant engaged the second defendant to help her in the suit and executed a power of attorney in favour of the second defendant for that purpose. The first defendant pleaded that she executed the power of attorney in favour of the second defendant to serve the limited purpose of defending the suit against her and to free her from constant attendance in Court, and the power to mortgage contained in it was fraudulently written without her knowledge and consent. She further contended that the mortgage was not within the scope of the second defendant's authority and that the plaintiffs did not act in good faith but in collusion with the second defendant and therefore she was not liable to pay under the mortgage. It was found that the agreement between the first defendant and second defendant which resulted in the execution of the power of attorney was, that the second defendant should advance money for defending the suit which had been brought against her and that he should receive one-fourth of the property if the first defendant succeeded in the suit. The evidence further showed that there was fraud and misrepresentation by second defendant in the execution of the power of attorney and that the plaintiffs did not act in good faith in getting the mortgage from the second defendant as agent of the first defendant. *Held* that, as the circumstances showed that the second defendant had exceeded his authority and executed the mortgage deed for purpose not warranted by the power of attorney, the first defendant was not bound to pay the mortgage money. (b) *Held* also that the plaintiffs having acted in bad faith and in collusion with the second defendant, they were not entitled to recover the mortgage money from the first defendant. *Held* further that the plaintiffs were not entitled to any lien or charge on the sale prices due to the first defendant in the matter of the specific performance of the contract to sell, as the plaintiffs' mortgage was ineffectual under the provisions of S. 52, Transfer of Property Act. **Bhagwanji v. Ganga**, 36 Ind. Cas. 968.

FAWCETT, A.J.C.

References:—(a) (1904) 2 K.B. 10=73 L.J. K.B. 669=90 L.T. 803=52 W.R. 583=9 Com. Cas. 251=20 T.L.R. 398; (1895) A.C. 173=64 L.J. Ch. 433=11 W.R. 159=72 L.T. 477=43 W.R. 606=59 J.P. 676; (1893) A.C. 170=62 L.J.P.C. 68=1 R. 336=68 L.T. 546=41 W.R. 600, R. (b) 1893 A.C. 170=62 L.J.P.C. 68=1 R. 336=68 L.T. 546=41 W.R. 600; (1902) 1 Ch. 816=71 L.J. Ch. 363=86 L.T. 275=50 R. 371=18 T.L.R. 384, R.

(43) *Ss. 52 and 53—Sale of property as unencumbered—Liability of purchaser to redeem mortgage thereon.*

The purchaser of a property at a Court sale is bound to pay off any encumbrance thereon, though the sale did not make mention of it, and he cannot escape liability by the provisions

Transfer of Property Act—(Continued).

of Ss. 52 and 53, Transfer of Property Act or of S. 64, Civ. Pro. Code. **Gur Charan Prasad v. Mussammat Bachmi**, 80 Ind. Cas. 238.

STUART, A.J.C.

(44) *Ss. 52, 58—Lease by mortgagor after mortgage decreed but before sale, whether binds to auction-purchaser—Nature of mortgage-decree—Lis pendens.* See **SMALL CAUSE COURT, JURISDICTION OF**, No. 1, 20 M.L.T. 512.

(45) *S. 53—Transactions when to be deemed fraudulent and impeachable.*

In a case in which no consideration of the law of bankruptcy applies, there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid, although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts.

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid.

So a transfer made for adequate consideration, in satisfaction of genuine debts, and without reservation of any benefit to the debtor, cannot be impeached under S. 53, Transfer of Property Act. **Mussabur Sahu v. Lala Hakim Lal**, 30 M.L.J. 116=3 L.W. 207=20 C.W.N. 393=14 A.L.J. 198=19 M.L.T. 203=23 C.L.J. 406=19 Bom. L.R. 378=(1916) M.W.N. 198=32 Ind. Cas. 343=43 C. 531 (P.C.).

VISCOUNT HALDANE, LORD FARMOR, LORD WRENBURY, SIR JOHN EDGE and MR. AMEER ALI.

(46) *S. 53—Land granted by Deputy Commissioner transferred to another person with permission of Deputy Commissioner at a time when transferor was involved in debts—Transfer whether void.*

On 3rd March 1903, the Government made a grant of land to M. On 5th July 1907, M applied to the Deputy Commissioner for permission to transfer the land to his brother A, and on 2nd April 1908 the transfer was sanctioned. In March 1907, i.e., before M's application to the Deputy Commissioner, M was hopelessly involved in debt and for that reason applied for the transfer to his brother. Plaintiff sued M on a pro-note dated March 1907 and got a decree in August 1909. *Held* that M's right to transfer with permission was a valuable right which he exercised in favour of his brother without any consideration and at a time when he was unable to pay his debts of which the plaintiff's claim was one, and the presumption, therefore, under S. 53 of the Transfer of Property Act, was that the transfer was void as against the plaintiff. **Maung Maung v. S. G. Firm**, 8 L.B.R. 233=85 Ind. Cas. 448.

ORMOND, J.

(47) *S. 53—Transfer of Property—Intent to defeat creditor—Good consideration—Validity of transfer.*

Transfer of Property Act—(Continued).

A transfer of property would not be void under S. 53 of the Act, if made for good consideration, though it was intended to defeat a creditor thereby. *Maung Tun U y. Maung Po Thauung*, 36 Ind. Cas. 395.

ORMOND and TWOMEY, JJ.

Reference:—3 L.B.R. 188, R.

(48) S. 53—Declaratory suit by defeated claimant against attaching decree-holders—Plea that sale was fraudulent under S. 53—Validity—Scope of S. 53—Remedy of persons aggrieved—Representative action whether necessary—Difference between judgment-creditors and ordinary creditors—English and Indian Law. See CIV. PRO. CODE (1908), No. 485, 30 M.L.J. 665.

(49) S. 53—Transfer of whole estate by a debtor in favour of his first wife's children—Consideration—Permission to marry second wife—Transfer if in fraud of creditors. See HINDU LAW (GIFT); No. 1, 3 L.W. 287.

(50) S. 53—Release in favour of father and uncle—Property screened from creditor executing decree—Fraud carried out in material part—Effect—Suit to avoid the transfer by party to fraud—No relief. See FRAUDULENT TRANSFERS, No. 1, 9 S.L.R. 108.

(50-a) S. 53. See No. 43, *supra*.

(51) S. 53 (2)—*Gratuitous transfer—Presumption.*

Under S. 52 (2) of the Transfer of Property Act there is a presumption that every gratuitous transfer, and transfer for a grossly inadequate consideration is made with a fraudulent intent if the effect of the transfer is to delay or defeat the transferor's creditors, and the burden of proving that it is not fraudulent is on the party seeking to uphold it.

The only point for determination in a case to which clause (2) applies is whether the transfer has the effect of delaying or defeating creditors. *Ma Nyun v. Maung Ba Tha*, 9 Bur. L.T. 157 = 33 Ind. Cas. 945.

U KIN, J.

(52) S. 54—*Oral sale—Vendee already in possession of property sold—Delivery of possession—Possibility of.*

In the case of an oral sale, there can be such a delivery as is contemplated in S. 54 of the Transfer of Property Act, even if the vendee is already in possession, as tenant, provided that the vendor had by appropriate acts or declarations converted the position of the vendee as tenant into one as purchaser. *Thakurdas v. Sobhachand*, 12 N.L.R. 3 = 32 Ind. Cas. 233.

BATTEN, A.J.C.

Reference:—34 C. 207, *Considered*; 27 M. L.J. 497, *F.*

(53) S. 54—*Sale-deed of property in possession of tenants—Interest conveyed is 'reversion' in the property—Sale-deed should be registered.*

In 1909, R's widow sold a house for Rs. 50 by a sale-deed, which was not registered, to defendants who were R's tenants prior to 1909 and who were in possession of the house.

Transfer of Property Act—(Continued).

In 1910, the house was sold by the same vendor by a registered deed of sale to the plaintiff. The plaintiff having sued to recover possession of the house:

Held, that the plaintiff was entitled to succeed, because what was conveyed to the defendants being the reversion in the house, their sale-deed required registration under S. 54 of the Transfer of Property Act. *Bhaskar Gopal v. Padman Hira Chowdhari*, 18 Bom. L.R. 8 = 40 B. 313 = 33 Ind. Cas. 267.

BATCHELOR and HAYWARD, JJ.

(54) S. 54—*Transfer of immoveable property of less than Rs. 100 in value to mortgagees with possession on failure to pay off mortgage—Oral transfer—Delivery of possession, necessity of—Formal delivery.*

Where immoveable property of less than Rs. 100 in value was first mortgaged to A with possession, and then, on mortgagor's failure to pay up the mortgage amount, the latter on 5th March 1906 orally sold the property to A, and at the same time formally delivered possession by pointing out boundaries, by endorsing on the back of the mortgage bond the fact of the sale and by handing it over to A; and the mortgagor later on, on 6th June 1906, sold the property to B by a registered deed.

Held—that everything that could be done to deliver possession to give effect to the sale of 5th March 1906 was done, and the requirements of S. 54 of the Transfer of Property Act having thus been satisfied, title passed to A, and B's suit to recover the property from A must fail. *Sonal Chutia v. Sonaram Chutia*, 20 C.W.N. 195 = 34 Ind. Cas. 692.

JENKINS, C.J. and WOODROFFE, J.

Reference:—34 C. 207, D.

(55) S. 54—*Registration Act, Ss. 17 and 49—Unregistered sale-deed of land of less than Rs. 100 in value—Admissibility in evidence.*

An unregistered sale-deed of property of the value of less than Rs. 100 is admissible in evidence to prove a contract of sale as the document is optionally registrable under the Registration Act, and there is no provision of law which prohibits such a document from being admitted in evidence. S. 49 of the Registration Act deals only with documents required to be registered under S. 17. *Poomalal Udayan v. Karuppa Serval*, (1916) 2 M.W.N. 136 = 34 Ind. Cas. 921.

BAKEWELL and PHILLIPS, JJ.

Reference:—38 M. 1158, D.

(56) S. 54—*Sale of property—Delivery.*

For the purposes of S. 54 of the Transfer of Property Act, 1882, a vendor is competent to make an effectual delivery of the property sold to the purchaser, even though the latter may already have physical possession of it in some other capacity. *Dinanath v. Manbodhi*, 12 N.L.R. 139 = 36 Ind. Cas. 547.

STANYON, A.J.C.

Reference:—12 N.L.R. 3, F.

(57) S. 54—*Sale, non-registration of, effect of—Land worth more than Rs. 100—Contract*

Transfer of Property Act—(Continued).

to sell—Specific performance, suit for—Limitation Act (1908), Sch. 1, Art. 113.

A sale of land worth more than Rs. 100 without registration, as required by S. 54 of the Transfer of Property Act, is in law a mere contract to sell and does not of itself create an interest in or charge on the land contracted to be sold.

A suit for the specific performance of such a contract is governed by Art. 113 of the Limitation Act and can be brought within three years from the date of the purchaser's knowledge that the vendor refused to perform the contract when no specific date is fixed for the performance.

The Limitation Act, being one in which rights are rendered ineffective if not abrogated, must be read strictly. *Ma Shwe On v. Maung Kywet*, 9 Bur. L.T. 45=32 Ind. Cas. 536.

FOX, C.J.

(58) *S. 54—Limitation Act (IX of 1908), Sch. 1, Art. 113—Sale of immovable property—Absence of agreement for registered conveyance—Suit by vendee for execution of such conveyance—Maintainability—Limitation—Computation of time.*

In a case governed by the Transfer of Property Act, in order that a vendee of immovable property who has done his part of the contract may maintain a suit against the vendor for the execution of a registered conveyance, it is not necessary that the vendor should have agreed to execute such conveyance.

Once there is an agreement to sell immovable property and the vendee has done his part of the contract by paying the purchase-money, the vendor is bound to do everything necessary in order to complete the title of the vendee, and where S. 54 of the Transfer of Property Act applies, a complete title cannot be given except by a registered deed of conveyance.

Such suit is governed by Art. 113 of the Limitation Act, and where no date has been fixed for the performance of the agreement to sell, the period of 3 years under the article shall be computed from the date on which the plaintiff had notice that the performance was refused. *Mya Bwin v. Maung Kya Zan*, 33 Ind. Cas. 761.

MAUNG KIN, J.

(59) *S. 54—Widow's interests—Transfer of—Price over Rs. 100—Registration necessary.*

A transfer by a Hindu widow of her life interests in certain immovable properties to the reversioners for a price over Rs. 100 can only be made by a registered instrument (a) *Betireddi Somireddi v. Betireddi Tatayya*, 34 Ind. Cas. 748.

SADASIVA AIYAR and MOORE, JJ.

Reference:—(a) 37 M. 423, Rel.

(60) *S. 54—Sale of immovable property less than Rs. 100 in value—Sale-deed unregistered—Delivery of possession—Validity of sale* *Kathari Narasimha Raju v. Bhopati Raju Raghunadha Raju*, 2 L.W. 964=18 M.L.T. 371=(1915) M.W.N. 819=29 M.L.J. 721=31 Ind. Cas. 52. See Final Part, 1915, Col. 1290.

Transfer of Property Act—(Continued).

(61) *S. 54—Agreement by minor to sell—Void.* See MINOR, No. 7, 33 Ind. Cas. 132.

(61-a) *S. 54.* See Nos. 10, 11, 12, 22, 25, *supra* and 145, *infra*.

(62) *Ss. 54; 6 (c)—Easement—Right of way—Grant by parol—Validity—No registered instrument necessary—Effect of S. 54—What it contemplates.*

S. 54 of the Transfer of Property Act, 1882, contemplates the transfer of a pre-existing easement and not the creation of a new one (a). The creation of a right of easement by grant is not such a transfer of ownership as is contemplated by S. 54 of the Act (b).

A right of way can be created by a verbal agreement and without a registered instrument in accordance with S. 54 of the Transfer of Property Act. *Gun Sone v. Cassim Dalla*, 34 Ind. Cas. 95.

MAUNG KIN, J.

References:—(a) 3 Ind. Cas. 615=31 A. 612=6 A.L.J. 871. (b) 4 M.H.C. 98, Rel. on.

(63) *Ss. 54, 55—Mesne profits—Damages between date of contract and date of execution of sale-deed.*

On an agreement to convey properties a person is not entitled to possession or mesne profits as such before the date of the execution of the registered conveyance in his favour having regard to S. 54, para. (2) and S. 55, sub-S. (4), cl. (a) of the Transfer of Property Act. He will, however, be entitled to compensation for breach of the contract to convey, in addition to the execution of the conveyance. And such compensation will naturally be the value of the mesne profits which could have been obtained between the date when the breach of contract took place and the date when the conveyance was actually executed. Such claim is not strictly one for mesne profits. *Subbaroyar v. Kottaya Goundan*, (1916) M.W.N. 284=34 Ind. Cas. 737.

SADASIVA AIYAR and MOORE, JJ.

(64) *Ss. 54, 55—Contract of sale—Guardian purchasing property for minor—Suit by minor for possession of property—Maintainability.* See MINOR, No. 1, 14 A.L.J. 65.

(65) *Ss. 54, 55 (6) (b), 100—Charge and interest in property, meaning thereof.*

Where a person purchased certain immovable property valuing more than Rs. 100 without obtaining a registered deed and was in possession and the same property was attached as being that of the vendor by the latter's judgment-creditor.

Held, that the purchaser acquired no interest in the property—but a mere charge on that property to the extent of the amount paid by him as purchase-money. *Maung Pe Gyl v. P.N. Yellian Chetty*, 8 Bur. L.T. 268=33 Ind. Cas. 610.

YOUNG, J.

(66) *Ss. 54, 58—Definitions of sale and mortgage—Applicability to Punjab.* See MORTGAGE (GENERAL), No. 15, 51 P.W.R. 1946.

Transfer of Property Act—(Continued).

- (67) S. 55—Sale of immoveable property—Part-payment of purchase money—Possession, transfer of—Owner selling the property to another person under a registered deed of sale—Right of second purchaser under the deed as against the first purchaser in possession.

The defendant contracted to purchase some lands from the owner, paid to him a portion of the purchase money agreed upon, and went into possession of the lands. The owner then sold the same lands to the plaintiff who had notice of the contract of sale to the defendant, and executed a registered deed of sale. The plaintiff relying on the deed sued to recover possession of the lands from the defendant :

Held, that the plaintiff's suit for possession must fail, because he could not profit by his conveyance except to stand in the shoes of his vendor and receive the balance of the purchase-money due on payment of which he would have to convey to the defendant.

Quere :—28 B. 466, 29 M. 336 were rightly decided. **Gangaram Ganapati Bhopale v. Laxman Ganoba Shet**, 18 Bom. L.R. 455—40 B. 498.

SCOTT, C.J., and HEATON, J.
References :—28 B. 466 ; 29 M. 336, *Appr.*

- (68) S. 55. See VENDOR AND PURCHASER, No. 1, 31 M.L.J. 530.

(68-a) S. 55. See Nos. 63, 64, 65, *supra* and 145, *infra*.

- (69) S. 55, sub-Ss. (1) and (5)—Vendor and purchaser—Breach of contract—Agreement to sell—Covenant against incumbrance—Sale by auction without advertisement at place where property situate—Damages—Receipt for repayment of mortgage money—Registration whether necessary—Registration Act (XVI of 1909), S. 17.

Non-purchase by buyer within time specified cannot be justified on the ground that the vendor failed to offer title deeds for inspection.

The words 'on his request' in cl. (b), sub-S. (1), S. 55, Transfer of Property Act, make it the duty of seller to produce his documents of title for examination by the buyer only when the latter asks for them.

A receipt for repayment of mortgage amount stating that the mortgage deed is returned does not require registration.

Auction sale, on refusal by party who consented to buy, cannot be made without advertisement at place where property is situated. If the advertisement is not adequate, the buyer cannot be held liable in damages for the difference between the contract price and the inadequate price realised at such sale. **Maung Po Te v. Maung Shwe Ko**, 35 Ind. Cas. 373.

FOX, C.J., and TWOMEY, J.

References :—(a) 11 Bur. L.R. 267 ; 65 L.T. 706, R.

- (70) S. 55 (2)—Sale of immoveable property—Representation in the deed that the property was let on yearly tenancy—The tenancy turning out to be permanent—

Transfer of Property Act—(Continued).

Misrepresentation—Damages for broken contract or warranty.

Defendants Nos. 1 and 2 sold certain lands to the plaintiff. It was stated in the deed of sale that some of the lands had been given for cultivation to tenants under an oral agreement for one year on a Makta (rent) of Re. 5-12-0. On completion of the sale, the plaintiff found that the tenants were permanent tenants of the lands. The plaintiff thereupon sued to recover damages from the defendants on account of the misrepresentation in the sale-deed as to the nature of the tenancy :

Held, that there was a clear case of a broken contract or warranty for which the plaintiff was entitled to claim damages without rescinding the purchase. **Yashwanath Ganesh Joshi v. Bala Kaku Kapadi**, 18 Bom. L.R. 292—34 Ind. Cas. 147.

SCOTT, C.J., and BEAMAN, J.

- (71) S. 55 (2)—Sale of land—Partial disposition—Suit for loss—One for failure of consideration and not breach of covenant for title—Limitation. See LIMITATION ACT (1908), No. 170, 19 M.L.T. 163.

(71-a) S. 55 (2)—Interest which seller 'professed' to sell—Euction by superior landlord—Liability of vendor.

If the interest which the seller "professed" to transfer was not larger than what he actually possessed, then the covenant mentioned in cl. (2) of S. 55 is not broken. The seller is not liable for any breach of covenant for title if the buyer is evicted by a superior landlord. **Yataka Chathillegath v. Ramaswamy Pattar**, 32 Ind. Cas. 984.

SADASIVA AIYAR and MOORE, JJ.

References :—15 M.L.T. 240 ; 38 M. 1171, D.

- (72) S. 55 (4)—Portion of purchase-money left with vendee to pay off vendor's creditor—Money not paid—Unpaid vendor's lien—Whether enforceable against transferee from vendee for consideration without notice of lien

The seller's charge as provided for in S. 55 (4) of the Transfer of Property Act cannot be enforced against subsequent transferees for value without notice.

Plaintiffs sold some property to G.D. G.D. paid a portion of the consideration to plaintiffs and the balance was left with him to pay off a simple contract debt of plaintiffs. Subsequently G.D. sold the property to K, and K again sold it to two others. None of these persons paid the creditor who brought a suit and realised the debt from plaintiffs. Plaintiffs brought a suit against all these transferees to recover from the property sold what they had to pay, as unpaid vendor's lien :

Held, that the plaintiffs were not entitled to enforce this charge against subsequent transferees for value without notice. **Guru Dyal Singh v. Karam Singh**, 14 A.L.J. 304—38 A. 254—35 Ind. Cas. 289.

RICHARDS, C.J., and RAFIQ, J.

Reference :—31 C. 57, D.

Transfer of Property Act—(Continued).

- (79) S. 55 (f) (b)—*Purchaser of land—Stranger in possession at the time of purchase—Notice of latter's title—No registered conveyance—Delivery of possession—Charge on the property for money paid—Interest or lien—Whether created by such delivery.*

Where the defendants were in possession of the land which the plaintiffs purchased, the plaintiffs must be held to have had notice of the title, if any, under which the defendants had possession of the land.

If the defendants had paid off money on account of the vendors and in consequence they were put in possession on the understanding that the vendors had to give them a registered deed of sale, then they had, under S. 55 (6) (b) of the Transfer of Property Act, a charge on the property for the amount paid as purchase money plus interest at 6 per cent. from the time of the contract of purchase (a).

A contract of sale followed by delivery of possession does not, when there is no registered sale, create any interest in the property agreed to be sold and cannot, even if enforceable at date of suit or decree, be pleaded in defence to an action for ejectment by one having a legal title to recover (b). Perhaps, the purchaser in such a case has a right to sue for specific performance within the proper time.

Delivery of possession does not, like part payment, create a lien or interest in the property (c). **Maung Bo v. Maung Tun Byu**, 33 Ind. Cas. 121.

MAUNG KIN, J.

References:—(a) 28 B. 466, F. (b) 29 M. 336, R. (c) 24 M. 377, R.

- (74) S. 55 (6). See MORTGAGE—REDEMPTION, No. 17, 9 Bur. L.T. 114.

(75) Ss. 55 and 58—*Mortgage-debt—Transfer—Implied covenant for title—Damages, suit for—Cause of action when arises.* **Samu Pattan v. Chidambara Odayan**, 2 L.W. 918=29 M. L.J. 454=(1916) M.W.N. 7=31 Ind. Cas. 179. See Final Part, 1915, Col. 1292

(76) S. 58—*Mortgage of land in favor of agriculturist who undertakes to pay debt due from an agriculturist to a non-agriculturist—Consideration.* See PUNJAB ACT XIII OF 1900 (ALIENATION OF LAND), No. 1, 114 P.W.R. 1916.

(77) S. 58—*Executory contract to convey land—Right thereunder if can be mortgaged—Document recognizing the ownership of a person other than mortgagor if can be treated as mortgage.* See CONTRACT, No. 9, 3 L.W. 435.

(77-a) S. 58. See Nos. 8, 66 and 75, *supra*.

(78) S. 58 (a) and (b). See MORTGAGE (GENERAL), No. 32, 1 Pat. L.J. 569.

- (79) S. 58 (c)—*Mortgage by conditional sale—Option to purchase—Registration—Amendment of plaint.*

The test for determining whether a document is a mortgage or a sale is whether the relation of creditor and debtor subsists between the

Transfer of Property Act—(Continued).

parties after execution of the document. If it does, the document is a mortgage (a).

An option to purchase is not an interest in land, and a document creating an option to purchase does not require registration under S. 17 of the Registration Act.

Where in a suit to redeem a mortgage it is found that the document sued on is not a deed of mortgage but a sale-deed the plaintiff ought to be allowed to amend his plaint so as to convert the suit for redemption into one for specific performance of an agreement to re-sell because the relief sought is in effect the same, the facts are the same, and the plaintiff is only asking the relief which is applicable to the facts stated in the plaint. **Ma Shwe U v. Maung Po Lu**, 9 Bur. L.T. 177.

ORMOND and TWOMEY, JJ.

Reference:—(a) 5 Bur. L.T. 99, F.

- (80) S. 58 (c)—*Deed—Construction—Sale or mortgage—Sale with condition of re-purchase.* See SALE, No. 9, 18 Bom. L.R. 250.

(81) S. 59—*Due attestation—Attestation by witnesses who did not see the execution insufficient—Simple mortgage—Simple money decree—Amendment adding prayer for a money decree—Debt contracted by father—Suit against sons—Hindu Law—Plea that the debt was for immoral purposes—Plea to be investigated in the suit itself and not to be left to be determined in execution.*

Where the mortgage deed was not executed by the mortgagor in the presence of the attesting witnesses there is no proper attestation of the deed as required by law (S. 59 of the Transfer of Property Act). Where a simple mortgage deed fails for want of proper attestation to take effect as a mortgage deed it can be treated as a bond and being a registered deed the lender is entitled to a simple money decree, the period of limitation for the suit being six years. Even at a late stage the plaintiff can be allowed to amend the plaint by adding a new prayer for a simple money decree.

In a suit upon the document against the sons of a Hindu who executed the document where the sons raise a plea that the debt was contracted for immoral purposes and that they were in no way liable to satisfy the debt in question, the matter should be determined before any decree is passed and it is not proper to pass a decree leaving the question to be determined in execution. **Chaudhuri Mahadeo Prasad v. Gajraj Singh**, 34 Ind. Cas. 397.

LINDSAY, J.C., and KANHAIYA LAL, A.J.C.

Reference:—35 M. 607 (P.C.), F.

- (82) S. 59—*Letter accompanying deposit of title-deeds, giving a personal remedy to the mortgagee, if simple mortgage requiring to be stamped and registered as such—Registration Act, Ss. 17, cl. (b) and 49—Instrument declaring interest in immovable property—What is—Stamp Act, S. 26, Sch. I, Arts. 5, 6 and 40—Evidence Act, S. 92.*

Transfer of Property Act—(Continued).

Along with a deposit of title-deeds to cover certain liabilities which might be incurred in the course of business a letter was given which recited: "I hereby give you full authority to make use of this property in any manner you think best and pay yourself up all these amounts, and if there should be any balance still left unpaid, you shall be at liberty to proceed on me personally and on the rest of my properties to recoup any short balances." The letter was neither stamped nor registered.

Held, that the letter was not a mere recital of an equitable mortgage, but contained all the elements of a simple mortgage and was therefore inadmissible in evidence for want of both stamp and registration.

It is the deposit of title-deeds that constitutes the equitable mortgage and a letter or writing, which simply contains evidence of the transaction cannot be said to create or declare any right or interest in immoveable property within the meaning of S. 17, cl. (b) of the Registration Act (a).

Seshagiri Iyer, J.—The document does not fall under Art. 6. of Sch. I to the Stamp Act as it does not secure any amount, and Art. 40 of the same Schedule does not apply as the instrument by itself does not create an equitable mortgage.

S. 26 of the Stamp Act does not refer to admissibility of documents but only deals with the quantum interest allowable in a suit when the document is sued on and admitted in evidence.

In order to bring an instrument containing declaration of a right to or interest in immoveable property within the provisions of S. 17, the declaration must, by its own force, have the legal consequences contemplated by the parties and should not simply be a statement of what has happened (b).

The letter not evidencing an equitable mortgage or its terms, S. 92 of the Evidence Act would be no bar to the reception of independent oral evidence to establish an equitable mortgage. *P. M. A. Muthiah Chetty v. P. V. Kothandaramaswami Naidu*, 31 M.L.J. 347 = (1916) 2 M.W.N. 221 = 4 L.W. 472 = 35 Ind. Cas. 864.

ABDUR RAHIM, O.C.J. and SESHAGIRI IYER, J.

References.—(a) 11 B.L.R. 405; 13 C. 322, F. (b) (1916) 1 M.W.N. 443, F.

(83) S. 59—*Mortgage-bond—Attestation—Person subscribing as scribe if attesting witness.*

Per Chamier, C.J.—To be an attesting witness within the meaning of S. 59 of the Transfer of Property Act, the witness must not only have seen the execution of the document but should have also subscribed as a witness (a).

Where a person who subscribed a mortgage bond as scribe was proved to have been present when the document was executed and the lower appellate Court upon this and other evidence found that he had seen the document executed and held that he was an attesting witness within the meaning of S. 59 of the Transfer of Property Act:

Transfer of Property Act—(Continued).

Held, per *Chamier, C.J.*—That, although on the finding he must be held to have seen the mortgage-bond executed, the scribe was not an attesting witness as he did not subscribe as a witness.

Per Jwala Prasad, J.—That, in the absence of evidence showing that he had witnessed the execution, it could not be presumed that he had.

A scribe of a deed who has witnessed the execution may sign the deed because he has done so, and yet describe himself as a scribe. *Ram Bahadur Singh v. Ajodhya Singh*, 20 C.W.N. 699 = 1 Pat. L.J. 129 = 34 Ind. Cas. 370

CHAMIER, C.J., and JWALA PRASAD, J.

References.—(a) 39 I.A. 218 = 35 M. 607 = 16 C.W.N. 1009, *Rel. on*; 5 C.W.N. 454; 7 C.W.N. 160; 35 A. 254, R.

(84) S. 59—*Attestation—Witnesses not present at actual execution—Admission of execution by mortgagor.*

Held, that a document which was not executed in the manner prescribed by S. 59 of the Transfer of Property Act, that is, the marginal witnesses not having seen the mortgagor sign it, did not operate as a mortgage, notwithstanding that the mortgagor did not deny the execution thereof. *Radhe Shyam v. Chunni*, 14 A.L.J. 361 = 35 Ind. Cas. 192.

RICHARDS, C.J., and RAFIQ, J.

Reference.—35 M. 607, F.

(85) S. 59—*Attestation—Scribe writing the name of a person as a marginal witness—No proof of authority to sign—Validity of mortgage—Charge.*

A document purporting to be a deed of mortgage bore the signature of one attesting witness; and the name of another person was written in the margin by the scribe but there was no signature or mark made by this second person. In a suit brought upon the document it appeared that the man was dead; and there was nothing to show that he had authorized the scribe to sign for him.

Held, that the document was not duly attested by two witnesses within the meaning of S. 59 of the Transfer of Property Act, and that it could neither operate as a valid mortgage nor create a charge. *Param Hans v. Randhir Singh*, 14 A.L.J. 673 = 38 A. 461 = 35 Ind. Cas. 748.

WALSH and SUNDER LAL, JJ.

(86) S. 59. See CIV. PRO. CODE (1903), No. 612, 8 L.B.R. 450.

(87) S. 59. See MALABAR LAW (ALIENATION), No. 1, (1916) 2 M.W.N. 312.

(88) S. 59. See EVIDENCE ACT, No. 40, 14 A.L.J. 1041.

(88-a) S. 59. See No. 128, *infra*.

(89) Ss. 59, 67, 100—*Mortgage, not validly executed, if creates a charge—Personal liability to repay if to be implied from fact that document mentioned advance of money.*

Held, on the construction of a document which purported to be a usufructuary mortgage but was not enforceable as such by reason of its

Transfer of Property Act—(Continued).

not being attested as required by S. 59 of the Transfer of Property Act, that the mortgagor did not intend that he should be personally liable to repay the advance, and the Trial Court and the High Court erred in assuming, from the mention in the document that a certain sum had been advanced, that it might be inferred that it was the intention of the parties that the mortgagor should be personally liable.

That the document did not create a charge within the meaning of S. 100, Transfer of Property Act. **Maharaja Ram Narayan Singh v. Adhinder Nath Mukhorji**, 20 C.W.N. 989 = (1916) M.W.N. 428 = 4 L.W. 15 = 31 M.L.J. 251 = 18 Bom. L.R. 862 = 20 M.L.T. 216 = 14 A.L.J. 1017 = 25 C.L.J. 115 = 34 Ind. Cas. 900.

LORD SHAW, LORD SUMNER, SIR JOHN EDGE and MR. AMEER ALI.

(90) Ss. 59, 100—Mortgage by insolvent within two years of his adjudication—Burden of proving good faith and consideration—Mortgage invalid under S. 59, if operates as a charge under S. 100. See ACT III of 1907 (PROVINCIAL INSOLVENCY), No. 42, 31 M.L.J. 133.

(91) S. 60, *Exception—Release by mortgagee of portion of claim—Right to proceed against other mortgagors—Effect of execution of fresh mortgage by released mortgagor.*

Apart from the exception to S. 60, Transfer of Property Act, it is open to a mortgagee to abandon part of his claim releasing one of the mortgagors and to sue to recover their proportionate share of the mortgage money from the other mortgagors (a).

But the mortgagee cannot affect the release so as to increase the burden on the other mortgagors. Subject to this restriction the mortgagee can release any portion of the claim and it is immaterial whether he releases gratuitously or otherwise (b).

The fact that the mortgagee obtained a fresh mortgage from the released mortgagor on the same security does not infringe the right of the mortgagee to sue the other mortgagors, but the mortgagee must make the released mortgagor also a party to a suit upon the mortgage as against the other mortgagors. **Basanta Kumar Sarvagya v. Jogendra Nath Dutta**, 36 Ind. Cas. 530.

NEWHOULD, J.

References:—(a) 30 C. 755 = 7 C.W.N. 723; 2 C.L.J. 202; 33 C. 613 = 10 C.W.N. 551 = 3 C.L.J. 576; 11 C.W.N. 403 = 5 C.L.J. 316; 12 C.W.N. 911, F.; 2 A. 906, D.; 28 A. 174 = 2 A.L.J. 630; A.W.N. (1905) 244, R. (b) 6 C.L.J. 46, R.

(92) S. 62—*Pre-emption decree obtained by prior mortgagees against subsequent mortgagees on ground of a subsequent mortgage being sale—Prior mortgagees' suit against mortgagor personally for recovery of mortgage money not maintainable.*

A suit by a prior mortgagee, after getting a pre-emption decree against a subsequent mortgagee on the ground of subsequent mortgage being a sale, against the mortgagor personally for recovery of his mortgage money, cannot be maintained since the effect of the pre-emption

Transfer of Property Act—(Continued).

decree was to merge the two rights of the mortgagor and the mortgagees in one and the same person, the prior mortgagee. **Arjun Prasad v. Lallu Singh**, 35 Ind. Cas. 845.

KANHAIYA LAL, A.J.O.

Reference:—21 Ind. Cas. 69, R.

(93) S. 65, cl. (c)—*Equity of redemption—Acquisition by prescription—Duty to pay taxes—Revenue sale—Property acquired by fraud—Suit for recovery, when lies.*

The person who acquires the equity of redemption by prescription is not under a duty to pay the taxes under S. 65 (c) of the Transfer of Property Act.

Where, therefore, such a person allowed the property to be sold for arrears of revenue and got it purchased by a third person *benami* for him.

Held, the mortgagee who had purchased the property in execution of the mortgage-decree cannot recover possession on the ground that the purchase in the revenue sale was fraudulent.

The true owner of property cannot recover possession of it from the person who has acquired it by fraud on the mere ground that fraud has been used in its acquisition, unless there is fiduciary relationship between the parties or the person defrauding is under a duty to speak or has joint interest with the person defrauded. **Punugu Subbiah v. Nukulapati Rami Reddi**, 19 M.L.T. 210 = (1916) M.W.N. 289 = 30 M.L.J. 331 = 39 M. 959 = 33 Ind. Cas. 326.

SESHAGIRI AIYAR and KUMARASWAMI SASTRI, JJ.

(94) S. 66. See LIMITATION ACT (1908), No. 115, 3 L.W. 341.

(95) S. 67—*'Contract to the contrary'—Suit by mortgagee for interest—Principal not becoming due—Maintainability.*

Where a mortgage document provided for the payment of interest every month and for enhanced interest on default.

Held that there was a 'contract to the contrary' within the meaning of S. 67 of the Transfer of Property Act and that a suit for interest was maintainable even before the principal money became due (a).

A mortgagee cannot sue for interest before the principal amount becomes payable, if there is an absolute covenant prohibiting him from so suing. **Subbiah Chetty v. Kuppammal**, 3 L.W. 587 = (1916) 2 M.W.N. 86 = 31 M.L.J. 437 = 35 Ind. Cas. 104.

SESHAGIRI AIYAR and NAPIER, JJ.

Reference:—(a) 14 M. 477, D.

(96) S. 67. See MORTGAGE (GENERAL), No. 11, 8 Bur. L.T. 261.

(36-a) S. 67. See Nos. 8 and 89, *supra*.

(97) S. 64 (d)—*Severance of mortgage debt—Previous suit by co-mortgagee for his share of debt—Subsequent suit by other co-mortgagees for his share of debt not barred.* **Vijaya Bhushanammal v. Evalappa Mudaliar**, 85 Ind. Cas. 91 = 39 M. 17. See Final Part, 1915, Col. 1996.

(98) S. 68, cl. (a) and (b)—*Mortgage—Foreclosure only remedy mentioned in the deed—*

Transfer of Property Act—(Continued).

Produce of mortgaged property—No charge constituted over the same—Mortgagor not personally liable—Applicability of cl. (a) or cl. (b) of S. 68.

Where, so far as the mortgaged property is concerned, the only remedy mentioned in the deed as available to the mortgagees is foreclosure, the mere fact of the existence in the deed of a promise to pay at a fixed date does not make the provisions of S. 68 (a), Transfer of Property Act, applicable to the case and make the mortgagor personally liable (a).

Where the contract did not expressly provide for either delivery of the produce or payment of its value annually to the mortgagee, and where, by failing to deliver the produce annually, the mortgagors did not destroy anything which could be foreclosed under the Act, held, that, so far as the produce of the land was concerned, no mortgage was created over it at all and that S. 68, cl. (b), did not apply (b). *Govind v. Jagannath*, 12 N.L.R. 19=33 Ind. Cas. 753.

DRAKE-BROCKMAN, J. C.

References:—(a) 10 C. 740; 16 C. 540; 4 M. 179; 22 A. 149 (169); 14 A. 513; 24 Ch. D. 511 (515); 10 C.P.L.R. 87, R. (b) 7 N.L.R. 72, R.

(99) Ss. 68, 100—*Charge—Applicability of obligations under S. 68 to charge holder—Mortgagor's heir—Whether liable for waste—Applicability of S. 68 to mortgagor's representatives or assignees. Ramakrishnama Chetty v. Yuvvatti Chengu Aiyar*, 27 M.L.J. 494=33 Ind. Cas. 921. See Final Part, 1914, Col. 1078.

(100) S. 72—*Improvement by mortgagee—Intention to add costs to mortgage money.*

S. 72, Transfer of Property Act, permits a mortgagee to spend such money as is necessary for the due management of the mortgaged property and the collection of the rents and profits thereof and for its preservation from destruction, but it does not permit a mortgagee to make improvements at the expense of the mortgagor with the object of deriving greater benefit during the period of his enjoyment from the mortgaged property, and to add the costs of the same to the mortgage money. *Jangli Ram v. Sheoraj Singh*, 30 Ind. Cas. 234.

STUART and KANHAIYA LAL, A.J.CS.

Reference:—19 M. 327, R.

(101) Ss. 72, 76 (3). See MORTGAGE (GENERAL), No. 33, 1 Pat. L.J. 589.

(102) S. 74. See MALABAR LAW—MORTGAGE, No. 1, (1916) 2 M.W.N. 358.

(103) Ss. 74 and 101—*Sale subject to prior charge—Payment of prior charge by purchaser—Extinguishment of lien.*

A person who purchased the right, title and interest of a mortgagor in certain property subject to a prior charge had a right on payment to extinguish the prior charge or to keep it alive, and in the absence of evidence to the contrary the presumption is that he intended to keep it alive for his benefit (a).

Where the purchaser of a property in execution of a simple money decree redeems the property from a prior mortgage upon it he does so

Transfer of Property Act—(Continued).

to protect the property purchased by him. As he is neither a subsequent nor a prior mortgagee the provisions of Ss. 74 and 101, Transfer of Property Act, will not apply. By agreeing to purchase the property burdened with the liens discharged by him the auction purchaser must be construed to have undertaken to pay the said liens, if they were proved to be valid and enforceable. In discharging one of the liens, notified in the proclamation of sale, when his duty was to discharge all of them, he cannot be allowed to set up his payment of one against his liability to discharge the others (b). *Lala Bhagwan Das v. Chaudhuri Ahmed Jan*, 36 Ind. Cas. 732.

STUART and KANHAIYA LAL, A.J.CS.

References:—(a) 10 C. 1035=11 I.A. 126=4 Sar. P.C.J. 543=8 Ind. Jur. 396=5 Ind. Dec. (N.S.) 692 (P.C.); 14 Ind. Cas. 496=39 C. 527=(1912) M.W.N. 357=11 M.L.T. 265=9 A.L.J. 332=14 Bom. L.R. 280=16 C.W.N. 505=15 C.L.J. 411=22 M.L.J. 468=39 I.A. 68 (P.C.), R.; (b) 7 Ind. Cas. 200=33 A. 101=7 A.L.J. 914; 6 Ind. Cas. 781=34 M. 119=20 M.L.J. 380=8 M.L.T. 132=(1910) M.W.N. 390, R.

(103-a) S. 76. See No. 101, *supra*.

(104) S. 76 (a)—*Usufructuary mortgage—Tenants let into possession by mortgagee—Redemption by mortgagor—Continuance of tenant's possession, if adverse to mortgagor—Limitation Act (1908), Art. 139—Adverse possession. Chinnappa Thevan v. Pazdanappa Pillai*, 2 L.W. 1132=18 M.L.T. 492=31 Ind. Cas. 630. See Final Part, 1915, Col. 1297.

(105) S. 76 (c). See TRUSTS ACT, No. 13, 18 Bom. L.R. 438.

(106) S. 76, cl. (b). See MORTGAGE (GENERAL), No. 31, 19 O.C. 328.

(107) Ss. 76 and 84. See MORTGAGE—REDEMPTION, No. 16, 9 Bur. L.T. 117.

(107-a) S. 78. See No. 13, *supra*.

(108) S. 81—*Right to marshalling.*

Abdur Rahim, J.—In order that a right to marshal may arise, the contending creditors must be creditors of one and the same person and must claim against the same property. Where the defendant had notice of the plaintiff's mortgage, when he obtained his security, that would be sufficient to bar his claim under S. 81 of the Transfer of Property Act.

Whether the Full Bench decision in 31 M. 419 applies also to a mortgagee from the purchaser?

Srinivasa Iyengar, J.—S. 81 of the Transfer of Property Act does not avail the mortgagees of purchasers as their right to marshal is in the right of their assignor who is the vendee of the original mortgagor. The right to marshal is a discretion in the Court which however is not a right of any particular party to direct the sale of any particular item if that would be sufficient to pay off the mortgage debt. It is a discretion which the Court is entitled to exercise at the time when final execution is ordered.

Transfer of Property Act—(Continued).

Ramaswamy Chetty v. The Madura Mill Co., Ltd., 1916) M.W.N. 265=34 Ind. Cas. 338.

ABDUR RAHIM and SRINIVASA IYENGAR, JJ.

(109) S. 81—Marshalling when available. See MORTGAGE (GENERAL), No. 21, 81 P.W. R. 1916.

(110) S. 82—Sale of portion of mortgaged property subsequent to mortgage—Liability of purchaser to contribute to mortgage debt.

Certain property including a house was pledged by the mortgagor. Subsequent to the mortgage defendant purchased half the house from the mortgagor. The mortgagor subsequently conveyed the equity of redemption in respect of all the mortgaged properties to the mortgagees. The mortgagees sued to enforce the mortgage by sale of the mortgaged properties. Held that, having regard to the terms of S. 82, Transfer of Property Act, it was improper to order sale without fixing the proportion of the mortgage debt chargeable on the house purchased by defendant. **Maharajah Ramnarain Singh v. Ram Kumar Lal Bhagat**, 1. Pat. L.J. 228=36 Ind. Cas. 208.

MULLICK and KINGSFORD, JJ.

Reference:—6 C.L.J. 612, F.

(111) S. 82—Mortgage—Contribution—Parties and valuation for ascertaining liability to contribution.

Where a suit is brought for contribution under S. 82 of the Transfer of Property Act, all the persons in whom the mortgaged property is vested should be made parties. It is only when such persons are properly before the Court that a proper decree finally settling all disputes can be made, and without their being before the Court the value of the different items of the property cannot be satisfactorily ascertained. In estimating the valuation of the different items of property, it ought to be as of the date of the mortgage, but if a purchaser produced evidence to show the valuation at the date of his purchase, it would lie upon the other party to show that the valuation at the date of the mortgage was different. **Shankarlal v. Latafat Ali**, 14 A.L.J. 713=35 Ind. Cas. 600

RICHARDS, C.J. and RAFIQ, J.

(112) S. 83—Interest after deposit, liability for—Duties of person entitled to the money—Failure to state clearly to whom money is to be paid, effect of.

Held, that a mortgagor is not liable to pay interest for the future after he has made a deposit in compliance with the terms of S. 83, Transfer of Property Act, and taken all the steps to pay the money to the person entitled to it.

Held, further, that if through the fault of the person or persons entitled to it, it is not clear exactly to whom the money is to be paid, the mortgagor cannot be deprived of the right conferred on him by the section on account of the omissions and errors of such persons. **Harihar Baksh Singh v. Sheo Singh**, 19 O.C. 145=36 Ind. Cas. 814.

STUART, J.C.

Transfer of Property Act—(Continued).

(113) S. 83—Tender—Validity of—Effect of—Mortgage suits—Costs, award of, principles regarding.

Under S. 83 of the Transfer of Property Act a mortgagor makes the tender at his own risk.

A mortgagee is not bound to accept anything less than the full amount that is owing to him, and he cannot be damaged by any mistake made by the mortgagor in making the tender. There is no *via media* in the matter; either a full tender is made in which case interest stops altogether or an inadequate tender is made which the mortgagee is at liberty to ignore and which will not affect his right to recover interest at the contract rate up to the date of the suit.

As a general rule, the mortgagee is entitled to his costs in suit for redemption or foreclosure unless he has been guilty of any misconduct; and the fact that the mortgagee claims more than is found owing to him is not *per se* any sufficient ground for depriving him of his costs. **Gauri Shankar v. Abu Jafar Khan**, 34 Ind. Cas. 690.

LINDSAY, J.C.

(114) S. 83—Amount due under the mortgage—Bond providing for payment of simple interest at a particular rate with a penal clause for payment of compound interest at an enhanced rate from date of default—Principal and compound interest at contract rate alone deposited—Penal interest not deposited—Amount tendered—Subsequently accepted by Court as sufficient—Tender, validity of—Mortgagor whether bound to tender full amount including penal rate of interest—*Mesne profits*. **Ayykutti Mankondan v. Periyaswami Kavandan**, 2 L.W. 585=18 M. L.T. 161=30 Ind. Cas. 497=39 M. 579. See Final Part, 1915, Col. 1300.

(115) S. 83—Value of improvements whether can be brought under the expression 'amount due on the mortgage' in S. 83. See MAD. ACT I OF 1900 (MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS), No. 1, (1916) M.W.N. 160.

(116) Ss. 83, 84—Mortgage—Deposit—Interest stops from what date—Deposit falling short by $4\frac{1}{2}$ pies—Effect—Fractions of day—Calculation of interest—Interest for day of deposit—Bona fide mistake in calculating the days for which interest payable—Effect.

S. 84 of the Transfer of Property Act requires the mortgagor only to do all that has to be done by him to enable the mortgagee to take the deposit amount out of Court, and when he pays batta for notice with the proper address of the mortgagee, he has done all that has to be done by him. Interest will cease to run thereafter. The deposit need not include the interest till the date on which defendant (mortgagee) gets notice of the deposit through Court (a).

Where there are conflicting rights as between subject and subject, a fraction of a day will be treated as a whole day, and the mortgagor is bound to pay interest for the day on which the deposit is made (b).

Transfer of Property Act—(Continued).

Where the deposit fell short of the sum due by 94 paise, owing to a *bona fide* mistake in calculating the number of days for which interest was payable, held, the deposit was not a proper deposit, and the mortgagor was not entitled to mesne profits (c). **Subbal Goundan v. Palani Goundan**, 30 M.L.J. 607=34 Ind. Cas. 825.

SADASIVA AIYAR and MOORH, JJ.

References:—(a) 35 M. 44, R. (b) (1875) 10 Q.B. 346; 9 C.W.N. 216, R. (c) 8 A. 502; 16 B. 141; (1847) 5 C.B. 365=16 L.J. Q.P. 237, R.

(117) S. 84—*Tender and deposit, difference between—Deposit of mortgage money in Court—Dispute among representatives of the mortgagee—Proper heirs not ascertained—Withdrawal of money before the persons entitled thereto are ascertained—No cessation of interest—Civ. Pro. Code, O. XXIV, r. 3—Deposit of money in Court after suit—Abatement of interest.*

The Legislature has drawn a distinction between the case of a tender and a deposit as to the date from which interest shall cease to run. A tender in order to be valid must be made to the person entitled to receive the money. But when only a deposit is made the mortgagor must do something more. He must do all that has to be done in order to enable the person entitled to the money to receive it.

Where the mortgagee, as in this case, is dead, and the mortgagor, not being sure as to who are the persons entitled to succession and thus unable to make a valid tender, deposit the money in Court, but withdraws it before the rightful heirs are ascertained, he cannot be said to have done all that he could do to enable them to receive the money. In such cases the mortgagor cannot claim the benefit of S. 84 of the Transfer of Property Act, for the money having been withdrawn before the persons entitled to it have established their right, it must be taken that so far as they are concerned the deposit has never been made. The deposit in order to be effective under S. 84 must remain in Court until the mortgagee or his successor in interest has been enabled or is in a position to draw it (a).

"There is no analogy between tender and deposit. When a debtor tenders money, he must do it only to the person legally entitled thereto. He takes the risk of deciding for himself whether the offer he is making is to the proper person; in the case of the person to whom the tender is made, the latter can have no claim for interest and can have no grievance if it is refused, as he had the option and right of claiming payment at once and had not availed himself of them. On the other hand, a deposit is ordinarily made when the debtor is in doubt as to who is the rightful claimant. He wants to absolve himself from future liability by leaving it to the Court to hand the money over to the true owner. Nobody may be in a position to apply for payment immediately as in the case of a tender. Consequently the money must be in deposit to be drawn out as soon as the legal rights of the parties are determined." Per **Seshagiri Aiyar, J.**

Transfer of Property Act—(Continued).

Where after the suit was instituted the mortgagor again deposited the amount in Court, in calculating interest from that date the amount deposited should be deducted from the principal, and interest allowed only on the balance. **Thevaraya Reddy v. Venkataschela Pandithan**, 31 M.L.J. 548=4 L.W. 433=(1916) 2 M.W.N. 321=20 M.L.T. 403.

ABDUR RAHIM, C.C.J., SESHAGIRI AIYAR and PHILLIPS, JJ.

Reference:—(a) 35 M. 44, R.

(117-a) S. 84. See Nos. 107 and 116, *supra*.

(118) S. 88.—Mortgage decree—Execution—Prayer for decree absolute absent in the application—Prayer for sale if implies prayer for making decree absolute. See LIMITATION ACT (1908), No. 285, 3 L.W. 469.

(118-a) S. 88. See No. 44, *supra*.

(119) Ss. 88, 89—Preliminary decree—Decree absolute for sale—First decree if not appealed from, cannot be attacked in appeal against the second—Second decree is in nature an application for execution—Civ. Pro. Code (1882), S. 244—Civ. Pro. Code (1908), Ss. 2, 97, O. XXXIV, rr. 1 and 5—Limitation Act (1877), Arts. 179, 180.

In a suit, brought in 1907, to recover the mortgage amount by sale of the property mortgaged, a preliminary decree was passed on 30th June 1913; and a final decree was passed on the 15th March 1914. The defendants, in appealing against the final order, substantially raised points against the decree of 1910 as well. The lower Court held that the correctness of the preliminary decree could not be disputed, under S. 97 of the Civ. Pro. Code, 1908. It was contended in appeal that the right of appeal accrued under the old Civ. Pro. Code, which was in force at the date of the suit:

Held, that, even under the old Code of Civil Procedure, the correctness of the decree, passed under S. 88 of the Transfer of Property Act, could not be questioned in an application for an order absolute under S. 89 or in an appeal from an order absolute made on such an application. **Murlidhar Narayan Gujarati v. Vishnuadas Balmukandas**, 18 Bom. L.R. 38=40 B. 321=33 Ind. Cas. 749.

SHAH and HAYWARD, JJ.

(119-a) S. 89. See No. 119, *supra*.

(120) S. 90. See MORTGAGE—USUFRUCTUARY, No. 5, 35 Ind. Cas. 43.

(121) S. 91—Mortgage when deemed to be extinguished—Mortgage transferred—Rights of transferee—Effect on right of redemption. See MORTGAGE (GENERAL), No. 5, U.B.R. (1915) 3rd Qr., 89.

(122) S. 91 (5)—Assignee of mortgagor's interest after the passing of decree conditional for foreclosure but before final decree—No right to redeem—Mortgage suit—Pendency till final decree—Assignee pendente lite—No party to proceedings for final decree—Binding nature of final decree.

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A person who has acquired the mortgagor's interest after decree conditional for foreclosure was passed, but before that decree was made final, is not a person entitled to redeem under S. 91 (b), Transfer of Property Act.

A mortgage suit is pending at any rate till a final decree is passed, even if not till sale takes place or possession is given (a).

An assignee *pendente lite* is bound by the final decree even if not made a party to the proceedings for obtaining that decree (b). **Digambar v. Ganpat**, 12 N.L.R. 50=33 Ind. Cas. 496.

DRAKE-BROCKMAN, J. C.

References:—(a) 23 A. 331, R. (b) 29 A. 76, R.

(123) S. 93—*Order for sale in Melkanomdar's suit—Jenmi's title, whether extinguished thereby—Mortgagor's right to obtain an order for sale in second mortgagee's suit—Actual sale, effect of—Res judicata—Prior suit by Melkanomdar, whether bars the Jenmi's suit.*

The Jenmi's (mortgagor's) title is not extinguished by an order for sale passed in a prior suit by the Melkanomdar (2nd mortgagee).

Synopsis.—An actual sale in the prior suit may extinguish the Jenmi's title. But a mortgagor defendant in the 2nd mortgagee's redemption suit cannot obtain an order for sale (a).

A mortgagor can apply for an order for sale only in the suit brought by himself.

Under S. 93, Transfer of Property Act, an order for sale extinguishes only the plaintiff's right to redeem and the security of the mortgagee is also extinguished thereby so far as the plaintiff is concerned. Ordinarily a redemption suit by a mortgagor is not barred as *res judicata* by reason of a previous suit by a 2nd mortgagee to redeem the first (b). **Yanberl Manakal Purushotaman Nambudri v. Purompul-anil Sankunil Menon**, 4 L.W. 184=36 Ind. Cas. 551.

SPENCER and KRISHNAN, J.J.

References:—(a) 36 M. 32, R. (b) 35 M. 42; 24 M.L.J. 534, F.

(124) S. 95. See MORTGAGE (REDEMPTION), No. 2, 14 A.L.J. 41.

(125) S. 99—Abrogation by O. XXXIV, r. 14, Civ. Pro. Code (1908)—Applicability of S. 99 to the Punjab. See MORTGAGE (REDEMPTION), No. 7, 18 P.R. 1916.

(126) S. 99—Mortgages—Separate money decree against mortgagor—Execution—Sale of equity of redemption—Purchase by mortgagee—No objection by mortgagor for the sale—Sale in contravention of S. 99—Loss of right to redeem. See MORTGAGE (REDEMPTION), No. 4, 19 M.L.T. 121.

(127) S. 100—Mortgage by reversioner and widow—Sale of widow's life interest—Redemption of mortgage—Right of reversioner to claim rateable contribution.

Where a reversioner jointly executed with the widow, a mortgage deed, and the widow's life interest in one of the properties included in the mortgage was purchased by another, the

Transfer of Property Act—(Continued).

reversioner on redeeming the mortgage is entitled to claim rateable contribution from the said purchaser, in respect of the mortgage debt, and the amount of contribution can be enforced as a charge upon the property under S. 100, Transfer of Property Act. **Tarak Nath Roy Chowdhury v. Syama Charan Chowdhury**, 36 Ind. Cas. 292.

CHATTERJEA and RICHARDSON, J.J.

References:—48 A. 492=10 C.W.N. 626 (P.C.)=3 A.L.J. 360=3 C.L.J. 481=1 M.L.T. 143=8 Bom. L.R. 397=16 M.L.J. 269=33 I.A. 81=8 Sar. P.C.J. 918, R.

(127-a) S. 100. See Nos. 65, 89, 90 and 99, *supra*.

(128) Ss. 100, 59—*Applicability of—Charge—Mortgage—Security, when amounts to charge.*

S. 100 of the Transfer of Property Act does not enable a mortgage to be converted into a charge, if it cannot operate as a mortgage by reason of non-compliance with the formalities prescribed by the law, such as that of registration prescribed by S. 59 of the Transfer of Property Act, the case being otherwise, if the relation of the mortgagor and mortgagee does not exist between the parties.

Case-law on the point reviewed. **Ma Bon Lon v. Maung Pa Lu**, 9 Bur. L.T. 64=32 Ind. Cas. 595.

U KIN, J.

(129) S. 101—Scope of—Mortgages becoming entitled to equity of redemption—Merger. See CIV. PRO. CODE (1908), No. 122, 30 M.L.J. 391.

(129-a) S. 101. See No. 103, *supra*.

(130) Ss. 105, 107—*Agreement to let land on payment of annual rent—Agreement neither in writing nor registered—License—Remedy for wrongful revocation.*

In a suit by the plaintiffs to recover possession of a *gola* (market place) on the allegation that the defendant, zamindar, had given them verbal permission to build the *gola* on their agreeing to pay an annual rent, and that they had built a permanent structure, from which they were evicted, held that the agreement was tantamount to a lease which neither being in writing nor registered, as required by S. 107 of the Transfer of Property Act, did not confer any title on the plaintiffs, and that they being mere licensees, their proper remedy was a suit for damages, and not for possession, for the wrongful revocation of the license. **Baile Rat v. Dwarka Ram**, 14 A.L.J. 137=38 A. 178=32 Ind. Cas. 346.

TUDBALL and WALSH, J.J.

(131) S. 106—*Lease—Notice determining the same given by two only of three joint owners—Sufficiency—Validity of notice.*

A notice determining a lease given on behalf of two only out of three joint owners of the property leased is not invalid on the ground that the provisions of S. 106 of the Transfer of Property Act, especially when the owner on whose behalf the notice was not given was in

Transfer of Property Act—(Continued).

charge of sending the notice and verbally asked the lessee to vacate. **Shalkh Karamat Ali v. Hanuman Das Marwari**, 34 Ind. Cas. 56.

SARFUDDIN and CHAPMAN, JJ.

(132) S. 106—*Ejectment—Notice to quit—Six months' notice—Notice ending with Bengali year—Bengali Calendar—'Local usage'—Transfer of Property Act*, S. 106. **Raj Behari Nath v. Kailas Chundar Dutt**, 22 C.L.J. 78=30 Ind. Cas. 887. See Final Part, 1915, Col. 1304.

(133) S. 106—*Lease deed—No time prescribed—Effect—Monthly tenancy—No permanent occupancy rights conferred*. See TRUST, No. 4, 33 Ind. Cas. 57.

(134) Ss. 106, 107—*Land held not for agricultural or manufacturing purpose on oral settlement at an annual rent—Presumption that tenancy annual—"Contract to the contrary," not valid, because not registered—Notice, length of*.

Where, there being no written lease, the tenants were found to have been holding the land on an annual rent of Rs. 15 and not for an agricultural or manufacturing purpose:

Held—That from the fact that the rent was an annual rent, the presumption ought to be drawn that the tenancy was an annual tenancy.

That, in the absence of anything to rebut the presumption, S. 106 of the Transfer of Property Act, if it stood alone, would be inapplicable, there being "a contract to the contrary" within the meaning of that section. This contract, however, not being in writing and registered, was invalid under S. 107.

That the tenancy was therefore terminable under S. 106 on fifteen days' notice expiring with the end of a month of the tenancy. **Shekh Akloo v. Sheikh Emanon**, 29 C.W.N. 1005=33 Ind. Cas. 899.

SANDERSON, C.J. and MOOKERJEE, J.

References:—19 C.W.N. 525=20 C.L.J. 448 at p. 454, R.

(135) Ss. 106 and 107—*Unregistered lease for three years—Tenant's remedies against landlord wrongfully refusing to register lease—Presumption of monthly tenancy*.

If a landlord wrongfully neglects or refuses to register a lease which requires to be registered under S. 107 of the Transfer of Property Act the tenant is not restricted to the remedy by a suit for specific performance. He can also resist a suit for enhancement of rent or ejectment before expiry of the term of the unregistered lease.

The presumption of tenancy from month to month under S. 106 arises only in the absence of a contract to the contrary. **Puzandaung Bazaar Co., Ltd. v. T. Gwan Chan**, 9 Bur. L.T. 80=8 L.B.R. 351=32 Ind. Cas. 692.

ROBINSON, J.

(136) Ss. 106, 108 (e)—*Lease of colliery—Destruction by fire—Notice by lessee to determine lease if should be 15 days' notice*. **Damoda Coal Company, Ltd. v. Hurmook Marwari**, 19 C.W.N. 1019=31 Ind. Cas. 697. See Final Part, 1915, Col. 1305.

Transfer of Property Act—(Continued).

(137) Ss. 106, 111, 116—*Lease for a year certain—Provision for yearly payments in case of holding over—Construction of lease—Holding over whether constitutes the lessee a trespasser or creates a tenancy from year to year—Notice to quit whether necessary*. See LANDLORD AND TENANT, No. 2, 6 L.W. 189.

(138) S. 107—*Agricultural lease, lease for planting casuarina trees, whether an*.

A lease for planting casuarina trees is not one for an agricultural purpose and is consequently invalid if not in writing and registered. **Devaraja Nalcker v. Amman, Ammal**, 3 L.W. 319=34 Ind. Cas. 539.

SESHAGIRI Aiyar and KUMARASWAMI SASTRI, JJ.

(139) S. 107—*Agreement to lease for more than a year constituted by correspondence contained in several letters—Registration if compulsory*. See REGISTRATION ACT (1908), No. 21, 3 L.W. 370.

(139-a) S. 107. See Nos. 130, 134 and 135, *supra*.

(139-b) S. 108. See Nos. 9, 29 and 136, *supra*.

(140) S. 108 (b). See LANDLORD AND TENANT, No. 29, 9 Bur. L.T. 101.

(141) S. 108 (b)—*Lease not valid—Right to compensation*. See LEASE, No. 1, (1916) M.W.N. 180.

(142) S. 111—*Permanent tenancy governed by Transfer of Property Act—Determinable by denial of landlord's title*. See LANDLORD AND TENANT, No. 25, 1 Bur. L.J. 157.

(142-a) S. 111. See Nos. 29 and 137, *supra*.

(143) S. 111 (g)—*Lease, provision in, for forfeiture on alienation—Usufructuary mortgage by lessee without divesting himself of possession*.

On the lessee, under a lease providing for forfeiture of land on an alienation in any manner with a right of re-entry, usufructually mortgaging the property without divesting himself of the possession of the land, *held* that this was not such a disposition of the property in the land as would necessarily amount to an alienation within the terms of the forfeiture claim in the lease deed. The law leans against forfeiture. The party relying on it must prove it to be very exact and certain (a). **Moideen Saiba v. Gopala Kudwa**, 31 Ind. Cas. 454.

SPENCER and TYABJI, JJ.

Reference:—(a) (1765) 2 Edon. 319, F.

(144) S. 111 (g)—*Landlord and tenant—Lease—Forfeiture—"Some act showing intention to determine the lease," whether confined to attempt at re-entry or suing in ejectment—Lawyer's notice, whether sufficient—Mesne profits, sub-lessee's liability for, on determination of lease*. **P. S. Sivarama Aiyar v. Muthu K. R. Alagappa Chetty**, 2 L.W. 946=(1915) M.W.N. 845=31 Ind. Cas. 211. See Final Part, 1915, Col. 1307.

(144-a) S. 116. See Nos. 26 and 137, *supra*.

Transfer of Property Act—(Continued).(144-b) S. 117. See No. 14, *supra*.

(145) Ss. 118, 119, 120, 54, 55 (6) (b)—*Property of the value of one hundred rupees and upwards—Exchange—No registered document—Validity—Land obtained on exchange sold by one of the parties—Effect—Estoppel—No estoppel against statutory directions and prohibitions—Exchange invalid in law—Right to a charge for its value on property obtained in exchange.* **Chidambarachettiar v. Validilinga Padayachil**, 38 M. 519=30 Ind. Cas. 408. See Final Part, 1915, Cbl. 1308.

(145-a) S. 119. See No. 145, *supra*.(145-b) S. 190. See No. 145, *supra*.(146) S. 123—*Gift by Mahomedan—Proof—Application of section.*

A Mahomedan made a gift of his property by a deed of gift. One witness was called to prove it but he stated that he had signed the deed after the other parties had signed. Held that the gift being a gift by a Mahomedan was admissible in evidence.

Held, also that the terms of S. 123, Transfer of Property Act, were not applicable to gifts by Mahomedans which are valid according to their law. **Karam Ilahi v. Sharf-ud-din**, 14 A.L.J. 119=38 A. 212=35 Ind. Cas. 14.

RICHARDS, C.J. and RAFIQ, J.

(147) S. 123—*Deed of gift—Requirements of—Donor's death after execution—Compulsory registration at the donee's instance—Gift, if complete and valid—Indian Registration Act (XVI of 1908), Ss. 32, 34, 35, 72 and 75, scope of.*

A deed of gift registered by the donee after the death of the donor without the consent of the legal representatives of the donor is valid (a).

All that a donor need do under S. 123 of the Transfer of Property Act is simply to execute the deed of gift and once it is executed, the document can be compulsorily registered in spite of the donor not agreeing to the registration and would take effect as from the date of its execution. **Yenkati Rama Reddi v. Pillati Rama Reddi**, 31 M.L.J. 690=4 L.W. 465=20 M.L.T. 450=(1917) M.W.N. 112=40 M. 204.

ABDUR RAHIM, O.C.J., SESHAGIRI AIYAR and PHILLIPS, JJ.

References:—(a) 35 A. 3; 20 A. 392; 11 A. 319; 32 B. 441; 33 C. 584, F.; 19 M. 433, overruled; 28 M.L.J. 378; 13 M.L.J. 303; 25 M. 672, R.

(148) S. 123—*Proof of deed of gift—Writer signing merely as writer—Evidence to show that writer signed as attesting witness*

Prima facie a signature of the writer of a document is not that of an attesting witness; but if there is sufficient evidence to show that the writer signed not only as a writer but as an attesting witness after the execution of the document he may be considered as one of the attesting witnesses. It is not necessary that an attesting witness should add the word "witness" after his signature. **Ma Kin v. Maung Kya Win**, 36 Ind. Cas. 275.

ORMOND, J.

Transfer of Property Act—(Concluded).*

(149) S. 123—*Gifts for religious purpose—Dedication to thakur—Absence of registered deed—Validity of gift.*

As S. 123, Transfer of Property Act, applies to religious gifts a dedication of property to a thakur would be invalid if the document is not registered as required by the section. **Mannu Lal v. Sri Thakur Ratha Kishorji Maharaj**, 36 Ind. Cas. 989.

RICHARDS, C.J., and RAFIQUE, J.

(150) S. 123—*Kanwin and payin property.* See BUDDHIST LAW (GIFT), No. 1, 9 Bur. L.T. 84.

(151) S. 123. See RAJINAMA, No. 1, 18 Bom. L.R. 976.

(151-a) S. 123. See No. 11, *supra*.

(152) Ss. 129, 130—*Actionable claim, gift of, whether governed by S. 129.* See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURTS), No. 1, 4 L.W. 339.

(152-a) S. 130. See No. 152, *supra*.(153) Ss. 130, 131 — *Actionable claim — Transfer—Notice.*

Though there be a valid transfer of a debt between its transferor and transferee, the person bound to pay the debt is not bound by transfer unless he receives an express notice in writing conforming to the provisions of S. 131 of the Transfer of Property Act from the transferor, or, if the transferor refuses to sign the notice, from the transferee stating the name and address of the transferee.

The notice must be given to the person concerned or to his agent authorized to receive such notices. **Basant Singh v. Burma Railways Co., Ltd.**, 8 Bur. L.T. 266=30 Ind. Cas. 279=8 L.B.R. 288.

FOX, C.J.

(153-a) S. 131. See No. 153, *supra*.

(154) S. 132 — *Assignment of mortgage whether an actionable claim.* See MORTGAGE (GENERAL), No. 13, (1916) M.W.N. 351.

(155) S. 137. See No. 15, *supra*.**Transfer of Suit.**

(1) *Application to District Judge for transfer — Judicial Officer, allegation against — Transfer, order of—Notice to the Judicial Officer and opposite party—Order of transfer without such notice, if valid.*

A District Judge cannot, upon a mere allegation of a party to a suit that a judicial officer presiding over a Court is interested in the case, direct the case to be tried by a different Court, without giving notice to that judicial officer and the party interested in opposing the application. **Dwarka Nath Sen v. Tara Prapsanna Sen**, 23 C.L.J. 995=33 Ind. Cas. 797.

D. CHATTERJEE and CHAPMAN, JJ.

(2) See CIV. PRO. CODE (1908), No. 65, 150 P.W.R. 1916.

(3) Suit instituted under the District Court transferred to Subordinate Judge empowered—Subsequent notification limiting jurisdiction of Subordinate Judge. See CIV. PRO. CODE (1908), No. 171, 31 Ind. Cas. 397.

Transfers and Bequests (Hindu) Act.

See MAD. ACT I OF 1914.

Translation.

Of a document, if secondary evidence—Admissibility. See EVIDENCE ACT, No. 29, 4 L.W. 331.

Trees.

(1) *Ex-proprietary holding—Trees—Saleability of.*

Trees do not necessarily form part of an ex-proprietary holding and the law does not forbid a sale of them, especially when both the tenant and zemindar are willing to dispose of them. *Mohan Singh v. Lachman Das*, 14 A.L.J. 244 = 33 Ind. Cas. 707.

TUDBALL, J.

(2) Scattered—Ownership. See BURDEN OF PROOF, No. 6-b, 32 Ind. Cas. 370.

(3) Second appeal—Suit for damages for cutting—Small Cause nature. See CIV. PRO. CODE (1908), No. 194, 20 M.L.T. 281.

(4) Grove, when ceases to retain its character as such—Portion not occupied by—Resumption by piecemeal. See GROVE, No. 1, 32 Ind. Cas. 369.

(5) Trees reserved by the lessor—Lessor if can cultivate shellac on the trees—Right to enjoyment of "fruits and flowers" of trees—Effect. See LEASE, No. 5, 24 C.L.J. 21.

(6) Hypothecation of land with trees—Trees sold by mortgagor and carried away by purchasers—Remedy against purchasers—Limitation. See LIMITATION ACT (1908), No. 115, 3 L.W. 341.

(7) See PARTITION, No. 8, 19 O.C. 151.

(8) Execution of document transferring standing tree—Nature of property, moveable or immovable. See REGISTRATION ACT (1908), No. 4, 30 Ind. Cas. 281.

Trespass.

(1) *Action for—Who may sue, tenant or owner—Title by adverse possession not pleaded, if may be allowed in the Court of Appeal—Civ. Pro. Code (1908), O. XLI. r. 24—Adverse possession against Municipality or the Crown—Public drains, filled up, if becomes public way.*

Per Sanderson, C.J., and Mookerjee, J.—The tenant is the proper plaintiff to sue for trespass committed in respect of the land, and the reversioner can only sue for trespass if the alleged trespass is injurious to the reversion.

Per Sanderson, C.J.—Even though the trespass is accompanied by a claim of right, it is not necessarily injurious to the reversionary estate (a).

Per Woodroffe, J.—It is not sufficient for the plaintiff in an action in ejectment to prove possession. He must show title.

Per Mookerjee, J.—Mere previous possession will not entitle a plaintiff to a decree for recovery of possession, except in a suit under S. 9 of the Specific Relief Act (b).

The plaintiff may be allowed to succeed on a title by adverse possession pleaded for the first

Trespass—(Concluded).

time in the Court of Appeal, provided such a case arises on the facts stated in the plaint, and the defendant is not taken by surprise (c).

To establish a title by adverse possession, the plaintiff must prove enjoyment possessing the same characteristics as are necessary for presumption of a lost grant and consequently that the possession was adequate in continuity, in publicity and in extent, to extinguish the title of the true owner (d).

Per Woodroffe, J.—Where, in a suit for declaration of title and possession, the plaintiff did not in the alternative plead title by adverse possession, the plaintiff cannot ask the Court to frame such an issue on appeal except by amendment, and O. XLI, r. 24, which authorises the Court to remodel the issues does not apply to such a case.

Per Curiam.—A public drain does not become a public way merely because it is filled up. *Ram Chandra Sil v. Ramanant Das*, 20 C.W.N. 773 = 36 Ind. Cas. 890.

SANDERSON, C.J., WOODROFFE and MOOKERJEE, JJ.

References:—(a) 4 Barn. & Ad. 72 (1832), R. (b) 17 C. 256; 26 C. 579 = 3 C.W.N. 568; 3 O. W.N. 158; 13 O.L.J. 649, R. (c) 14 C. 592; 28 I.A. 81 (88) = 5 C.W.N. 545; (1914) M.W.N. 784; 31 M. 531; 2 C. 418; 8 C. 975; 24 W.R. 444, R. (d) 21 M.L.J. 132; 27 C. 943 = 4 C.W. N. 593, L.

(2) *What constitutes—Proof.*

The foundation of trespass is, the doing of an illegal act, forcibly and without legal authority, as against the property of another. To sustain trespass the illegality and the wrongfulness of the act must be established by proof. If the act is not illegal no right is infringed. *Danal Das v. Govinda Gedi*, 1 Pat. L.J. 533.

MULLICK and ATKINSON, JJ.

(3) *Damages—Suit against trespasser and lessee from him—Liability of both. Goverdhan v. Marut*, 11 N.L.R. 183 = 31 Ind. Cas. 872. See Final Part, 1915, Col. 1309.

(4) Suit for, whether cognisable by Civil Court. See C.P. ACT XI OF 1898 (TENANCY), No. 7, 1 Pat. L.J. 525.

(5) Mitakshara family—Trespass on family waste lands—Power of manager to sue—Law governing suits under Bengal Tenancy Act. See HINDU LAW (JOINT FAMILY), No. 5, 1 Pat. L.J. 154.

Trespass (Cattle) Act.

See ACT I OF 1871.

Trespasser.

(1) *Plaintiff when may succeed on strength of his long possession—Defendant's occupation by permission of landlord—Plaintiff whether can sue for declaration of title and possession—Interference in second appeal.*

Plaintiff sued for a declaration of title to and recovery of possession of a tank of which a third party was the admitted landlord. Defendant pleaded permissive occupation from the landlord. The lower Courts found that plaintiff

Trespasser—(Continued).

had not proved the title set out in his plaint, but that he and his predecessors have been in possession of the tank for more than 12 years, and that defendant was a trespasser. It was also found that no settlement was made in favour of the defendant by the landlord, but that the defendant was being supported by the landlord in resisting this suit. *Held*, under the circumstances, that the defendant was not a trespasser, but must be considered a permissive occupant and in possession co-ordinate to that of the plaintiff, and the plaintiff's suit based on long possession must be dismissed.

In order to succeed on the strength of long possession, the plaintiff must show that the defendant is a trespasser.

The term "trespasser" is a term of law and it is competent for the Court in second appeal to examine whether the defendant may in law be described as a trespasser. **Central Karkend Coal Co., Ltd. v. Kartic Rewani**, 1 Pat. L.J. 47=34 Ind. Cas. 616.

MULLICK, J.

(2) See U.P. ACT XII OF 1881 (N.W.P. RENT), No. 1, 31 Ind. Cas. 445.

(3) See U.P. ACT II OF 1901 (AGRA TENANCY), No. 23, 31 Ind. Cas. 893.

(4) See OUDH ACT XXII OF 1886 (RENT), No. 17, 31 Ind. Cas. 472.

(5) Ejectment of, through Revenue Court—Jurisdiction of Revenue Court. See OUDH ACT XXII OF 1886 (RENT), No. 18, 30 Ind. Cas. 257.

(6) In occupation—Right of owner to sue for possession and damages—Necessity to recognise trespasser as tenant. See OUDH ACT XXII OF 1886 (RENT), No. 44, 30 Ind. Cas. 364.

(7) Suit for ejectment through Revenue Court—Recognition of, as tenant. See OUDH ACT XXII OF 1886 (RENT), No. 43-a, 36 Ind. Cas. 770.

(8) Suit for rent by tenant against, treating him as sub-tenant, maintainability of—Tenant and sub-tenant, nature of their relationship. See OUDH ACT XXII OF 1886 (RENT), No. 40, 19 O.C. 370.

(9) See ADVERSE POSSESSION, No. 5, 19 O.C. 374.

(10) Suit by co-owners in actual occupation against trespassers—Maintainability—Non-jointer of other co-owners—Effect. See CO-OWNERS, No. 3, 3 L.W. 542.

(11) See EJECTMENT, No. 10, 33 Ind. Cas. 70.

(12) Suit for possession and ejectment of—Landlord supporting. See EJECTMENT, No. 5, 1 Pat. L.J. 430.

(13) Homestead, transferability of—Ejectment of. See EJECTMENT, No. 6, 1 Pat. L.J. 502.

(14) Tenant put in possession by landlord—Subsequent dispossession by trespasser—Landlord's right to sue for possession—Form of decree—Q. XXI, r. 36, Civ. Pro. Code (1908).

Trespasser—(Concluded).

See LANDLORD AND TENANT, No. 4, 60 M.L.J. 258.

(15) Trespasser's right to tack period of possession of previous trespasser. See LIMITATION ACT (1908), No. 246, 18 O.C. 289.

(16) Land—Possession by—Effect—Adverse *ab initio* to all persons. See LIMITATION ACT (1908), No. 260, 113 P.R. 1916.

(17) Decree on possessory title as against trespasser whom to be given. See POSSESSION, No. 1, (1916) M.W.N. 110.

(18) Any possession is legal possession as against a. See POSSESSION, No. 7, 8 L.B.R. 372.

(19) Suit by trespasser for declaration that he is trespasser—Maintainability. See SPECIFIC RELIEF ACT, No. 26, 1 Pat. L.J. 35.

Tripartite Agreement.

See SPECIFIC PERFORMANCE, No. 10, 35 Ind. Cas. 810.

Trust.

(1) Temple trustee—Dismissal, when proper—Suit by some trustees joining others as defendants—Payment to some of the trustees, when valid.

Where a trustee is dismissed without being called upon to answer the charges in respect of which it was proposed to dismiss him, such an abuse of the rules of natural justice would invalidate the dismissal in the case of an officer of this kind. Where the managing member circulated the proposal to dismiss the trustee to the other members and before the answers were received the dismissal was communicated, it does not amount to a proper dismissal.

Where two trustees were improperly dismissed by the Temple Committee and three more trustees were appointed by them, it is competent for the two trustees to institute a suit by themselves without consulting the other trustee whom they have impleaded as defendants.

One out of many trustees can receive and give a good discharge for rent and similar payments of income if he has or is held out by his co-trustees as having authority to do so.

The majority of trustees have no power to usurp the duties of the trust and to say that payment should be made to them.

Quære:—Whether as a properly convened meeting a majority of trustees might decide that payment should be made to them alone to the exclusion of the other trustees? **Ponnambala Pillai v. Muthu Chettiar**, (1916) M.W.N. 181=30 M.L.J. 619=33 Ind. Cas. 52.

VAULIS, C.J. and PHILLIPS, J.

(2) Trustees—Adverse possession—When commences—S. 10, Limitation Act.

Where, on the death of a trustee of two temples, trustees were appointed to one of them and not to the other, and such trustees were exercising acts of ownership over the lands belonging to the other temple:

Held, that such possession of the lands is not adverse to the temple until new trustees are

Trust—(Continued).

appointed, capable of taking proceedings necessary for the protection of the property (a).

A new trustee succeeds to the office of a former trustee and not to him personally and cannot be said to be his legal representative within the meaning of S. 10 of the Limitation Act. **Manikkam Pillai v. Thanikachalam Pillai**, (1916) 2 M.W.N. 87=4 L.W. 369=34 Ind. Cas. 945.

BAKEWELL and PHILLIPS, JJ.

References:—(a) 32 Ind. Cas. 129=38 M. 903, F.

(3) *Deed of trust—Construction—Joint property settled in trust—Each share settled upon each settlor and his heirs—Specific provision for the payment of profits of the settlor who died first—Absence of like provisions regarding settlors dying subsequently—Suit by predeceased son's widow to recover her share of profits on the death of the last settlor.*

Three brothers, having acquired property which was held as joint family property, executed a deed of trust dividing the property, into three lots and allotting one lot to each of the brothers. The deed provided that the trustees should collect the rents and profits of the property and after deducting the outgoings pay to the three brothers "jointly for the use of themselves and their respective families during the joint lives of them all." On the death of any one of the three, each of the two surviving brothers was to be paid separately the rents and profits of his lot so long as he lived, and elaborate provision was made as to what the trustees were to do with the profits of the lot of the brother who died first. No specific provision was made as to the profits of the lots of the brothers dying subsequently. Two of the brothers died without leaving any issue. The third brother, who died last, left him surviving three sons (defendants) and the widow (plaintiff) of a predeceased son of his. The deed provided for them thus: "On the death of any son of the said.....during the life-time of his brothers the heirs of such deceased shall be entitled to be paid by the said trustees the proportionate share of the said rents and profits which such deceased son himself would have been entitled to if alive." The widow sued to recover as an heir one-fourth share of the profits of the portion of the lot constituting the share of her father-in-law:

Held, (1) that the remainder in favour of the sons of the third brother, who was the last to die, took effect although he was not the first settlor to die;

(2) that the substitutionary provision in favour of the heirs of a deceased son applied to the heirs of a son predeceasing the settlor;

(3) that the plaintiff was therefore entitled to recover one-fourth share of the profits of the share of her father-in-law. **Pranjiwandas Kallidas v. Shamkorebal**, 18 Bom. L.R. 516.

SCOTT, C.J. and HEATON, J.

(4) *Lease of trust property—No time prescribed in the deed—Long occupation—No right of permanent occupancy—Transfer of*

Trust—(Continued).

Property Act, 1882, S. 106—Tenant erecting building on site leased—Conduct of trustee—Trust, not liable to pay compensation.

Where a lease deed prescribed no time, the mere fact that the lessee and his assigns had been allowed to occupy the lease site for 60 years cannot create a permanent lease right (a).

Held that the document can be treated as creating a monthly tenancy.

A trustee cannot by his conduct make the trust liable to pay compensation to a tenant who builds on the leased site and who has not got a right of permanent occupancy (b). **Murugappa Chettiar v. Rangasami Nalcken**, 33 Ind. Cas. 57.

SADASIVA AYYAR and SESHAGIRI AYYAR, JJ.

References:—(a) 19 Ind. Cas. 824=24 M.L.J. 642; 17 B. 736, R. (b) 28 Ind. Cas. 840, F.

(5) *Suit to recover trust properties—Suit by some of the trustees—Others made party defendants—Allegation in plaint that these defendants lost their right to trusteeship—Acknowledgment of their right at the trial—Suit whether bad for non-joinder—Alienation of office by the hereditary trustee—Validity—Suit to recover alienated property from alienee—Limitation—Arts 91, 124, Limitation Act—Trustee de son tort—Right to retain trust estate until he is paid out of pocket expenses—S. 32, Trusts Act—Duty of Court.* **Narayanan Chettiar v. Lakshmanan Chettiar**, 28 M.L.J. 571=29 Ind. Cas. 1=39 M. 456 See Final Part, 1915, Col. 1311.

(6) *Charity—Gift of immoveable properties to a chattram not in existence—Construction of document—General charitable intention—Cypres doctrine—Burden of proof—Certainty.* **Doraiswamy Pillai v. Sandanathammal**, 2 L.W. 577=(1915) M.W.N. 478=30 Ind. Cas. 225. See Final Part, 1915, Col. 1311.

(7) *Decree directing trustees to perform a festival—Direction to trustees to perform the same, if can be issued—Civ. Pro. Code (V of 1908)—Jurisdiction.* **Krishnlengar v. Sri Viraraghavathathachariar**, 2 L.W. 607=30 Ind. Cas. 771. See Final Part, 1915, Col. 1311.

(8) *Public Charitable Trust—Trustees—Deed—Recital of execution by five trustees—Execution by four—Refusal by fifth to join in execution—Deed of majority, whether binding on the trust—Intention—Civ. Pro. Code (1908), S. 100—Second Appeal—Concurrent finding of fact—Duty to set aside, if no evidence to support—Trusts Act, S. 42—Several trustees—Power of one to give a valid discharge for sums received.* **Nethiri Menon v. Gopalan Nair**, 2 L.W. 714=29 M.L.J. 291=(1915) M.W.N. 586=18 M.L.T. 220=30 Ind. Cas. 713=33 M. 597. See Final Part, 1915, Col. 1312.

(9) *Trust-deed—Voluntary settlement to pay off debts—Trustee, mortgage by—Validity—Trustee acting improperly and unreasonably in execution of trust—Compromise based on such alienation, if valid—Compromise by guardian ad litem of minor without Court's sanction—Civ. Pro. Code (1882), S. 462.* **M.R.M.A. Subramanian Chettiar v. Rajah Rajeswara Doral**, 29 M.L.J. 856=20 O.W.N. 201=3 L.W.

Trust—(Continued).

149=19 M.L.T. '150=14 A.L.J. 153=(1916) M.W.N. 100=18 Bom. L.R. 380=23 C.L.J. 337=39 M. 115 32 Ind. Cas. 258 (P.C.). See **Final Part**, 1915, Col. 1314.

(10) Suit against a Government ward as trustee of a public trust—Notice of suit whether necessary. See **BOM. ACT I OF 1905 (COURT OF WARDS)**, No. 1, 18 Bom. L.R. 563.

(11) Gift by way of. See **OUDH ACT XVIII OF 1876 (LAWS)**, No. 3, 31 M.L.J. 604.

(12) See **CIV. PRO. CODE (1882)**, No. 31, 36 Ind. Cas. 880.

(13) Nature of suit under S. 92, Civ. Pro. Code—Public trust—Suit by two worshippers with the sanction of the Advocate-General—Death of one plaintiff, it causes suit to abate—Court's power to add parties—Sanction of Advocate-General if necessary for such addition. See **CIV. PRO. CODE (1908)**, No. 180, 3 L.W. 305.

(14) Ss. 92 and 115—Public, cause of action as to—Practice of District Courts to enquire first whether subject-matter of trust is public—Public trust, if may be declared, when suit dismissed for want of cause of action. See **CIV. PRO. CODE (1908)**, No. 177, 20 C.W.N. 1354.

(15) Hindu widow succeeding her husband as trustee—Alienation by her of the office—Effect. See **CIV. PRO. CODE (1908)**, No. 166, 31 M.L.J. 280.

(16) Suit *re* public—Consent of Advocate-General—Right to worship idol. See **CIV. PRO. CODE (1908)**, No. 179, 35 Ind. Cas. 846.

(17) Cypres doctrine—Application *extra territorium*—Jurisdiction. See **CYPRES DOCTRINE**, No. 1, 18 Bom. L.R. 60.

(18) Grant whether to temple or Archakas—Construction—S. 92, Civ. Pro. Code (1908)—Scheme. See **GRANT**, No. 3, 31 M.L.J. 202.

(19) Father's power to appoint guardian for minor's person and property—Father's power where property is joint or trust property—'Thirumalgais' and 'Athan Thirumalgais' whether private or trust properties. See **HINDU LAW (GUARDIANSHIP)**, No. 2, 30 M.L.J. 504.

(20) Inam burdened with a service whether a public charitable trust. See **INAM**, No. 1, 3 L.W. 157.

(21) Appointment of trustees and settling scheme of management for a religious institution—Discretionary powers of Civil Court—Rules laid down by the founder how far to be followed. See **MAHOMEDAN LAW (WAKF)**, No. 5, 14 A.L.J. 741.

(22) Trust deed executed by administrator with the permission of the Dt. Judge—Trust deed empowering trustee to grant permanent leases—Person interested not impeaching the lease—Lessee's right to sue for partition. See **PARTITION**, No. 7, 24 C.L.J. 26.

(23) Mahant whether can alienate trust property without authority. See **RELIGIOUS ENDOWMENTS**, No. 2, 91 P.W.R. 1916.

Trust—(Concluded).

(24) Money left with vendee to pay off mortgage—Money not paid—Suit against vendee—Vendee whether a trustee. See **SALE**, No. 3, 14 A.L.J. 151.

(25) Investment of trust money on first mortgage—Accumulation of debt in excess of value of mortgaged property—Breach of trust. See **WILL**, No. 20, 33 Ind. Cas. 604.

Trust (Improvement) Act.

See **BOM. ACT IV OF 1898**.

Trustees.

(1) Temple trustee—Hereditary temple servants—Enquiry into conduct without notice—Onus—Small Cause suit—Revision—Act IX of 1887 (*Provincial Small Cause Courts*), S. 25.

If a hereditary Archaka questions the act of temple trustees in respect of the punishment inflicted on him by them, on the ground that no notice of an intended inquiry into his conduct was given to him, the trustees must show that they gave notice of the enquiry and that the procedure was legal (a).

Sadasiva Aiyar, J.—The High Court should not interfere in revision on the mere ground that the lower Court in arriving at a finding of fact in Small Cause Court misdirected itself as to the burden of proof. **Rangasamy Bhattar v. Seshadri Aiyangar**, 35 Ind. Cas. 204.

OLDFIELD and SADASIVA AIYAR, JJ.
References:—(a) 21 M. 179; 30 M.L.J. 274, F.; 30 L.T. 217; 30 B. 508, F.

(2) Money borrowed by trustee of temple without consulting co-trustee—Money spent for benefit of temple—Enforcement of debt against trust fund.

Where a trustee of a temple borrowed money without consulting his co-trustees and spent the money for the benefit of the temple, the trustee becomes personally liable to pay the amount and the creditor cannot recover the money from the temple funds. **Thiruvengadaswamy Aiyangar v. Veera Pillai**, 30 Ind. Cas. 778.

SESHAGIRI AIYAR, J.

(3) Wakf—Scheme suit—Removal of. See **CIV. PRO. CODE (1882)**, No. 31, 35 Ind. Cas. 880.

(4) Removal of. See **CIV. PRO. CODE (1908)**, No. 165, 4 L.W. 228.

(5) See **RELIGIOUS ENDOWMENTS ACT XX OF 1863**, No. 6, 31 M.L.J. 777.

(6) Charitable trust—Trustee's power to invest trust funds. See **TRUSTS ACT**, No. 3, 33 Ind. Cas. 677.

Trusts Act.

(1) See **MAHOMEDAN LAW (GIFT)**, No. 1, 31 M.L.J. 607.

(2) S. 6—Declaration of trust—Misrepresentation of fact—Misrepresentation of future intention—Liability to make the fact good.

Trusts Act—(Continued).

Ladkabal v. Navirahu, 17 Bom. L.R. 788=31 Ind. Cas. 708. See Final Part, 1915, Col. 1318.

- (3) Ss. 15, 20—*Charitable trust—Trustee's power to invest trust funds—Civ. Pro. Code (Act V of 1908), S. 92, suit under—Court's power to give directions regarding income and property of trust.*

Though there is no statute governing charitable trusts in India, the general principles enunciated in S. 15 of the Indian Trusts Act, as regards the way in which a trustee ought to deal with the trust property in his hands is applicable to a trustee of a charitable or religious institution. But while in the case of private trusts in India the Legislature in dealing in S. 20 of the Trusts Act with the question of investments of proceeds according to the principle laid down in S. 15 thought that securities mentioned in the former section were the proper forms of investment and that no other form of investment should be authorised, a trustee of a charitable endowment is not confined to the modes of investment specified in S. 20, and may invest the trust funds in a bank possessing a good reputation.

Where a trustee of a religious institution who was enjoined by a decree of Court to invest in Government Securities whatever money was not required for immediate expenditure; invested all the money which he had reason to believe might be required to meet the probable expenditure of the temple during the year in fixed deposit in a Bank on terms which would enable the trustee to withdraw the deposit or any portion thereof on foregoing the interest on the amount withdrawn, held that in making the deposit the trustee did not contravene the decree of the Court or commit a breach of trust.

In a suit under S. 92 of the Civ. Pro. Code the Court is entitled to give any directions that may be necessary and proper with reference to the property and income of the trust though the parties interested have not come forward to complain. **Sri Mahant Prayag Dassjee Varu**, 33 Ind. Cas. 677.

ABDUR RAHIM and PHILLIPS, JJ.

- (4) S. 20. See No. 3. *supra*.

(5) S. 23. See **GUARDIAN AND WARD**, No. 3, 34 Ind. Cas. 900.

- (6) Ss. 44, 45, 71, 76—*Trustees—Resignation—Vacancy—Survival of trust to co-trustees—Instrument of trust vesting management of temple in five trustees—Suit by four and death of one of them pending appeal—Effect—Mortgage—No tender of amount—Right to interest.*

Where the instrument of trust clearly provides for vacancies being caused by resignation, the resignation by a trustee operates to discharge him from his duties as trustee, and on such discharge the trust survives and the trust property passes to the co-trustees, unless the instrument of trust expressly declares otherwise.

Trusts Acts—(Continued):

Where an instrument of trust vested the management of a temple in five trustees and provided that suits by the temple must be filed by the five jointly and that the five must join together and defend suits against the temple and after the resignation of one of them (for which the instrument provided) the other four trustees instituted a suit on behalf of the temple and pending appeal another trustee died and there was no obligatory and imperative provision in the instrument as to the minimum number of trustees required to represent the temple; held that the temple was properly represented in the suit and that the suit was maintainable and could be validly continued by the remaining trustees (a).

Where there is no tender of the mortgage amount, interest is rightly chargeable. **Krishna Bhatta v. Udayavar Srinivasa**, 32 Ind. Cas. 97.

AYLING and PHILLIPS, JJ.

References:—(a) 7 Ind. Cas. 754=8 M.L.T. 213=(1910) M.W.N. 608=20 M.L.J. 814=34 M. 1, D.

- (1) S. 45. See No. 6, *supra*.

- (8) S. 71. See No. 6, *supra*.

- (9) S. 76. See No. 6, *supra*.

(10) S. 83—*Failure of trusts after settlor's death—Resulting trust in favour of the heirs of the settlor at the time of her death.* **Dwarkanadas Damodar v. Dwarkadas Shamji**, 17 Bom. L.R. 938=40 B. 341=31 Ind. Cas. 441. See Final Part, 1915, Col. 1319.

(11) S. 84—*Release—Relinquishment of rights in favour of father and uncle—Fraud carried into effect—Suit to avoid the transfer by party to fraud—No right to relief.* See **FRAUDULENT TRANSFERS**, No. 1, 9 S.L.R. 108.

- (12) S. 88, illustration (f)—*Scope of.*

Illustration (f) to S. 88 of the Indian Trusts Act goes further than the operative portion of the section itself and does not enunciate good law. **Hajee Siddick Hajee v. Mahomed Hushum Sait**, (1916) 2 M.W.N. 341=4 L.W. 521.

ABDUR RAHIM, O.C.J. and SESHAGIRI Aiyar, J.

- (13) S. 90—*Advantage gained by mortgagee—Mortgagee in possession—Non-payment of Tagavi claims—Sale of mortgaged property owing to mortgagee's default—Purchase of property by mortgagee in the name of a benamidar—Transfer of Property Act, S. 76, cl. (c)—Mortgagor can enforce his mortgage rights against the property so sold in the hands of the mortgagee—Land Revenue Code (Bom. Act V of 1879), Ss. 56, 153—Land Improvement Loans Act (XIX of 1883), S. 7.*

In 1893, B (plaintiff's father) executed a San-mortgage of his property to defendant No. 1. In 1901, B's widow K took an advance by way of tagavi from Government and gave a charge on Survey No. 311 (one of the properties mortgaged) as collateral security for payment of the loan. K executed a possessory mortgage of the

Trusts Act—(Concluded).

property (inclusive of Survey No. 311) in favour of defendant No. 1 and put him in possession. In 1906, Government sold Survey No. 311 to satisfy its claim in respect of the *tagavi* allowance: it was purchased by defendant No. 2 who was a *gumasta* and a *benamidar* of defendant No. 1. In 1909, defendant No. 1 assigned his mortgage rights to defendant No. 3; and, on the same day, defendant No. 2 also sold Survey No. 311 to defendant No. 3. Defendant No. 3 was the paternal uncle of the plaintiff; he had been cultivating Survey No. 311 as a tenant for a number of years past; and he had notice of every thing that occurred in connection with the property. The plaintiff sued in 1912 to redeem the property under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. Defendant No. 3 contended *inter alia* that Survey No. 311 was owing to the intermediate sale and purchase freed from the mortgage claim:

Held, (1), that, inasmuch as the sale took place at the instance of the Mamladar in consequence of a wilful default on the part of the mortgagee (defendant No. 1), he, in acquiring the property through his *benamidar* at such sale, had availed himself of his position as mortgagee to gain an advantage spoken of in S. 90, Trusts Act;

(2) that S. 56 of the Land Revenue Code, 1879, had no application, because there had been no forfeiture under S. 153 of the Code;

(3) that, the sale having taken place by reason of defendant No. 1's default as mortgagee and by his improperly availing himself of his position as mortgagee, he should not obtain immunity from his breach of trust by reason of the extinction of his position as mortgagee through his fraudulent action as mortgagee;

(4) that the defendant No. 3, who was not a *bona fide* purchaser without notice, was bound by the equities enforceable against defendant No. 1. *Chitta Bhula v. Bai Jamni*, 18 Bom. L.R. 438=40 B. 483.

SCOTT, C.J. and HEATON, J.

(14) S. 91—*Specific Relief Act*, S. 27—*Transfer of Property Act*, S. 40—*Contract to sell*—*Subsequent purchaser with notice*—*Conveyance to contractee to sell*—*Possession, suit for, by purchaser with notice*—*Maintainability*.

After contracting to sell certain immoveable properties to defendants 4 and 5, defendants 1 to 3 sold the same to the plaintiff, who had notice of the prior contract to sell. About a month later, they again executed a registered conveyance in favour of defendants 4 and 5 and put them in possession. The plaintiff thereupon instituted the present suit for possession.

Held that, having regard to S. 91, Trusts Act, the plaintiff's suit did not lie. *Malamel Thiruvankata Charlar v. Parl Seshadri Iyengar*, 3 L.W. 457=30 M.L.J. 559=19 M.L.T. 369=34 Ind. Cas. 488.

WALLIS, C.J. and SRINIVASA AYYANGAR, J.

* *References*:—30 M. 169, F.; 29 M. 336, D.

Ebhayakar.

Right of, if civil in nature—*Dharmakarta* if can impose conditions on. See CIV. PRO. CODE (1908), No. 13, 3 L.W. 512.

Ultra Vires.

(1) Senate and the Syndicate, functions of—Regulation LXIV, if, of the Senate—Power of Senate to impose veto of Government on matters reserved for itself by Statute. See ACT VIII OF 1904 (UNIVERSITY), No. 1, 31 M.L.J. 634.

(2) See BEN. ACT V OF 1911 (CALCUTTA IMPROVEMENT), No. 1, 24 C.L.J. 246.

(3) Order of Deputy Collector debarring one from appearing as vakil for parties in village Courts—Specific Relief Act (I of 1877), S. 42—Sditi for declaration of invalidity of order, maintainability of. See MAD. ACT I OF 1889 (VILLAGE COURTS), No. 2, 39 M. 808.

(4) See U. P. ACT III OF 1901 (LAND REVENUE), No. 6, 33 Ind. Cas. 205.

Unascertained Sum of Money.

Insurance policy—Due thereunder—Whether forms part of estate of deceased—Not a debt for which succession certificate can be issued—Certificate if necessary for realising the same. See SUCCESSION CERTIFICATE ACT (1889), No. 3, 33 Ind. Cas. 157.

Unborn Son.

(1) Hindu law—Mitakabara—Joint family—Charge created by one member, whether it binds the family property after his death—Whether share of son born subsequently to creation of the charge is bound. See HINDU LAW (JOINT FAMILY), No. 15, 1 Pat. L.J. 497.

Uncertified Payment.

(1) Effect—Not recognizable by executing Court. See CIV. PRO. CODE (1909), No. 100, 33 Ind. Cas. 71.

(2) Acceptance of portion of decretal amount from several judgment-debtors, effect of—Execution Court, if can investigate fact of payment. See EXECUTION OF DECREE, No. 19, 24 C.L.J. 462.

Unchastity.

Remarriage of widow—Right to husband's estate—Widow's, after inheritance, effect. See HINDU LAW (WIDOW), No. 32, 32 Ind. Cas. 338.

Unconscionable Bargain.

(1) Stipulation for payment of interest and damages—Award of reasonable compensation. See CONTRACT ACT, No. 95, 36 Ind. Cas. 404.

(2) Possession by tenant of lands adjacent to his own holding—Presumption—Undue influence. See LANDLORD AND TENANT, No. 33, 1 Pat. L.J. 604.

Undefended Cases.

Plaintiff to prove his case in. See CIV. PRO. CODE (1908), No. 369, 20 C.W.N. 1192.

Under-broker.

Position of. See **BROKERAGE CONTRACT**, No. 1, 20 C.W.N. 708.

Under-Proprietary Rights.

- (1) *Execution of Kabuliati for enhanced rent, effect of.*

The mere fact that an under-proprietor executes a *kabuliati* agreeing to pay an enhanced rent does not affect his under-proprietary rights. **Ganga Din Shukul v. Krishna Prasad Singh**, 30 Ind. Cas. 387.

HOLMS, J.M.

Reference:—S.D. No. 4 of 1912, R.

- (2) *Shankalap, proof of—Change in rent effect of.*

Where land is entered as *shankalap* in the *naqsha tasfi* *lagan* without any material change in rent the entry is sufficient *prima facie* proof of a *shankalap* under-proprietary right. A slight change in the rent of certain plots of the said land does not affect the under-proprietary right. **Lotan Goshala v. Ajodhya Estate**, 30 Ind. Cas. 425.

TWERDY, S.M. and HOLMS, J.M.

- (3) *Cash nankar, effect of right to.*

The fact that a party is entitled to a cash *nankar* does not mean that he possesses an under-proprietary right in a land in the village. **Sri Ram Kuar v. Hanoman Singh**, 30 Ind. Cas. 373.

CAMPBELL, J.M.

- (4) *Land tenure—Proprietor purchasing proprietary rights—Subsequent loss of proprietary rights—Partition—Decision regarding his status—Effect of.*

When a person purchases proprietary rights and subsequently ceases to be a proprietor just before or after the confirmation of the partition proceedings held that his status as an under-proprietor or permanent lessee is entirely apart from his status as proprietor and an adjudication in the course of the partition proceedings or any entry in the *kura* cannot decide the question of his status as under-proprietor or permanent lessee which must be settled in the usual course by ordinary law. **Umed Ali v. Anwar Husain**, 34 Ind. Cas. 733.

HOLMS, S.M. and CAMPBELL, J.M.

- (5) See **OUDH ACT XXII OF 1886 (RENT)**, No. 27, 33 Ind. Cas. 137.

(6) *Suit by talukdar—Plea of—Adverse possession—Decision of Revenue Court.* See **BURDEN OF PROOF**, No. 6-c, 32 Ind. Cas. 376.

(7) *Claim of, by lessee—Assertion of title by adverse possession.* See **LANDLORD AND TENANT**, No. 34, 30 Ind. Cas. 218.

(8) See **LANDLORD AND TENANT**, No. 61, 34 Ind. Cas. 304.

(9) See **MORTGAGE (GENERAL)**, No. 42, 33 Ind. Cas. 203.

(10) See **SETTLEMENT DECREE**, No. 4, 33 Ind. Cas. 254.

(11) *Decree for, without power of transfer, effect of.* See **SETTLEMENT DECREE**, No. 1, 19 O.C. 115.

Under-Proprietary Rights—(Concluded).

(12) See **SUMMARY SETTLEMENT**, No. 1, 34 Ind. Cas. 768.

Under-Proprietor.

Suit to contest notice of ejection, dismissal of—Suit for declaration of status as, before actual ejection, maintainability of—Jurisdiction of Civil Court—**Oudh Rent Act**, S. 103, cls. (8) and (10). See **OUDH ACT XXII OF 1886 (RENT)**, No. 1, 19 O.C. 67.

Under-tenure.

Splitting up of jama—Private arrangement

A mere splitting up of the *jama* by private arrangement would not necessarily mean a splitting up of the under-tenure. **Moulvi Saiyid Razi-ud din Hossain v. Bendeshri Prasad Singh**, 36 Ind. Cas. 769.

MULLICK, J.

Under-valuation.

Property sold with full knowledge at an, if disentitles vendor to relief—Tenants. See **SPECIFIC PERFORMANCE**, No. 8, (1916) 2 M. W.N. 191.

Under-ryayat.

Status of, where ryayat evicted from occupancy holding for non-payment of rent in Chota Nagpur—Interest of, void or voidable—Right of, to contest the validity of the decree against his lessor. See **BEN. ACT X OF 1859 (RENT)**, No. 3, 20 C.W.N. 1240.

Undivided Share.

Gift of, of Zamindari village—What constitutes delivery. See **GIFT**, No. 2, 31 M.L.J. 607.

Undue Influence.

- (1) *Second appeal—Question of fact and law mixed—Undue influence—Interpretation of the sale-deed—Art. 91, Limitation Act (1908)—Adverse possession—Transaction voidable but not void—Mortgagor alleged to be drunkard.*

Held, that Art. 91, Limitation Act, is applicable in a case where the transaction is not void *ab initio* but voidable.

Held, also, that the fact that mortgage is in possession is insufficient to show that his transaction is valid, where undue influence has been duly established.

Held, further, that when the sale-deed is fictitious having been executed under undue influence, it should be ignored altogether even if it has been acted upon, and a part of the consideration has nominally passed. **Musamat Taro v. Sarbodial** 34 P.W.R. 1916.

SHAH DIN, J.

(2) Whether a branch of fraud in equity. See **CIV. PRO. CODE (1908)**, No. 654, 18 Bom. L.R. 27.

(3) *Possession by tenant of lands adjacent to his own holding—Presumption—Unconscionable bargain.* See **LANDLORD AND TENANT**, No. 33, 1 Pat. L.J. 604.

(4) *Pardanashin lady, transaction with—Gift deed—Bona fides—Onus—Maintainability of*

Undue Influence—(Concluded).

declaratory suit, when possession not delivered. See *PARANASHIN WOMAN*, No. 1, 35 Ind. Cas. 395.

Unincorporated Societies.

(1) Suits by or against corporations, or clubs. See *CIV. PRO. CODE* (1908), No. 304, 9 Bur. L.T. 247.

Universities Act.

See *ACT VIII OF 1904*.

University (Calcutta) Act.

See *ACT II OF 1857*.

Unnecessary Findings.

Cannot operate as *res judicata*. See *RES JUDICATA*, No. 15, 19 O.C. 69.

Unpaid Purchase-money.

Charge for, purchaser being directed to pay off a creditor of the vendor—If extinguishes charge. See *VENDOR AND PURCHASER*, No. 1, 31 M.L.J. 530.

Unregistered Deed.

Of sale—Subsequent sale of same property by registered deed—Suit by first vendee for registration of his deed and for declaration that the subsequent transaction was void, whether suit for specific performance. See *SPECIFIC RELIEF ACT*, No. 14, 1 Pat. L.J. 455.

Usage.

Matathipathi—Succession to—Proof. See *MUTT*, No. 1, 34 Ind. Cas. 1375.

Use and Occupation.

(1) *Small Causes Court—Jurisdiction—Damages for use and occupation, suit for—Title, determination of—Presumption from occupation—Rent*

A Court of Small Causes has jurisdiction to go into the question of title arising incidentally in a suit for damages for use and occupation.

A purchaser of immovable property can sue its occupant for damages for use and occupation, if the occupant had occupied the premises with the consent of the previous owner but had been served with a notice that he would no longer be allowed to occupy it free of rent. A presumption to pay rent arises from occupation. *Yoo Joo Sein v. Maung Ba Tin*, 9 Bur. L.T. 60=31 Ind. Cas. 893.

ORMOND, L.

(2) Suit for ejectment and for damages for—Suit after termination of tenancy—Claim whether for distinct subjects. See *COURT FEES ACT*, No. 19, 36 Ind. Cas. 883.

(3) Compensation for—Liability to pay on holding over—Claim for—Transferability. See *LANDLORD AND TENANT*, No. 10, 3 L.W. 408.

User.

(1) Vacant space—By public—Presumption of dedication. See *PUN. ACT III OF 1911 (MUNICIPALITY)*, No. 2, 108 P.R. 1916.

Ugpr—(Concluded).

(2) Right to take water—Long—Presumption of lawful origin—Difference between Indian and English Law. See *EASEMENTS ACT*, No. 1, 4 L.W. 128.

Usury.

Abrogation of—Act XXVIII of 1855—Equitable Considerations. See *MAHOMEDAN LAW (DOWER)*, No. 2, 14 A.L.J. 1055.

Usury Laws Repeal Act.

See *ACT XXVII OF 1855*.

Vacant Site.

Possession follows title—Burden of proof. See *ADVERSE POSSESSION*, No. 3, 116 P.W.R. 1916.

Vacant Space.

User by public—Presumption of dedication. See *PUN. ACT III OF 1911 (MUNICIPALITY)*, No. 2, 108 P.R. 1916.

Vacating Order.

Passed without jurisdiction. See *JURISDICTION (GENERAL)*, No. 3, 31 M.L.J. 827.

Vakalatnamahs.

(1) Acceptance of, by pleaders—Endorsement of acceptance in writing if necessary—Endorsement if must be made in all cases before Vakalatnama is filed. See *PLEADER*, No. 1, 20 C.W.N. 287.

(2) Non-compliance with rules as to receiving instructions and accepting—Duty of Court. See *PLEADER*, No. 2, 20 C.W.N. 283.

(3) Pleader's acts how far binding on clients—Pleader's authority to compromise—Vakalatnamah containing such authority whether sufficient—Form IV, Sind Courts Civil Circulars—O. III. r. 1, Civ. Pro. Code. See *PLEADER AND CLIENT*, No. 5, 9 S.L.R. 218.

Vakil.

(1) *Attornies—Their right of audience on the original side of the Madras High Court—Original Side Rules of Practice of 1902, Rule 533—Whether ultra vires—Supreme Court of Madras—Practitioners having rights of audience before—High Court Act 24 and 25 Vic., c. 104, ss. 8, 11 and 15—Effect of, on the pre-existing judicial, system.*

Vakils have a right of audience on the original side of the Madras High Court. Attorneys have not the right of audience on the original side of the Madras High Court (a).

Rule 533 of the Original Side Rules of the Madras High Court of 1902 is *infra vires* the rule making power of the High Court.

Under the Charter of the Supreme Court of Madras, the Supreme Court had no jurisdiction to give the right of audience to any one who had not been enrolled as an Advocate, or the right of acting for a party to any one who had not been enrolled as an attorney.

The effect of ss. 8, 11 and 15 of the High Courts Act 24 and 25 Vic., Ch. 104, discussed.

Yakhi—(Concluded).

Any anomaly or inconvenience created *per incurram* or by bad draftsmanship in the matter of the successful party on the original side not being able to recover the fees paid to his vakils as party and party costs is not enough to take away the privilege of audience of vakils. *Namberumal Chetty v. Narasimachari*, 31 M.L.J. 698 = (1916) 2 M.W.N. 529.

COURTS-TROTTER, J.

Reference:—(a) 1 M. 24 (F.B.), F.

(2) Order of Deputy Collector debarring one from appearing as, for parties in Village Courts, *ultra vires*—Specific Relief Act (I of 1877), S. 42—Suit for declaration of invalidity of order, maintainability of. See MAD. ACT I OF 1899 (VILLAGE COURTS), No. 2, 39 M. 808.

(3) Statement as to an admission in judgment of Court of First Instance—Absence of affidavit denying the same by, who appeared in Court below—Statement not to be lightly treated by appellate Court. See ADMISSION, No. 1, 31 M.L.J. 269.

Valuation.

Property sold with full knowledge at an under-valuation—If disentitles vendor to relief. See SPECIFIC PERFORMANCE, No. 8, (1916) 2 M.W.N. 191.

Valuation for purposes of Appeal to Privy Council.

Appeal by claimant to Privy Council—Subject-matter of appeal, if mortgage-debt or property claimed—Appealable value. See MORTGAGE SUIT, No. 1, 20 C.W.N. 1279 (P.G.).

Valuation of Suit.

(1) Suit for restitution of conjugal rights and injunction—Jurisdictional value. See APPEAL (SECOND APPEAL), No. 1, 28 P.W.N. 1916.

(2) Investigation as to amount or value of subject-matter of suit—Power of Court of first instance to remit the investigation to some other officer. See CIV. PRO. CODE (1908), No. 693, 43 C. 225.

(3) Appeal to Privy Council—Property in dispute, value of—Valuation how to be determined—Valuation in the plaint whether estops the plaintiff—Admission, if rebuttable. See CIV. PRO. CODE (1908), No. 225, 24 C.L.J. 350.

(4) Court Fees Act, S. 7 (iv) (f)—Administration suit, nature of—Valuation for jurisdiction. See COURT-FEE, No. 2, 24 C.L.J. 448.

(5) See COURT FEES ACT, No. 8, 36 Ind. Cas. 615.

(6) Execution of decree in suit valued at over Rs. 5,000 but decreed for less—Appeal—Act XII OF 1887. See EXECUTION OF DECREE, No. 24, 31 Ind. Cas. 496.

(7) Estimated value of the suit admitted by defendant—Effect—Consent of parties as to valuation—Effect on jurisdiction of Court. See JURISDICTION (GENERAL), No. 1, 18 O.C. 364.

Valuation of Suits Act.

See ACT VII OF 1887.

Yatandar.

See JURISDICTION OF CIVIL COURTS. No. 4, 18 Bom. L.R. 779.

Yatan Properties.

Gordon Settlement—Male holder of a *yatan* property liable to pay maintenance charges of the last holder.

Where a *yatan* property is held under a *sawad* under the Gordon Settlement, each successive male holder is substantially holding an estate of inheritance in tail male unburdened by any duties of service. A *yatandar*, who takes such property by inheritance, is liable to maintain the widow of the last male holder of the *yatan* property. *Basangayda Channappagayda v. Gangava Kummayyada*, 18 Bom. L.R. 450.

SCOTT, C.J. and HEATON, J.

Vendor and Purchaser.

(1) Charge for unpaid purchase-money, purchaser being directed to pay off a creditor of the vendor—If extinguishes charge—Transfer of Property Act, S. 55

Held on a reference to the Full Bench that a "contract to forego the vendor's charge for unpaid purchase-money cannot be necessarily inferred from the fact that the whole or part of the consideration for the purchase of immoveable property, is agreed to be paid by the purchaser to a third party on behalf of the vendor"

(a). *Sivasubramania Ayyar v. Subramania Ayyar*, 31 M.L.J. 530 = 20 M.L.T. 375 = (1916) 2 M.W.N. 306 = 4 L.W. 415 = 39 M. 997.

ABDUR RAHIM, O.C.J., SESHAGIRI AIVAR and PHILIPS, J.J.

References:—(a) 33 A. 446; 31 C. 57, R.; (1869) L.R. Eq. 409; (1886) 4 Ch. D. 562; 21 M.L.J. 359; 21 M. & J. 849; (1910) 7 Ind. Cas. 639; 42 C. 849; 12 A.L.J. 1034; 2 W. & T.'s L. C., p. 964; 29 M. 305; 22 A.L.J. 207; 31 A. 583; 21 M.L.J. 359, R.

(2) *Specific performance of contract to sell*—Vendor bound to do all things necessary to complete purchaser's title—Limitation Act (IX of 1908), Sch. I, Art. 113.

A vendor is bound to do all things necessary to complete the title of his vendee, and, where S. 54 of the Transfer of Property Act applies, to execute a registered conveyance. Art. 113 of the first Schedule of the Limitation Act applies to suits to compel the execution of a registered document by way of specific performance, and when no date of performance is fixed, time runs from the date when plaintiff has notice of refusal. *Maung Ne Dun v. Ma Le*, 9 Bur. L. T. 86 = 32 Ind. Cas. 573.

U KIN, J.

(3) *Courts of Equity*—Time, stipulation as to—Jurisdiction, exercise of—Vendor, and purchaser—Sale, agreement for—Installments at specified dates—Forfeiture on default—Action for specific performance—If maintainable.

Courts of Equity which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulations as to time

Vendor and Purchaser—(Continued).

have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply, by providing that time is to be of the essence of their bargain. If the parties, having originally so provided, have subsequently expressed or by implication waived the provision made, the jurisdiction will again attach.

In an agreement for the sale of lands (a portion of the money having been paid on the date of the deed) it was stipulated, that the balance of the purchase-money, was to be payable in annual instalments at specified dates; that on any default the whole of the principal and interest secured by the agreement should at once become due and be payable, or the contract should be forfeited and determined at the option of the vendor, who should also be at liberty to retain any payments made on account of it as and by way of liquidated damages; and that time was to be considered as of the essence of the agreement. Default in punctual payment having occurred the vendor gave notice cancelling the agreement. The purchaser after making one or two tenders of the instalment, which the vendor declined to receive, brought an action claiming specific performance and in the alternative relief from forfeiture under the terms of the agreement.

Held that in the absence of any agreement to extend time, nor anything that amount to waiver of the right to treat time as of the essence, there could be no justification for decreeing specific performance; that the vendor could not insist on forfeiture in accordance with the strict terms of the agreement; and that the purchaser should be relieved from forfeiture of the sums paid by him under the agreement. **Steedman v. Drinkle**, 33 Ind. Cas. 323 (P.C.).

VISCOUNT HALDANE, LORD CHANCELLOR, LORD PARKER and LORD SUMNER.

Reference :—(1913) A.C. 319, D.

- (4) *Immoveable property under mortgage—Purchaser discharging prior mortgage—Sale not registered—Subsequent purchase under registered sale-deed—Former purchaser's right to claim amount of mortgage paid off by him—When exists—Intention to keep mortgage alive—Mutilation of document—Effect.*

A purchaser of property who had paid off a mortgage that was subsisting on the property and the sale in whose favour was not made by a registered instrument as required by S. 54, Transfer of Property Act, cannot claim, as against a subsequent purchaser under a registered sale-deed, the rights of the mortgagee whom he paid off, unless there was an intention on his part to keep the mortgage alive.

The mutilation of a discharged document is evidence of the absence of an intention to keep the mortgage alive (a). **Ma Kyun v. Myaling Shing**, 34 Ind. Cas. 47.

MAUNG KIN, J.

Reference :—(a) 1 Bur. L. T. 65, *Ref. to.*

Vendor and Purchaser—(Continued).

- (5) *Option by purchaser to re-sell—Specific performance—Action—Misconception—Redemption decree—Technical mistake.*

An option by a purchaser to re-sell the land to the vendor on certain terms and conditions is a perfectly valid contract provided it is not subject to any possible question of perpetuity, and there can be specific performance of such contract as has been directed in many actions brought to enforce such options.

On a Court misconceiving an action as based on mortgage wrongly decreed redemption for specific performance, the decree is only technically wrong. It should not be interfered with in appeal as the parties are in exactly the same position as if there had been a decree for specific performance. **Dharanidhar Mukherji v. Rakhal Das Bhattacharjee**, 35 Ind. Cas. 631.

FLETCHER and TEUNON, J.J.

- (6) *Contract to sell immoveable property—Purchase-money paid—Suit for specific performance with an alternative claim for refund of purchase-money—Limitation—Act IX of 1908, Sch. I, Arts 62, 97.*

Where in pursuance of a contract to sell immoveable property, a portion of the consideration was paid as earnest money at once and the balance was paid two months after, a suit by the purchaser for specific performance with an alternative claim for the return of the purchase-money instituted more than 3 years from the date of the payment of the balance of the purchase-money is barred by limitation. A suit for specific performance must be brought within 3 years of the date upon which the contract was to be performed. The claim for the return of the purchase-money is governed either by Art. 62 or Art. 97 of the Limitation Act. If Art. 62 applies, the suit should be brought within three years from the date when the money was received by the vendor. If Art. 97 applies, the date of failure must be taken to be the date when the balance of the purchase-money was paid. **Fatmatus Sughla Begam v. Mariamunnissa Begam**, 33 Ind. Cas. 49.

RICHARDS, C.J. and RAJQUE, J.

- (7) *Sale—Specific performance—Misrepresentation as to extent of property—Compensation—Principle—Court of equity.*

In exercising its jurisdiction over specific performance, a Court of Equity looks at the substance and not merely at the letter of the contract. If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disintitiled himself to his remedy. If it is the purchaser who is suing, the Court holds him to have an even larger right. He may elect to take all that he can get, and to have a proportionate abatement from the purchase-money. But this right applies only to a deficiency in the subject-matter described in

Vendor and Purchaser—(Concluded).

the contract. It does not apply to a claim to make good a representation about that subject-matter, made not in the contract, but collaterally to it. In the latter case the remedy is rescission, or a claim for damages for deceit where there has been fraud, or for breach of a collateral contract if there has been such a contract. *Rutherford v. Acton-Adams*, 32 Ind. Cas. 47 (P.C.).

VISCOUNT HALDANE, LORD PARKER
and LORD SUMNER.

(8) Previous suit between—Subsequent suit between two purchasers from the same vendor. See CIV. PRO. CODE (1908), No. 20, 9 Bur. L. T. 88.

(9) Purchase of property under attachment—Effect—Void transaction—Purchaser not entitled to lien for purchase-money. See CIV. PRO. CODE (1908), No. 142, 34 Ind. Cas. 34.

(10) Sale of land—Intention to transfer the whole of the share of the vendor in a village—Inadvertent omission of certain plots in the list attached—Omission immaterial—False demonstration. See CONSTRUCTION OF DEED, No. 5, 34 Ind. Cas. 390.

(11) Absence of privity of contract—Direction to purchaser to pay vendor's debt—Right of creditor to enforce such undertaking. See CONTRACT ACT, No. 62, 36 Ind. Cas. 792.

(12) Deposit by purchaser—Stipulation as to forfeiture if purchaser makes default—Relief against forfeiture. See CONTRACT ACT, No. 91, 12 N.L.R. 177.

(13) Delay of buyer in taking delivery—Damage to goods—Liability of purchaser. See CONTRACT ACT, No. 84, 10 S.L.R. 14.

(14) Buyer failing to take delivery of goods and the seller exercising his powers of re-sale—Damages, claim for, at market rate—Maintainability. See CONTRACT ACT, No. 108, 8 L.B. R. 367.

(15) Re-sale of grove—Vendee whether liable to ejectment. See CUSTOM (GENERAL), No. 2, 31 Ind. Cas. 979.

(16) Sale by Manager of joint Hindu family—Sale not binding on other co-parcener—Remedy of purchaser. See HINDU LAW (ALIENATION), No. 17, 12 N.L.R. 161.

(17) See LIMITATION ACT (1908), No. 187, 33 Ind. Cas. 527.

(18) Concurrence of landlord and raiyat necessary to convey title to purchaser. See OCCUPANCY RIGHTS, No. 1, 36 Ind. Cas. 803=21 C.W.N. 400.

(19) See PRELIMINARY DECREE, No. 1, 9 Bur. L.T. 119.

(20) Property sold with full knowledge as an under-valuation—If disentitles vendor to relief. See SPECIFIC PERFORMANCE, No. 8, (1916; 2 M.W.N. 191.

(21) See TRANSFER OF PROPERTY ACT, No. 63, 35 Ind. Cas. 373.

Vendor and Vendee.

Surrender of right by vendee—Mortgage to vendor.

There is nothing to prevent a vendee from surrendering his rights under his sale-deed in any manner he thinks proper. He can effect the surrender by executing a mortgage-deed to the vendor in respect of the property already sold to him, so long as there is no law prescribing the form in which the surrender is to be made. *Jangl Ram v. Sheoraj Singh*, 30 Ind. Cas. 234.

STUART and KANHAIYA LAL, A.J.Cs.

Reference:—8 O.C. 317, R.

Verandah:

Remedy of persons dissatisfied with any act of municipal committee—Power of committee to direct removal of, projecting on public street on payment of compensation. See PUN. ACT III OF 1911 (MUNICIPALITIES), No. 3, 104 P.R. 1916.

Verification.

Plaint verified, if evidence—Object of. See CIV. PRO. CODE (1908), No. 369, 20 C.W.N. 1192.

Vesting of Estate.

Release in favour of reversioners—Acceleration of. See HINDU LAW (WIDOW), No. 22, 30 Ind. Cas. 234.

Village Courts.

Order of Deputy Collector debarring one from appearing as Vakil for parties in, *ultra vires*—Specific Relief Act (I of 1877), S. 42—Suit for declaration of invalidity of order, maintainability of. See MAD. ACT I OF 1889 (VILLAGE COURTS), No. 2, 39 M. 808.

Village Courts Act.

See MAD. ACT I OF 1889.

Village Hereditary Officers Act.

See MAD. ACT III OF 1895.

Village Service (Proprietary Estates) Act.

See MAD. ACT II OF 1894.

Voluntary Offering.

See RIGHT OF SUIT, No. 1, 1 Pat. L.J. 381.

Voluntary Settlement.

Void as against creditors—Dedication reserving life estate to settlor in the income of property, if valid. See MAHOMEDAN LAW (WAKF), No. 6, 31 M.L.J. 431.

Vyassantol Procession.

See PROCESSIONS, No. 1, 18 Bom. L.R. 460.

Wager.

(1) Agreement by way of—Suit to recover anything alleged to be won a wager—Lottery. See CIV. PRO. CODE (1908), No. 592, 9 Bur. L.T. 228.

Wagering Contract.

Badni—Illegal contract—Maintainability of suit thereon. See CONTRACT ACT, No. 17, 74 P.L.R. 1916.

Waiver.

- (i) *Landlord and Tenant—Decree for ejectment—Institution of rent suit when right to eject had not accrued—Waiver—Waiver of conditional right.*

On 18-7-1910, defendants sued plaintiff for rent of the years 1314-1317 and on 8-4-1911 obtained an *ex parte* decree which directed that, if the arrears were not paid within 30 days of the tenant's becoming aware of the decree, he was to be ejected. That decree was executed and possession was given to the defendants on 13-7-1911. On 30-4-1911, the defendants instituted a suit against the plaintiff for the rent of the year 1318, which apparently began in September 1910, and ended in September 1911. Previous to the institution of the suit the plaintiff (tenant) had on the 10th of April 1911, deposited Rs. 58-13 annas into Court in part payment of the rent of the year 1318; the total demand on account of which was Rs. 64 approximately. This second rent suit was decreed on the 16th July 1911.

On 20-1-1912, the present suit was instituted by plaintiff (tenant) to recover possession of the *mauza* on the ground that defendants were not competent to eject the plaintiff by reason of previous waiver.

Held that the institution of the suit coupled with the acceptance of the money deposited for the year 1318 constituted a complete waiver and estopped the defendants from proceeding in ejectment in execution of the decree of the 8th of April 1911.

There may be a waiver of a conditional right.

Quære:—Whether, having failed to plead waiver in the proceedings in execution of the ejectment decree, the plaintiff can now be permitted to plead it in a separate suit (a). *Midnapore Zamindari Co., Ltd. v. Joyram Santal*, 1 Pat. L.J. 185=34 Ind. Cas. 918.

MULLICK, J.

Reference:—(a) 17 B. 23, R.

(2) *Liability of surety—Termination of liability—Surety if may waive previous notice to judgment-debtor.* See CIV. PRO. CODE (1908), No. 131, (1916) 2 M.W.N. 273.

(3) See HINDU LAW (JOINT FAMILY), No. 27, 34 Ind. Cas. 827.

(4) See PRE-EMPTION, No. 13, 106 P.R. 1916.

Wajib-ul-arz.

- (1) *Construction of—Widow's right of transfer—“Aulad,” meaning of.*

A *Wajib-ul-arz* contained the following provision: “Women who are without issue (*aulad*) are permitted to hold the shares of their husbands without any power of transfer. After the decease of childless widows the property devolves upon the uncles and nephews of their deceased husbands and thereafter upon the more remote collateral male relations.”

Wajib-ul-arz—(Continued).

Held that the term “*aulad*” meant male issue only. *Held* also that the custom of exclusion of daughters and their issue from inheritance could not be inferred from the entries noted above. On a further construction of certain entries in the *wajib-ul-arz*, the Chief Court inferred that the powers of a childless widow in the matter of disposing of the estate of her husband in favour of a daughter or daughter's son had been extended. *Surajball v. Tilok Chand*, 36 Ind. Cas. 66.

LINDSAY, J.C.

- (2) *Statement of mukhtar alleging power to take away muafis—Proof of custom of resumption.*

Where a *wajib-ul-arz* contained a statement made by the mukhtar of a zamindar, that his client had power to take away all *muafis* at his pleasure, it is not sufficient evidence to prove the custom of resumption, as it contained merely a statement of an interested party. *Ala Bux v. Radhay Lal*, 30 Ind. Cas. 805.

BALLIE, S.M., and TWEDDY, J.M.

Reference:—3 Rev. L.J. 103, R.

- (3) *Proof of custom recorded—Question of fact and not of law—Proof of custom.*

The question whether a particular *wajib-ul-arz* is sufficient proof of a custom recorded in it is a question not of law but of fact, as it is a question regarding the weight or value to be attached to it. It cannot be contended that as a matter of law *wajib-ul-arz*, if un rebutted, is conclusive proof of a custom. *Tilak Ram v. Sitla Ram*, 30 Ind. Cas. 503.

LINDSAY, J.C.

References:—4 O.C. 71; 20 Ind. Cas. 894=17 O.C. 1, P.; 5 C. 744=6 C.L.R. 593=7 I.A. 634=4 Sar. P.C.J. 93=3 Suth P.C.J. 705=Rafique and Jackson's (P.C.) No. 61=24 Ind. Jur. 423, R.

- (4) *Entry without attestation by muafidars—Rent free land by local custom—Holding at pleasure of grantor.*

Where an entry in a *wajib-ul-arz*, attested by the *asamis* of a village and not by its *muafidars*, was relied upon to prove that the land was held rent free by local custom at the pleasure of the grantor, such entry could not, in the absence of any other evidence of local custom, establish the said custom. *Ganesh Prasad v. Sheo Dayal*, 30 Ind. Cas. 392.

HOLMES, J.M.

- (4-a) “*Malik Kamila*,” meaning—Tribal Custom excluding daughter from inheritance—Discretion of Court—Gift by a Hindu widow to married daughter—Declaratory suit by reversioner.

Where a *Wajib-ul-arz* contained a clause to the effect that a Hindu widow who succeeds her husband in the absence of male offspring succeeds as “*malik kamila*,” *held* that the words “*malik kamila*,” meant an absolute owner (a).

A tribal custom excluding daughters from succession in certain families in a district must be proved with regard to the particular family in question (b).

Wajib-ul-arz—(Concluded).

A Court should, in the case of a gift by a Hindu widow to her married daughter, refuse, in the exercise of its discretion, to grant a declaration that the deed of gift does not prejudice the plaintiff's reversionary rights. **Thakurdin Singh v. Bhagwant Kuar**, 32 Ind. Cas. 734.

STUART, A.J.C.

References:—(a) 3 O.C. 181, *Expl.* (b) Case No. 41 and 8 O.C. 94, R. (c) 11 A. 273, *F.*

(5) *Provisions in Wajib-ul-arz regarding the refuse of the village—Non-proprietors in the village whether bound by.* **Karim Bakhsah v. Aitaf Ali**, 88 P.R. 1915=180 P.W.R. 1915=31 Ind. Cas. 469. See Final Part, 1915, Col. 1326.

(6) Presumption as to correctness of the. See ACT IX OF 1887 (PROVL. & C. COURTS), No. 24, 12 N.L.R. 47.

(7) See OUDH ACT XVIII OF 1876 (LAWS), No. 6, 36 Ind. Cas. 668.

(8) Rent free lands—Local custom—Entry in—Absence of Musafidar's attestation. See OUDH ACT XXII OF 1886 (RENT), No. 24, 30 Ind. Cas. 203.

(9) See CONSTRUCTION OF DEED, No. 8, 32 Ind. Cas. 337.

(10) No express record in—Inference of custom to be on clear grounds. See CUSTOM (GENERAL), No. 4, 36 Ind. Cas. 66.

(11) Value of, when signed by ancestors of parties. See CUSTOMS (PUNJAB—INHERITANCE AND SUCCESSION), No. 5, 19 P.W.R. 1916.

(12) See GROVE HOLDERS, No. 1, 33 Ind. Cas. 237.

(13) Burden of proof of custom, evidentiary value of statements in. See MAHOMEDAN LAW (INHERITANCE), No. 1, 20 M.L.T. 362.

(14) See PRE-EMPTION, No. 22, 33 Ind. Cas. 775.

(15) See PRE-EMPTION, No. 23, 33 Ind. Cas. 301.

(16) Entry in—No rights conferred thereby. See WASTE LANDS, No. 1, 36 Ind. Cas. 634=2 P.R. 1917.

Wakf.

(1) Act XX of 1863 (Religious Endowments), S. 18—Scheme suit—Removal of trustees. See CIV. PRO. CODE (1882), No. 31, 35 Ind. Cas. 880.

(2) See JURISDICTION OF REVENUE COURTS, No. 2, 30 Ind. Cas. 240.

War.

See ALIEN ENEMY.

(1) Contract within alien enemy—Payment of interest under contract entered into before outbreak of war—Trading license granted to alien enemy—Suspension of interest after the outbreak of war.

The existence of a state of war between the respective countries of debtor and creditor suspends the accrual of interest when it would ordinarily be recoverable as damages and not as

War—(Concluded).

a substantive part of the debt. If the enemy creditor remains in the country of the debtor, the accrual of interest is suspended until the debtor has actual notice that the principal debt can safely be paid without the possibility of its owing for the benefit of the enemy during the continuance of hostilities. **Wilfred R. Padgett v. Jameshetji Hormusji Chothia**, 18 Bom.L. R. 190=33 Ind. Cas. 724.

MACLEOD, J.

(2) Alien enemy—Licensed to trade—Right to bring suits. See ALIEN ENEMY, No. 2, 9 Bur. L.T. 51.

(3) Bill of exchange—Proclamation enabling British subject to obtain goods on enemy steamer in natural port—Acceptor dishonouring bill by non-payment—Effect. See BILL OF EXCHANGE, No. 1, 18 Bom. L.R. 521.

(4) Effect of, on contract previously concluded—Contract for sale of goods—Seizure and release of goods by the Crown, effect of—Damages for breach of contract. See CONTRACT, No. 17, 33 Ind. Cas. 540.

(5) Outbreak of—Goods shipped in enemy ship—Arrest of the ship as prize—Non-payment of bill at maturity—Goods delivered later at destination—Liability to pay amount of bill with interest. See CONTRACT, No. 15, 18 Bom. L.R. 915.

(6) Contract with enemy—Trading with enemy—Hostile Foreigners Trading Order—Impossibility of performance—Effect of war—Right to refund of deposit amount. See CONTRACT ACT, No. 55, 18 Bom. L.R. 105.

Warrant.

(1) Direction to bailiff to attach goods—Execution by Nazir—Resistance to his entry—No offence—No day mentioned in the warrant of day before which it is to be executed—Illegality. See PENAL CODE, No. 3, 1 Pat. L.J. 550.

Warranty of Title.

Lands situated in the mofussil—Exchange effected before the Transfer of Property Act—Breach—Damages. See EXCHANGE, No. 1, 31 M.L.J. 380.

Waste Lands.

(1) *Shamilat in village patti Allanwala, Jhang District—Rights of Ala maliks to its proprietorship—No rights to Adna maliks—Acquisition of rights from Dewan Sawan Mal's—Right to lands actually held—No right to waste—Position of bathrakidar, talukdar and tarraddakhar—Entry in wajib-ul arz—No rights conferred thereby.*

As Dewan Sawan Mal recognised no rights in land that was not being actually cultivated, it would follow that proprietorship acquired through him could only refer to the proprietorship of the actual holding, then under cultivation, and that he granted no rights to any one in waste land as waste.

Waste Lands—(Concluded).

As village boundaries have only been fixed since the advent of the British rule, it is impossible to hold that persons acquired any rights in the *shamilat* when they acquired proprietary rights in their holdings through Dewan Sawan Mal (a).

In the Jhang District, the *adna malik* may be said to be the present equivalent of the *hathrakhiar* or *tarraddadkar* or he may be a proprietor as created by Dewan Sawan Mal.

The land belonged to *ala maliks* but the *adna maliks* having been in possession of it for a long period and having paid revenue direct, were deemed to be entitled to the proprietorship of it, subject to the payment of a proprietary fee.

The enforcement of *hathrakhai* or *talukdari* right is a clear indication that the original owners were recognised as the superior proprietors by the British Government.

The rights of a proprietor in the *shamilat* lands are not a mere accessory to the land separately held by him. Therefore a sale of land by a proprietor without an express sale of his rights in the *shamilat* gave the vendee no rights in the *shamilat* (b).

Held that, in the village *Path Allanwala* in the tahsil and district of Jhang, it is the *ala maliks* and not the *adna maliks* who are entitled to the *shamilat* lands of the village.

Held further that no question of custom arose as this is the very first time that the *shamilat* has been partitioned.

Held, also, that the entry in the *wajib-ul-ars* Cl. (14) which gives to the *khewatdars* a right in the *shamilat* merely lays down a basis or mode of partition, and creates or gives no right to share to any person (c). *Sultan Ahmad v. Parsa Ram*, 36 Ind. Cas. 634 = 2 P.R. 1917. SCOTT-SMITH and BROADWAY, JJ.

References:—(a) 33 P.R. 1903, *Ref. to.* (b) 113 P.R. 1901; 3 P.R. 1907, *Ref. to.* (c) 75 P.W.R. 1910, *Ref. to.*

(2) See EJECTMENT SUIT, No. 1, 30 Ind. Cas. 191.

Waste Land Grant Rules.

Enforcement by Government — Effect of rules on Courts of Justice.

Waste Land Grant Rules are not binding on the Courts of Justice. They are in the nature of conditions attached to the lease granted by the Government and are binding only between the grantee and the Government. They are not rules which could be enforced against the grantee at the instance of the tenant. Their enforcement lies in the Government, the grantors. *Maung Aung Himin v. Monlandy Servai*, 36 Ind. Cas. 373.

MAUNG KIN, J.

Waste Lands Act.

See ACT XXIII OF 1867.

Water.

(1) Right to take—Long user—Presumption of lawful origin—Difference between Indian and English Law. See EASEMENTS ACT, No. 1, 4 L.W. 128.

Water—(Concluded).

(2) Right to discharge surplus, through water course—Easement—Natural right—Proof. See LIMITATION ACT (1908), No. 88, 35 Ind. Cas. 394.

(3) Perpetual injunction—Right to use, decreed in previous suit—Owner filling up tank. See SPECIFIC RELIEF ACT, No. 48, 35 Ind. Cas. 40.

Water-cours.

Classification of bed of water course for levy of, by Government. See EASEMENTS ACT, No. 7, 31 Ind. Cas. 982.

Water Courses.

(1) Easement as against Government when and how acquired. See EASEMENTS ACT, No. 7, 31 Ind. Cas. 982.

(2) Right to discharge surplus water through — Easement — Natural right — Proof. See LIMITATION ACT (1908), No. 88, 35 Ind. Cas. 394.

Wedding Presents.

Hindu Law—Conversation of self-acquisition into family property—Widowed daughter-in-law's maintenance—Wedding presents. See HINDU LAW (JOINT FAMILY), No. 34-a, 32 Ind. Cas. 955.

Widow.

(1) Family house—Widow's right to maintenance. See BUDDHIST LAW, (MAINTENANCE), No. 1, 8 L.B.R. 404.

(2) Right to succeed to estate of husband's collateral. See CUSTOMS (PUNJAB)—INHERITANCE AND SUCCESSION, No. 11, 121 P.R. 1916.

(3) Hindu Law — Widow — Maintenance—Facts to be considered in fixing the rate. See HINDU LAW (ADOPTION), No. 12, 123 P.R. 1916.

(4) Widow's interests — Transfer of—Price over Rs. 100 — Registration necessary. See TRANSFER OF PROPERTY ACT, No. 59, 34 Ind. Cas. 746.

Widows' Re-marriage (Hindu) Act

See ACT XV OF 1856.

Wife.

Appointment of guardian of lunatic — Whether, may be appointed. See ACT IV OF 1912 (LUNACY), No. 3, 36 Ind. Cas. 983 = 15 A.L.J. 10.

Will.

(1) Due execution and attestation, proof of—Attesting witnesses, turned hostile—Court may find execution proved from other evidence—Proof that testator saw attesting witnesses sign, and latter saw testator sign, if necessary, where Will regular on its face — Presumption of due execution.

The mere fact that attesting witnesses to a Will have repudiated their signature does not invalidate the Will, if it can be proved by

Will—(Continued).

evidence of a reliable character that they have given false testimony.

When the evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point, the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the statute were complied with; in other words, the Court may, on consideration of the other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character or that they are wilfully misleading the Court, and accordingly disregard their testimony and pronounce in favour of the Will.

It is not necessary under the law that affirmative evidence should be forthcoming, that the testator did as a matter of fact see the attesting witnesses put their signatures or that the attesting witnesses did actually see the testator sign the document. It is enough if the circumstances show that their relative position was such that they might have seen the execution and the attestation respectively.

Every presumption will be made in favour of due execution and attestation in the case of a will regular on the face of it and apparently duly executed. *Brahmadat Tewari v. Chaudan Bibi*, 20 C.W.N. 192=34 Ind. Cas. 686.

MOOKERJEE and BEACHCROFT, JJ.

(2) *Revocation of, tearing—Succession Act (X of 1865), S. 57.*

When a testator sent for his Will, wrote the word "cancelled" thereon and signed it and according to his Attorney's direction tore it partially.

Held—that this showed the intention of the testator to revoke the will and the partial tearing constituted a sufficient revocation of the Will within the meaning of S. 57, Succession Act. *Johur Lal Dey v. Dharendra Nath Dey*, 20 C.W.N. 304=23 C.L.J. 314=34 Ind. Cas. 707.

SANDERSON, C. J., WOODROFFE and MOOKERJEE, JJ.

References:—1 Sw. and Tr. 155 (1858), D.; 2 W. Bl. 1043 (1749), R.

(3) *Revocation by parol—Actual destruction, whether necessary—Animus revocandi—Omission to make a subsequent Will, effect of—Custom—Intestate succession among Arains of Lahore—Brothers and their sons, rights of, as against widow and daughter's sons.*

Held, that, in cases not governed by the English Law, the Indian Succession Act or any other Statute specifying a particular method of revocation, actual destruction or a formal revocation is not essential to constitute the revocation of a Will (a).

Under the Muhammadan Law, a bequest may be revoked by express declaration, oral or written.

Where, therefore, a testator expressed in a Court of Justice his intention of revoking a Will previously made:

Will—(Continued).

Held, also, that this was a case of the revocation of Will by parol and that the mere fact that the testator failed to destroy the existing Will or omitted to make a subsequent one, could not have the effect of reviving a Will which had been cancelled.

Held, further, that, among the Arains of Lahore, brothers and their sons are not heirs at intestate in the presence of the widow and the daughter's sons (b). *Miran Baksh v. Mussamat Mehr Bibi*, 6 P.W.R. 1916=41 P.L.R. 1916=31 Ind. Cas. 693.

RATTIGAN and SHADI LAL, JJ.

References:—(a) 25 M. 678=29 I.A. 156 (P.C.) =7 C.W.N. 1=12 M.L.J. 299; 4 I.A. 228 at p. 245=1 C.L.R. 113=3 C. 626=3 Sar. P.C.J. 740=3 Suth. P.C.J. 458; P.C. No. 46=1 Ind. Jur. 679, R. (b) 19 P.R. 1906=70 P.W.R. 1906, R.

(4) *Dispositive words—Operative words, nature of.*

Where the material words of a Will ran as follows: "I bequeath to Pakkremmar who is my nephew and to Mammad who is my nephew, these properties so that they may enjoy them after my death and on the death of either Pakkremmar or Mammad, his right should be enjoyed then by the remaining members born of his mother." *Held* that the whole of it ought to be given effect to as actually operative words expressing the intentions of the testator, and that, on the death of Mammad during the lifetime of the testator the estate vested in the children of Mammad's mother as from the testator's death. When one of the properties so bequeathed comprised a mortgage and the whole of the money due thereunder was received by Pakkremmar from the mortgagor: *Held*, that he was bound to account to Mammad's mother's children for their share of the mortgage money. *Arippayil Kader v. Arrippayil Pakkremmar*, (1916) M.W.N. 190=33 Ind. Cas. 988.

COUTTS-TROTTER and SESHAGIRI AIYAR, JJ.

(5) *Construction of—Dedication of property for worship—Executors to divide profits after expenses—Trust property.*

A testator bequeathed his property in the following terms:—

"In the other dwelling-house consisting of three sections of Thakurdwara including the staircase, both the executors aforesaid should reside, put up pilgrims and attend on them jointly and from the income thereof to daily perform the usual worship of the gods Mufli Dhar, Raj Rajesbri and Mahadeo and the worship on *Basant Panchini*, *Ram Nauni*, *Janam Ashtami*, *Nauratri*, *Shivaratri*, *Dhanurmas*, and *Sami* festivals and to look after its repairs. After this is done both the executors should make a receipt and disbursement account of the income annually and after deducting the above expenses should divide the profits between them in half and half and should grant receipts and acquittances as between themselves."

Will—(Continued).

of the executors shall in any way be entitled to transfer, mortgage or sell this house, and if they do so it will be utterly null and void."

Held, that the will created a trust and the only beneficial interest given under the will to the nephews was the right to take surplus profits, if any, after the worship had been performed and the festivals duly observed. **Murli Dhar v. Dewan Chand**, 14 A.L.J. 249 = 38 A. 214 = 32 Ind. Cas. 945.

RICHARDS, C.J. and RAFTQ, J.

(6) *Construction of—Dedication to idols—Completes dedication or charge—Surplus income arising from debutter estate—Accumulation—Power given to shebait to invest—Cash and money—Devise of residuary estate.*

Held, on the construction of the will in question, that there was a valid trust for religious and charitable purposes with regard to the surplus income arising from the debutter estate.

That the clause relating to accumulation was merely incidental to the provisions relating to dedication and management of the property.

That a power was given to the shebait from time to time in the course of the management of the properties to make safe investment of surplus income and thus increase the debutter fund, and a direction was necessarily implied that the income not required for the specified expenses should be used within a reasonable time and in a reasonable way for other religious ceremonies and other charitable work. It was left to the discretion of the shebait to decide the exact form and the exact time when the income should be so used.

The term 'cash' used by the testator in cl. 12, did not include arrears of rent, debts due and the like properties.

Clauses 12, 13 and 14 of the will, contained a devise of the residuary estate to his two sons.

Per **Sanderson, C.J.** and **Woodroffe, J.**—The word 'cash' in the ordinary acceptance of the term has a narrower meaning than money, and when taken in conjunction with the words 'Government Promissory Notes,' means cash in the ordinary meaning of the word.

Per **Mookerjee, J.**—Cl. 1 of the will constituted a complete dedication of all the property to the idols. It did not create merely a charge on the property in favour of the idols.

Where there is an unconditional gift to charity, a direction for accumulation is invalid.

The trustees of a charity are not bound to spend the whole of the income of the charity every year; they can lay by money for an ulterior purpose, just as an individual can, provided the purpose is within the scope of the charitable trust.

In case of doubt, one should so read the will as to lead to a testacy and not to an intestacy. **Sarajini Dassi v. Ganendra Nath Das**, 23 C. L.J. 241 = 33 Ind. Cas. 102.

SANDERSON, C.J., WOODROFFE and MOOKERJEE, JJ.

References:—(1877) 6 Ch. D. 189 (186); (1885) 30 Ch. D. 390 (1893); (1903) 1 Ch. 483 (489); (1906) 1 Ch. 570, R.

Will—(Continued).

(7) *Construction—Duty of Court to ascertain intention of testator—Devise of absolute estate in favour of wives—Condition in restraint of alienation validity of—Pre-emption suit—Plaintiff's proprietors at time of sale and at date of suit—Suit whether maintainable—Punjab Pre-emption Act (II of 1905), S. 11, proviso.*

1. The duty of a Court in interpreting a testament is to ascertain the intention of the testator from all the clauses of the document and to give full effect to it.

2. Where a testator, having conferred an absolute estate upon his wives, attaches a condition in restraint of alienation, such a condition is void in law (a).

Where, therefore, a testator bequeathed his entire property to his two wives, and expressly conferred upon them full powers of alienation by sale, mortgage, etc., and there was a clause in a subsequent part of the will providing that, on the death of one wife, the other would succeed to her estate, and that, on the death of both, certain specified collaterals would inherit the property:

Held, that what the testator intended was that, after his death, the widows should have unrestricted powers of alienation, whether during their lives, or to take effect after their deaths, and that the later clause did not justify a distinction between gifts *inter vivos* and Wills, i.e., the property not covered by any alienation should devolve on his collaterals.

Where plaintiffs in a pre-emption suit were proved to have been proprietors in the village at the time of the sale as well as on the date of the suit and the defendants produced no evidence in rebuttal:

Held, that they had complied with the requirements of the proviso to S. 11 of the Pre-emption Act and were entitled to pre-empt. **Nek Muhammad v. Maya Ram**, 35 F.W.R. 1916 = 32 Ind. Cas. 605.

SHADI LAL, J.

References:—(a) 18 W.R. 369 = 9 B.L.R. 377 = I.A. Sup. Vol. 47 = 2 Suth. P.C.J. 692 = 3 Sar. P.O.J. 85, F.

(8) *Demonstrative legacy—Interest whether payable thereon—Time from which interest payable—Ss. 311, 312, Act X of 1865 (Succession).*

Interest is payable on demonstrative legacies (a).

A legacy payable at a future day carries interest only from the time fixed for its payment. On the other hand, where no time for payment is fixed, the legacy is payable at, and therefore bears interest from, the end of a year after the testator's death, even though it be expressly made payable out of a particular fund which is not got in until after a longer interval (b). And S. 311, Succession Act, applies to such a case.

The Act provides 4 per cent. per annum which will be the rate of interest allowed upon

Will—(Continued).

these demonstrative legacies. *Administrator-General of Bengal v. A.D. Christiana*, 43 O. 201—84 Ind. Cas. 157.

CHAUDHURI, J.

References:—(a) 29 M. 155; (1850) 1 Drew and Sm. 204, F. (b) (1867) L.R. 2 Ch. App. 782 (789); (1912) 1 Ch. 219 (225), *Appl.*

- (9) *Genuineness, proof of*—*Clear and trustworthy evidence of attesting witness is to be rejected because appearance of document suspicious*—*Court, if in such a case may speculate as to what would have been a proper Will for the testator.*

Proof of the genuineness of a Will depended mainly upon the testimony of a doctor who attested, on the last page of the Will, the signature of the deceased, and who deposed that, at the time the Will was executed, the deceased was perfectly capable of understanding a business transaction. The Will on examination showed that the writing on the last page was inconveniently crowded above the signature of the testator, and, on the last page but one, the writing at the foot was so placed as to lend colour to the suggestion that the page had been filled up after the signature had been attached. Upon this the Trial Judge built the theory that the Will had been written in blank pages over signatures of the testator previously obtained.

Held, that the doctor's evidence, if believed (and which the Judicial Committee did believe) completely destroyed this theory, and that the High Court was right in pronouncing in favour of the genuineness of the Will.

That it would be most unsafe and most undesirable, in circumstances such as these, to try to spell out, from the peculiar form in which a document written in the vernacular appears, a hypothetical answer to the clear, distinct and trustworthy evidence of the doctor who witnessed the Will.

Where a Will has once been made and is apparently in perfect form, and the evidence of the attesting witness is to be trusted, few things can be more dangerous than to attempt to re-create the kind of Will that the man ought, in the opinion of the Court, to have made. Once the man's mind is free and clear and is capable of disposing of his property, the way in which it is to be disposed of rests with him, and it is not for any Court to try and discover whether a Will could not have been made more consonant either with reason or with justice. *Sona Ana Arunachalam Chetty v. S. R. M. Ramaswami Chetty*, 30 M.L.J. 555=20 O.W.N. 673=3 L.W. 508=(1916) M.W.N. 399=23 O.L.J. 632=18 Bom. L.R. 408=20 M.L.T. 50=35 Ind. Cas. 1 (P.C.).

LORD CHANCELLOR, VISCOUNT HALDANE, SIR JOHN EDGE, MR. AMEER ALI and SIR LAWRENCE JENKINS.

- (10) *Execution in unusual circumstances*—*Will not inofficious*—*Witnesses such as were reasonably to be expected to be available in the circumstances, not to be disbelieved merely because their position socially inferior*—*Beneficiary under Will recited as*

Will—(Continued).

being testator's adopted son—*Caveator, if may question adoption*—*Judge, if may refuse to frame an issue as to adoption, whilst admitting evidence thereon*—*Relevancy on the question of genuineness of Will*—*Note of evidence to be given by witness, refusal to produce, if should prejudice party*—*Privilege.*

K, a Hindu gentleman of means and resident of a place called Sursand, went accompanied by his two wives and some of his servants and dependants to attend the bathing fair at Sonapur on 10th November 1905. Cholera having broken out at the fair, it was broken up by Government order, but K, who had been suffering from dysentery and had been made nervous about the state of his health by the out-break of cholera, (it was alleged) executed the disputed Will on 15th November 1905 and died at 9 A.M. on 16th November 1905. The Will was proved by such of the attesting witnesses as were available and other witnesses. The genuineness of the Will was challenged *inter alia* on the ground that the witnesses to the execution were not of a superior position. The Will however appeared to be one which a Hindu gentleman in K's position might reasonably and naturally have made, and the attesting witnesses were such as one would reasonably expect to be available on the occasion.

Held, that, there being nothing in the case to suggest that the Will had been forged or that the witnesses who gave evidence as to the preparation, and as to the due execution, of the Will had committed perjury, the contention that the Will should not be accepted as genuine because the witnesses to its execution were not of a superior position was not sound and was contrary to the view of the law as expressed in 22 I.A. 12 at p. 24, 41 I.A. 80=18 O.W.N. 521.

That something more than mere suspicion is necessary in such a case to make convincing an argument based on the social position of the witnesses.

One of the beneficiaries under the Will was C, a boy who, the Will recited, had been adopted according to Hindu rites, by K as his son. The caveators questioned the *factum* of the adoption:

Held, that the trial Judge was right, upon an application for probate, in declining to frame an issue as to the alleged adoption, though the matter had to be considered as bearing on the question of the genuineness of the Will, and the caveators were not precluded from questioning the adoption and were rightly allowed to cross-examine the propounder's witnesses on that subject and to call evidence to prove that C was not adopted.

For the purposes of the propounder's brief, a note had been obtained from a witness (subsequently examined at the trial) of the evidence that he could give:

Held, that the note was privileged from production and the caveators were not entitled to see it, and the Judges should not have allowed their minds to be influenced in considering the evidence by the fact that the note was not produced in Court for the information of the

Will—(Continued).

overlaid. **Dulhin Genda Kunwar v. Harmandan Singh**, 20 C.W.N. 617=30 M.L.J. 624 (1916) M.W.N. 353=4 L.W. 214=33 Ind. Cas. 790 (P.C.).

VISCOUNT TALDANE, LORD SHAW, SIR JOHN EDGE and MR. AMER ALI.

- (11) *Proof of genuineness and validity thereof—Probate—Letters of administration with the will annexed—Probative value—No distinction.*

No distinction can be drawn between a grant of probate and a grant of letters of administration with the will annexed so far as it affects the proof of genuineness and validity of a will. Both of them are conclusive evidence of the factum and validity of the will. **Rallabandi Venkataratnam v. Rallabandi Raja Ram Mohana Rao**, 31 M.L.J. 277=4 L.W. 248=35 Ind. Cas. 854.

ABDUR RAHIM, O.C.J. and KRISHNAN, J. *Reference*:—7 H.L.C. 124.

- (12) *Wording of a document called codicil—Modification of will—Oral will to be very distinct, etc.—Present and future intention to modify the will*

Held, that:—

1. A person who wants to prove a modification of a Will by subsequent testamentary declaration is bound to establish an actual intention, but not expression declaratory only of a future design, of the testator to revoke its clauses imposing the conditions which he seeks to avoid.

2. Where a Will contains a clear and unambiguous disposition of the property real or personal such a gift is not allowed to be revoked by doubtful expressions in a codicil, i.e., a distinct disposition made by a Will cannot be revoked by a codicil except through the medium and use of the words equally clear and distinct (a).

3. If any party is bound to strictness of pleadings it is he who sets up a nuncupative will. He who rests his title on an uncertain foundation as the spoken words of a man since deceased is bound to allege as well as prove with the utmost precision the words on which he relies with every circumstance of time and place (b).

4. In the present case a portion of the will also provided as follows:—

"After my or my wife's death (whichever takes place afterwards) the big *haveli* with stable shall be possessed by both my grandsons Naringan Das and Narsingh Das, sons of Lala Naringan Das deceased for three years and none of my descendants can eject them from this *haveli*. They shall possess the whole of that part of the big *haveli*, and stable which is possessed by me now-a-days. Devi Das shall only remain in possession of the large room on the second storey towards the *Bazaar* and shall have no concern with any other part of the *haveli* and stable. If he wishes that after three years Naringan Das and Narsingh Das shall give up possession of the big *haveli* and stable, he must after my or my wife's death (whichever takes place afterwards) pay within three years a

Will—(Continued).

sum of Rs. 6,000 (six thousands) to both my grandsons Naringan Das and Narsingh Das in equal shares.

The plaintiff in this case contended on the strength of the document containing certain words which he called codicil and some oral evidence that the testator during his life time had revoked the conditions after receiving the sum of Rs. 1,665 and that he had become absolute owner of the *haveli*.

Held, that the principles above enunciated that this document was a mere receipt and it including the oral evidence, was quite insufficient to revoke the said provisions of the will. **Naringan Das v. Devi Das**, 112 P.W.R. 1916=41 P. L.R. 1917=35 Ind. Cas. 899.

GHADI LAL and LE ROSSIGNOL, JJ.

- References*:—(a) 3 H.L. 160 at p. 167, F. (b) 12 M.I.A. 1 at p. 28, F.

- (13) *Construction of will—Devise of whole estate to one person coupled with a devise of a particular village to another—Repugnancy—Express conferment of powers of alienation upon general devisees and omission of such powers in case of particular devisees—Whether such difference of language limits the interest of the particular devisees.*

A testatrix described her title as "I am the sole owner in possession (*malik-o-qabiz*) of his (her deceased husband's) entire estate and possess all the proprietary powers" and bequeathed the entire estate of her husband to one F.C. with certain conditions, one of which was that "I shall continue to be the owner in possession of the entire estate the subject of the will and possess all the powers such as those of making sales, mortgages, &c." and condition 4 was in the following terms; "I have bequeathed Mauza Kludde, with all the property to Mussammat Gomti—After my death she shall be the owner in possession (*malik-o-qabiz*) of the entire property in Mauza Khudla aforesaid":—

Held, that the words "*malik-o-qabiz*" signify a full ownership in property; that by condition 4 the village in question was absolutely bequeathed to Mussammat Gomti; that expressions as to powers of alienation by the testatrix neither abate from, nor fortify, the completeness of the ownership and possession of the testatrix, and, being words which are thus surplusage, should be omitted in construing condition 4; and that inasmuch as the entire estate devised to F.C. was subject to conditions, an absolute gift of the village in question to another person was an exception but not repugnant to F.C. (a). **Fateh Chand v. Pandit Rup Chand**, 38 A. 446=18 Bom. L.R. 900=20 M.L.T. 481=21 C.W.N. 102=4 L.W. 597=(1916) 2 M.W.N. 567 (P.C.).

LORD SHAW, LORD PARMOOR and MR. AMER ALI.

- References*:—(a) (1907) L.R. 35 I.A. 17; 10 Bom. L.R. 59, *Appr. and F.*

- (14) *Construction—Life interest—Absolute estate.*

A testator provided in his will as follows:—I appoint by this testament my brother Joaquim Serpes as my only and universal heir

Will—(Continued).

of all the immovable property which I possess, and which may hereafter in any manner belong to me. With the strict obligation to him not to sell, exchange or hypothecate it, but only to enjoy the usufruct thereof, and at his death to pass over the same to his male children, preserving the same as a patrimony of the house:

Held, on a construction of the above clause, that under it Joaquim took only a life interest in the property devised to him. *Rope D'Souza v. Joseph Joaquim Serpes*, 18 Bom. L.R. 943 = 41 B. 70.

BATCHELOR, AG. C.J., and SHAK, J.

(15) Construction—Bequest by Hindu father—Absolute gift to two sons with gift over in the event of legatee's death—Effect.

B, a Hindu, left a will dated 19th December 1894, and died thereafter leaving him surviving two sons R and T. The will left by B contained, among others, the following provision, *vis.* '...The share of T shall be entrusted to B as T was subject to fits of epilepsy. In case he dies on account of the said disease, his wife shall be entitled to maintenance allowance and all the brothers shall be owners of his property in equal shares...' T begot a son, U, the plaintiff, and died ten months after U was born. T's share of the property was with B's widow and sons. U instituted the present suit for the recovery of a half share of certain houses left to his father T by B's will.

Held, that, on a true and proper construction of the will, the words 'in case he dies' occurring in the will, mean 'in case he dies without issue before me' and that the plaintiff was entitled to recover the half-share of the properties assigned to T under the will (a). *Udho Ram v. Mehr Chand*, 114 P.R. 1916.

JOHNSTONE, C J. and SHADI LAL, J.

References:—(a) 24 C. 834; 40 C. 274; 22 O.L.J. 316 and 27 Ind. Cas. 239, *Ref. to*; 20 C. 906 and 13 Ind. Cas. 571, *Dist.*

(16) Probate proceeding—Right of creditor to come in such proceedings.

The owner of a property by a will left it to his wife for life, after her death to his daughter-in-law for her life. After her death, he said the male children that should be born to his son, should on attaining majority get the property in absolute right. He further declared that no property left by him was to be liable for debt of his son. No executor was definitely appointed by the will, but the testator gave equal power to his wife and to his daughter-in-law, and directed that, in case of death, of one of them the survivor of the two should continue to be in enjoyment and possession in the manner stated above. His wife obtained Probate of the will and retained possession of the property during her life. The present appellant, who was a creditor of the testator's son, applied to be made a party to the probate proceedings. *Held*, that, it would only be in the event of a will being put forward possibly to defraud creditors, that a creditor would

Will—(Continued).

have *locus standi* to come in probate proceedings. In the present case there could be no question of fraud upon the appellant, as he was not a creditor at all and apparently had no prospect of being one when probate was granted to the widow of the testator. *Akshay Kumari Basu v. Prasanno Kumari Ghose*, 30 Ind. Cas. 538.

CHITTY and TUENON, JJ.

References:—15 Ind. Cas. 686 = 16 O.W.N. 1099 = 17 C.L.J. 230, *F.*

(17) Proof of testator's intention—Admissibility of oral evidence.

Though oral evidence is admissible to prove the surrounding circumstances of a testator and the beneficiaries under his will, no such evidence is admissible to prove the intention of the testator. *Gadigeremula Sunkil Reddi v. Yengal Reddi*, 30 Ind. Cas. 391.

BAKEWELL and SPENCER, JJ.

(18) Successive executors—Non-liability of second executor for his predecessor's account—Fistate in embarrassment—Sale of property by executor—Debtor appointed as executor, effect—Directions by testator as to marriage expenses, if valid—Suit for construction of will—Costs—Benami transaction—Test—Evidence Act, S. 145—Previous statements, when can be used as evidence.

Where a person makes a testamentary disposition of his properties and appoints successive executors, the second executor as such is not liable for the accounts of his predecessor or for his wrongful acts, but it is incumbent upon him to call upon the representatives of his predecessor to render an account and respond in damages for *devastavit*, mismanagement, or breach of duty whereby any property of the deceased testator was diverted from a due course of administration (a).

Where the estate of a testator which has come into the hands of the executor is admittedly in a condition of considerable embarrassment, his failure to raise money on interest with a view to save the property from sale is not necessarily a dereliction of duty, unless it is proved that damage has actually resulted to the estate from the sale.

The effect of the appointment of a debtor to the office of executor is that the debt due from the debtor executor is considered to have been paid to him by himself and that the executor is accountable for the amount of his debt as assets (b).

Directions given by a testator in respect of the marriage expenses of his great grandsons and great grand-daughters are valid in law (c).

In a suit for construction of a will, for administration of the estate of the testator, for settlement of the accounts of the executor and for partition of such properties as may be left after payment of the debts, costs of all Courts must be paid out of the estate (d).

In determining whether a conveyance was *benami* or not the source of the purchase money and possession of the property are the principal tests. Reliance must be largely placed, not

Will—(Continued).

only upon the surrounding circumstances and the position of the parties and their relations to one another, but also upon the motives which could govern their actions and their subsequent conduct (e).

Previous statements, unless used to contradict or discount the evidence of a witness given in the suit, cannot be legitimately used, and even then the particular matter or point must be placed before the witness as one for explanation in view of its discrepancy with the evidence tendered unless the specific statements are put to the parties sought to be contradicted, they cannot be used in evidence (f). **Upendra Nath Nag v. Bhupendra Nath Nag**, 32 Ind. Cas. 267.

MUKERJEE and BEACHROFT, JJ.

References:—(a) 1 Ind. Cas. 289=8 O.L.J. 383=13 C.W.N. 557, R. (b) 9 B. & C. 130=4 Man. & Ry. 18=7 L.J.K.B. (O.S.) 148=109 E.R. 49=32 R.R. 605; 98 Beav. 366; (1790) 3 Bro. C.O. 110; 11 Ves. 87; 66 E.R. 1019; 31 C. 519=8 C.W.N. 500, R. (c) 7 Ind. Cas. 921=13 C.L.J. 85=15 C.W.N. 66; 11 Ind. Cas. 67=39 C. 87=14 C.L.J. 20=15 C.W.N. 925, R. (d) 7 Qb. D. 33, R. (e) 3 M.I.A. 229=6 W.R. 43 (P.C.); 6 M.I.A. 53=4 W.R. 46; 13 I.L. 160=14 C. 109, R. (f) 29 Ind. Cas. 639=22 O.L.J. 1=13 A.L.J. 570=19 C.W.N. 729=29 M.L.J. 34=39 B. 441, R.

(19) Transfer of Sir by Will—Expropriary tenancy—Landlord and Tenant.

Where a sir-holder transfers his sir by Will to a person who is not his heir, the sir becomes sir of the transferee and no expropriary rights arise in favour of the transferor or his heirs. **Imam-un-Nissa Bibi v. Pershad**, 32 Ind. Cas. 864.

HOLMES, S.M. and CAMPBELL, J.M.

(20) Construction of—Direction to trustee to invest testator's money in a company for a certain period—Change of investment after the period, whether necessary—Trust—Investment of trust money on first mortgage—Accumulation of debt in excess of value of mortgaged property—Breach of trust.

A Will contained a direction to a trustee appointed under it to collect the money due on a policy of insurance upon the testator's life and invest that sum in A and Co. and improve the principal and interest for three years; it also provided that in certain events the money that might accrue till then (i.e., till the end of 3 years) should be considered as belonging to the testator's wife and daughter, and that even then the testator's younger brother and trustee should continue to have the authority of supervision connected with that money as it was in the mean-time. The trustee deposited the money in A and Co. according to the directions in the Will, but did not withdraw it after 3 years, and the money perished in the Company's bankruptcy. In an administration suit brought by the testator's wife, seeking to make the trustee liable for the loss of the money on the ground that by allowing it to remain in deposit with the Company after 3 years, he had

Will—(Continued).

acted contrary both to his duties as trustee under the law and to the express terms of the Will.

Held that on the true construction of the will the defendant was directed to invest the money in A and Co. and to remain trustee of the fund until he transferred it according to law to the beneficiaries, and that he was accordingly entitled to retain the money in that Company if he liked, and was not bound to change the investment.

Where trustees who had invested trust money on a first mortgage of immovable property, knowing that the mortgagor was in embarrassed circumstances, made no attempt to obtain payment of principal or interest, till the total amount of debt considerably exceeded the value of the property, **held** that the trustees having done nothing to protect the interest of the *cestui que trust*, were liable to make good the loss caused by their default. **Dhupati Srinivasachari v. Andoor Perindeamma**, 33 Ind. Cas. 604.

COUTTS-TROTTER and SRINIVASA AIYANGAR, JJ.

(21) Succession Act (X of 1865), S. 62—Bequest in favour of a person not named by the testator communicated to another in private—Validity of the bequest. **Bayabal Sakalkar v. Haridas Ranchhodani**, 17 Bom. L.R. 115=27 Ind. Cas. 946=40 B. 1. See Final Part, 1915, Col. 1329.

(22) Will, lost—Presumption that it has been revoked how to be applied in India—Finding that Will was revoked, based on presumption, upset in second appeal—Proof of Will by copy taken from Registrar's office, without objection in the first Court—Objection on appeal that conditions for admission of secondary evidence not fulfilled is admissible. **Padman v. Hanwanta**, 19 C.W.N. 999=18 M.L.T. 54=13 A. L.J. 801=110 P.W.R. 1915=29 M.L.J. 307=17 Bom. L.R. 609=(1916) M.W.N. 500=2 L. W. 645=22 C.L.J. 172=39 P.R. 1915=11 P. L.R. 1916=29 Ind. Cas. 807 (P.C.). See Final Part, 1915, Col. 1337.

(23) Construction of—Absolute interest subject to condition, devise of—Condition as to residence, if valid—Succession Act (X of 1865), Ss. 82, 121—Civ. Pro. Code (1908), O. XLI, rr. 4, 30, 33—Appeal by some of the parties, against part of the decree—Whole decree, if can be reversed. **Ambika Charan Chakrabarti v. Sasitara Debi**, 22 O.L.J. 61=30 Ind. Cas. 868, See Final Part, 1915, Col. 1338.

(24) Unprobated will—If may be used by defendant to contest plaintiff's suit—Bequest by father to son—Property taken by son whether ancestral or self-acquired—Minor when may sue for partition—S. 187, Succession Act—Scope. **Sadagopa Naidu v. Thirumalaswami Naidu**, 18 M.L.T. 129=30 Ind. Cas. 972. See Final Part, 1915, Col. 1339.

(25) Life-estate given by testator—Gift over to daughters—Surviving daughter takes a vested

Will—(Continued).

remainder — Will — Construction. *Maftalal Motilal & Kanilal Trikamlal*, 17 Bom. L.R. 705=30 Ind. Cas. 915. See Final Part, 1915, Col. 1939.

(26) *Legacy—Legatee not entitled to legacy till he makes good anything which he owes to the testator's estate* *Halal v. Chaturbhuj Gopalji*, 17 Bom. L.R. 935=31 Ind. Cas. 500. See Final Part, 1915, Col. 1340.

(27) *Residuary clause — Construction — English rules inapplicable—Existence of fund unknown to testator—Right to the money — Release executed under mutual mistake—Effect.* *Kunthalammal v. P.N.K. Suryaprasad Mudalliar*, 29 M.L.J. 682=38 M. 1096=31 Ind. Cas. 494. See Final Part, 1915, Col. 1341.

(28) *Bequest of "6 acres of good irrigated nanja lands" out of 19 and odd acres—Bequest whether void for uncertainty—Construction of wills —Duty of Courts.* *Bharadwaja Mudalliar v. Kolandavala Mudalliar*, 29 M.L.J. 717=19 M. L.T. 141=31 Ind. Cas. 786. See Final Part, 1915, Col. 1341.

(29) *Hindu will — Construction — Malik—Nirbuyadha malik — Absolute interest, if and when can be cut down to lesser interest —Absolute interest and gift over—Gift over void — Intention — Language, if can be altered—Harsh consequences of rules of law.* *Sures Chandra Palit v. Lalit Mohan Dutta Chaudhuri*, 22 C.L.J. 316=20 O.W.N. 463=31 Ind. Cas. 405. See Final Part, 1915, Col. 1342.

(30) *Will not admitted to probate—Document, if admissible in evidence—Evidence Act, Ss. 13 cl. (a), 32, cl. (7).* *Moheswar Panda v. Sundar Narain Pattanaik*, 22 C.L.J. 551=33 Ind. Cas. 342. See Final Part, 1915, Col. 1343.

(31) *Placing of mark under direction of testator, if valid affixture of mark—Attestation. See ACT X OF 1865 (SUCCESSION), No. 6, 4 L.W. 255.*

(32) *Absence of attestation clause—Validity of.* See ACT X OF 1865 (SUCCESSION), No. 6, 30 Ind. Cas. 263.

(33) *Circumstances showing that testator had no disposing mind. See CUSTOMS (PUNJAB — INHERITANCE AND SUCCESSION), No. 5, 19 P.W.R. 1916.*

(34) *Authority given verbally to adopt—No directions for adoption contained in earlier will —Relevancy of will in estimating probabilities as to the adoption. See HINDU LAW (ADOPTION), No. 6, 20 O.W.N. 650.*

(35) *Execution by person suffering from plague—Mental incapacity. See HINDU LAW (ADOPTION), No. 12, 123 P.R. 1916.*

(36) *Burden of proof of will. See HINDU LAW (GUARDIANSHIP), No. 2, 30 M.L.J. 504.*

(37) *Property taken by sons under their father's, nature of. See HINDU LAW (JOINT FAMILY), No. 23, 33 Ind. Cas. 785.*

(38) *Setting up, of last male holder—Onus—Suit by reversioner for setting aside will as forgery and for declaration of invalidity of*

Will—(Concluded).

widow's alienation—Nature of suit—Limitation Act, Art. 93. See HINDU LAW (WIDOW), No. 16, (1916) 2 M.W.N. 325.

(39) *Life-estate to widow—Residue to gradsons of testator then in existence and thereafter to be born—Validity of will—Meaning and effect of S. 2 (2), Mad. Act I of 1914 (Hindu Transfers and Bequests). See HINDU LAW (WILL), No. 5, 31 M.L.J. 33.*

(40) *Application for succession certificate as heir—Right as legatee not set up—Genuineness of, not gone into—Registration. See LIMITATION ACT (1908), No. 165, 32 Ind. Cas. 99.*

(41) *Devise by a sunni Mahomedan, construction of. See MAHOMEDAN LAW (WILL), No. 1, 19 O.C. 319.*

(42) *See MALABAR LAW (ALIENATION), No. 2, 32 Ind. Cas. 459.*

(43) *Prima facie case—Revenue Court. See MINOR, No. 9, 32 Ind. Cas. 368.*

(44) *Will thirty years old—Proof of—Probate —Application for revocation—When to be made —Reversioner if can apply — Acquiescence—Delay—Effect—Compromise — Family settlement—Validity. See PROBATE, No. 1, 23 O. L.J. 82.*

(45) *Death of testator—Subsequent suit for mere declaration that will is null and void—Maintainability—Prayer for cancellation essential—Court-fee payable—S. 7 (IV) (c), Court Fees Act. See SPECIFIC RELIEF ACT, No. 25, 87 P.R. 1916.*

(46) *Document intending to operate on vendor's death, Construction of. See SPECIFIC RELIEF ACT, No. 24, 31 Ind. Cas. 77.*

(47) *Will of person domiciled abroad—If can be proved before will proved in country of domicile. See STRAITS SETTLEMENTS LIMITATION ORDINANCE, No. 1, 20 O.W.N. 833.*

Winding up of Company.

(1) *Company wound up—Winding up order, passed—Effect of order on Company's properties —Discharge of servants of company—Appeal. See COMPANIES ACT (1882), No. 7, 4 L.W. 226.*

(2) *Application by fully paid up share-holder —Effect of appointment of Receiver—Acquiescence to jurisdiction. See COMPANIES ACT (1913), No. 5, 36 Ind. Cas. 980.*

(3) *Power of one partner to mortgage firm's assets—Acknowledgment. See PARTNERSHIP, No. 8, 8 L.B.R. 363.*

Withdrawal of a Plea.

Pleader, authority of—Withdrawal binding on the party. See CONSTRUCTION OF DEED, No. 5, 34 Ind. Cas. 390.

Withdrawal of Attachment.

Specific Relief Act, S. 42—Suit for declaration after. See CIV. PRO. CODE (1908), No. 487, 9 Bur. L.T. 89.

Withdrawal of Suit.

(1) *Permission to withdraw suit—Omission to consider question of costs—Substantial injustice—Shirking of jurisdiction.* *Horl v. Sri Thakurji Maharaj*, 13 A.L.J. 10 (Rev.) = 31 Ind. Cas. 617. See Final Part, 1915, Col. 1345.

(2) See ACT XV OF 1882 (PRESIDENCY SMALL CAUSE COURT), No. 3, 36 Ind. Cas. 1003 = 5 L.W. 147.

(3) Leave to withdraw insolvency proceedings after adjudication, incompetent. See ACT III OF 1907 (PROVINCIAL INSOLVENCY), No. 7, 10 S.L.R. 47.

(4) See CIV. PRO. CODE (1908), No. 558, 34 Ind. Cas. 934.

(5) With liberty to file a fresh suit. See CIV. PRO. CODE (1908), No. 560, 32 Ind. Cas. 847.

(6) Absence of formal defect—Revision. See CIV. PRO. CODE (1908), No. 257, 36 Ind. Cas. 843.

(7) Application to withdraw from suit with liberty to sue again—Court if may grant application but without liberty. See CIV. PRO. CODE (1908), No. 561, 20 C.W.N. 1011.

(8) Pedigree filed with plaint being found wrong—No formal defect—Liberty to bring fresh suit. See CIV. PRO. CODE (1908), No. 557, 30 Ind. Cas. 351.

(9) Withdrawal without leave—Effect. See CIV. PRO. CODE (1908), No. 562, 24 C.L.J. 79.

(10) Withdrawal without permission—Second suit—Cause of action and relief different—Whether in respect of same subject-matter—If statutory bar. See CIV. PRO. CODE (1908), No. 555, 31 M.L.J. 48.

(11) Inability to adduce all the evidence at the first hearing—Order for withdrawal of suit with liberty to bring fresh suit—Validity—Fresh suit if barred by *res judicata*. See RES JUDICATA, No. 7, 23 C.L.J. 489.

Witnesses.

(1) Testimony of—Value of opinion of trial Judge—Witnesses who went over from one side to another—Non-citation of such witnesses by either side. See HINDU LAW (ADOPTION), No. 6, 20 C.W.N. 650.

(2) Trial Judge's appreciation of witnesses examined in his presence, value of. See PLEADINGS, No. 1, 20 C.W.N. 297.

(3) Deed of gift—Two persons signing as witnesses—One of them described as scribe—Effect—Validity of deed. See REGISTRATION ACT (1908), No. 32, 33 Ind. Cas. 33.

(4) Proof of deed of gift—Writer signing merely as writer—Evidence to show that writer signed as attesting. See TRANSFER OF PROPERTY ACT, No. 148, 36 Ind. Cas. 275.

Woman.

(1) Pauper suit by—Security not required. See CIV. PRO. CODE (1908), No. 571, 8 L.B.R. 387.

Woman—(Concluded).

(2) If can be enrolled as legal practitioner. See LEGAL PRACTITIONERS, No. 1, 24 C.L.J. 382.

Women's (Married) Property Act.

See ACT III OF 1874.

Worship.

(1) Application for temporary injunction restraining plaintiffs from preventing defendants entering and worshipping certain temples—Not maintainable. See CIV. PRO. CODE (1908), No. 627, 1 Pat. L.J. 560.

(2) Family temple—Idols and places of worship—Right to partition—Right of management by rotation. See HINDU LAW (RELIGIOUS ENDOWMENTS), No. 2, 9 S.L.R. 209.

Worshippers.

Religious Association—Roman Catholic Church—Claim by one section of worshippers to exclude another from a portion of the Church—Caste distinctions—Authority of the Bishop.

It is not competent to persons who have joined an established Church to introduce innovations contrary to the rules and tenets of that church. A claim on the part of a section of the Roman Catholic Indian Christians to exclude another section on the ground of alleged inferiority of caste from occupying seats in one wing of the church, to dictate to their clergy who shall and who shall not assist the priest in the ceremonial, and to control the arrangements for festivals, processions and custody is opposed to the rules and tenets of the Catholic Church and cannot be allowed. A concession by one Bishop of such privileges is not binding on the church or his successors in office. *Kattalal Michael Pillal v. Bishop of Trichinopoly*, 19 M.L.T. 249 = 3 L.W. 348 = 30 M.L.J. 423 = (1916) M.W.N. 307 = 39 M. 1056 = 34 Ind. Cas. 557.

SADASIVA AIYAR and NAPIER, JJ.

Writer.

Proof of deed of gift—Writer signing merely as writer—Evidence to show that, signed as attesting witness. See TRANSFER OF PROPERTY ACT, No. 148, 36 Ind. Cas. 275.

Writing.

Mortgages in India before the Transfer of Property Act (IV of 1882)—No, required. See STAMP, No. 1, 18 Bom. L.R. 904.

Written Statement.

(1) Pleadings—Specific denial—In absence of denial, facts alleged treated as admitted—Practice—Proof of letter. See CIV. PRO. CODE (1908), No. 368, 18 Bom. L.R. 946.

(2) Setting up of custom different from that pleaded in. See CUSTOM—GENERAL, No. 4, 36 Ind. Cas. 66.

(3) Suit for partition, by widow—Admissibility. See EVIDENCE ACT, No. 4, 33 Ind. Cas. 446.

Yati:

See **RELIGIOUS ENDOWMENTS**, No. 4, 35 Ind. Cas. 630.

Zamindar.

(1) Government lands under ryotwari tenure, purchased by—Jurisdiction of Civil Courts. See **MAD. ACT I OF 1908 (ESTATES LAND)**, No. 17, 39 M. 944..

(2) Muafdar, whether a. See **ACT VIII OF 1873 (NORTHERN INDIA CANAL AND DRAINAGE)**, No. 1, 32 Ind. Cas. 556.

(3) See **ADVERSE POSSESSION**, No. 4, 35 Ind. Cas. 60=21 C.W.N. 199.

(4) Position of the Inamdar same as, under Permanent settlement—Inamdar not a permanent lessee under Government. See **CROWN GRANTS**, No. 1, 31 M.L.J. 483.

(5) 'Protected' gaontia—Power to relinquish—Surrender of tenure to—Validity—Gaontia not empowered to grant permanent rights. See **GAONTIA**, No. 1, 1 Pat. L.J. 293.

Zamindari.

(1) *Permanently Settled Estate—Area can be changed by an agreement between Zamindar and Government—Agreement by Zamindar to hold ryoti land on ryotwari patta—Rent suit—Jurisdiction.*

The area of a permanently settled partible estate can be diminished or increased by agreement between the Zamindar and the Government, provided the rights of third parties are not affected thereby.

Where therefore the holder of a partible Zamindari agreed with the Government, before the Estates Land Act came into force, to hold certain ryoti lands comprised in his sunnud on

Zamindari—(Concluded).

ryotwari tenure and the rights of the tenants were not affected thereby: *Held*, that the lands ceased to form part of the permanently settled estate and a suit for rent lay in the Civil Court and not in the Revenue Court. **Varadaraja Appa Rao Bahadur v. Ganesalla Punnayya**, 30 M.L.J. 545=19 M.L.T. 338=34 Ind. Cas. 696.

SADASIVA AIYAR and NAPIER, JJ.

(2) Gift of undivided share of, village—What constitutes delivery. See **GIFT**, No. 2, 31 M. L.J. 607.

(3) *Sunnad granted to zamindar—Permanent Settlement of revenue—Certain inams not specially reserved—Right of Government to resume or assess such lands to public revenue—Grant—Construction—Grant whether ultra vires.* See **MAD. REGULATION XXV OF 1802 (PERMANENT SETTLEMENT)**, No. 2, 31 M.L.J. 97.

Zar-i-Chaharum.

Right to sue—*Terminus a quo*—Completion of sale—Limitation. See **LIMITATION ACT (1908)**, No. 199, 14 A.L.J. 382.

Ziladar.

(1) Suit against, and Mukhtar for rent collected—Limitation prescribed by Oudh Rent Act, applicability of, to suits in Civil Courts. See **JURISDICTION OF CIVIL AND REVENUE COURTS**, No. 4, 19 O.C. 314.

Zur-i-peshgi Lease.

Suit for damages for breach of covenant in a registered. See **LIMITATION ACT (1908)**, No. 192-b, 34 Ind. Cas. 51.

SUPPLÉMENT.

Digest of Mysore Chief Court Reports.

.. (Civil Cases). .

Appeal (Second Appeal).

Suit for Permanent Injunction—Concurrent findings on question of title—Different findings on question of possession—Dismissal of suit—Second appeal—Right of respondent to question concurrent findings of facts in support of the appellate decree—Civ. Pro. Code, O. XL, r. 22, O. XLII, r. 1, Ss. 100 and 101, discussed.

The Chief Court cannot in second appeal be called upon by either party to go behind findings of fact which are not divergent. **Chlek Sankarayya v. Dodda Sankarayya**, 20 Mys. 315.

CHANDRASEKHARA AIYAR and PARAMASIVA IYER, JJ.

Chief Court Circulars.

Circular No. 179 of 1905. See EXECUTION OF DECREE, No. 1, 20 Mys. 312.

Civ. Pro. Code (Mysore).*

(1) S. 48 (1) (b)—*Execution of decree—Limitation.*

An order transferring a decree for execution to another Court is not a final disposal of the application on which the order was passed, and its withdrawal and representation to the Court which passed the decree is not a fresh application but a continuation of the original application. **Raghavendrappa v. Raja Rao**, 20 Mys. 284.

CHANDRASEKHARA AIYAR and PARAMASIVA IYER, JJ.

(2) S. 98 (2)—*Chief Court Regulation, S. 15 (3) as amended by Reg. III of 1911—Conflict—Material question—Difference of opinion between Judges constituting a Bench.*

When two Judges constituting a Bench differ on a material question, it is open to them to take either of the courses laid down in S. 15 (3) of the Chief Court Regulation as amended by Reg. III of 1911 (the Code of Civil Procedure). Per **Miller, C.J. and Paramasiva Iyer, J.**—A material question may be a question either of law or fact. Per **Chandrasekhara Aiyar, J.**—There is no real conflict between S. 98 (2) of the Civ. Pro. Code and S. 15 (3) of the Chief Court Regulation. A question of fact dependent merely on an appreciation of evidence is not a material question within the contemplation of S. 15 (3) of the Chief Court

Civ. Pro. Code (Mysore)—(Concluded).

Regulation. **Mudde Gowda v. Dyavamma**, 20 Mys. 247 (F.B.).

MILLER, C.J., CHANDRASEKHARA AIYAR and PARAMASIVA IYER, JJ.

(3) O. II, r. 5—*Joinder of causes of action—Claim by heir as such.*

The suit was instituted by three partners for the recovery of two debts from the defendant. In respect of a portion of the claim the three plaintiffs were partners and in respect of the remainder the third plaintiff based his right on the footing that his right to recover from the defendant had devolved on him on the death of his father who was during his life a partner of the firm. Objection was taken that the suit as framed contravened the provisions of O. II, r. 5 of the Civ. Pro. Code.

Held, that the plaintiff was not prevented by that rule from joining a claim, to which he was entitled personally by reason that it had devolved on him by succession to a deceased person, with one to which his title was acquired otherwise. **Iddaji v. Sunnilal**, 20 Mys. 303.

MILLER, C.J., and PARAMASIVA IYER, J.
References:—18 A. 256; 31 B. 105, F.

(4) O. XXXII, r. 7 (2), S. 115—*Compromise on behalf of a minor without leave—Decree set aside in a subsequent suit—Parties remitted to their original rights—Effect of decree—Restoration to the file of the compromised suit—Jurisdiction of the Court.*

Where a compromise effected on behalf of a minor without the leave of the Court is made the basis of a decree and that decree is subsequently set aside in a suit by the minor, after attaining majority, the parties are entitled to take up the litigation at the point where it was dropped in consequence of the compromise, and for that purpose, to apply to the Court which passed the decree on the compromise to restore the suit to file and continue it. That Court has jurisdiction to restore and continue the suit, and a refusal to do so may be corrected by the Chief Court under S. 115 of the Code. **R. Pommiah v. Sangamma**, 20 Mys. 263.

MILLER, C.J. and PARAMASIVA IYER, J.

(5) O. XLI, r. 22, O. XLII, r. 1, and Ss. 100, 101—Scope. See APPEAL (SECOND APPEAL), No. 1, 20 Mys. 315.

Compromise.

Compromise on behalf of a minor without leave—Decree set aside in a subsequent suit—

Compromise—(Concluded).

Parties remitted to their original rights—Effect of decree—Restoration of the compromised suit to the file—Jurisdiction of the Court. See CIV. PRO. CODE (MYSORE), No. 4, 20 Mys. 263.

Contract.

Deed of hypothecation consolidating and renewing old bond-debts—Deed invalid for want of registration—Right to sue on the original bonds. See NOVATION, No. 1, 20 Mys. 243.

Contribution.

Costs—Suit for contribution—Joint wrong doers—Previous judgment—Relevancy. See COSTS, No. 1, 20 Mys. 274.

Costs.

Contribution, suit for—Joint wrong-doers—Previous judgment—Relevancy.

The judgment in a previous suit in which the present parties were ranged as co-defendants is relevant and conclusive in so far as it holds that both of them were liable for costs to the plaintiff in that suit. It is not *conclusive* on the question of the liability of the parties to contribute as among themselves or the extent of such liability; but it may be *relevant* for the purpose of determining the said question, as for instance where the direction in regard to the defraying of costs rested largely on a finding that the defence was false to the knowledge of the parties making it; such a finding would raise a presumption in the matter. The record of the previous litigation may be relied on as evidence in so far as it tends to establish the collusive conduct alleged. *Brahmayya v. Nagarajayya*, 20 Mys. 274.

CHANDRASEKHARA AIYAR and PARAMA-SIVA IYER, JJ.

Court Fees Regulation.

S. 3, Sch. I, Art. 5. See EXECUTION OF DECREE, No. 1, 20 Mys. 312.

Evidence Act (Mysore).

S. 91, *Excep. 2—Wills—Probate.*

Under *Excep. 2* to S. 91 of the Evidence Act as in force in Mysore, Wills admitted to probate in the Civil and Military Station of Bangalore may be proved by the probate. *In re Sundaramma*, 20 Mys. 310.

CHANDRASEKHARA AIYAR and PARAMA-SIVA IYER, JJ.

Execution of Decree.

(1) *Application for re-transfer—Presentation of Court fee stamp of eight annas with a memorandum for a transfer order—Chief Court Circular No. 179 of 1905—Court Fees Regulation, S. 3, Sch. 1, Art. 5—Step-in-aid-of execution—Limitation Regulation, Art. 182.*

As long as the authorized practice of the Courts requires a decree-holder to file a copy of the order passed for transfer or re-transfer of the decree from one Court to another for execution, the copy filed of such order must necessarily bear a Court-fee stamp. Consequently the presentation by decree-holder of a process memorandum along with the Court-fee required

Execution of Decree—(Concluded).

for the re-transfer order is a step-in-aid of execution within the meaning of Art. 182 of the Limitation Regulation. *Sooranna v. Shama Rao*, 20 Mys. 312.

CHANDRASEKHARA AIYAR and PARAMA-SIVA IYER, JJ.

*Reference:—*16 Mys. C.O.R. 107, R.

(2) *Order transferring decree for execution—Withdrawal and re-presentation to the Court which passed the decree—Not a fresh application but a continuation of the original application.* See CIV. PRO. CODE (MYSORE), No. 1, 20 Mys. 284.

Hindu Law (Alienation).

Alienation by widow—Legal necessity—Extent—Reversioner's rights. See HINDU LAW (WIDOW), No. 1, 20 Mys. 293.

Hindu Law (Marriage).

Agreement not to remove wife from her parental abode—Validity. See HUSBAND AND WIFE, No. 1, 20 Mys. 277.

Hindu Law (Widow).

Alienation by Hindu widow—Legal necessity—Extent—Reversioner's rights.

Where the alienee has done all that is reasonable to satisfy himself of the existence of necessity for the alienation by a Hindu widow, and where as a matter of fact necessity is established in respect of a very substantial portion of the consideration, the fact that there is a relatively small balance not properly accounted for does not necessarily vitiate the alienation, the true test being whether in the facts and circumstances of the particular case the transaction was a proper one and for the benefit of the estate.

Where money is borrowed in order to meet the expenses of the Upanayanam of a son adopted by a Hindu widow, the fact that the adoption is subsequently adjudged to be invalid does not affect the character of the debt as one covered by legal necessity. *Subbanna v. Venkatesiah*, 20 Mys. 293.

MILLER, C.J., and CHANDRASEKHARA AIYAR, J.

*Reference:—*14 C.W.N. 895, R.

Husband and Wife.

Agreement not to remove wife from her parental abode—Validity.

An agreement by which a Hindu husband undertakes not to remove his wife from the house of her foster-parents, and in the event of doing so, to return the marriage expenses incurred by the latter is invalid, even though the agreement be prompted by affection. *Kappanna v. Putteeranna*, 20 Mys. 277.

CHANDRASEKHARA AIYAR and PARAMA-SIVA IYER, JJ.

*Reference:—*48 C. 751, F.

Interest.

Penal provision regarding—Relief by executing Court. See INSTALMENT DECREE, No. 1, 20 Mys. 299.

Instalment Decree.

Compromise decree—Meaning of "default in respect of any two instalments" explained—Interest—Relief against penalty.

Where an instalment decree directed that, in default of payment of any two instalments, the whole of the decretal amount then due should be paid with interest at 12 per cent. thereon from the date of suit to that of payment.

Held that the expression "any two instalments" meant any two consecutive instalments.

Held also that the provision regarding payment of interest was of a penal nature, as the decree amount already included future interest, and that it could be relieved against by the executing Court. *Sannapa v. Mallapa Jole*, 20 Mys. 299.

CHANDRASEKHARA AIYAR and PARAMASIVA IYER, JJ.

Limitation Regulation.

Art. 182—What amounts to a step-in-aid of execution. See EXECUTION OF DECREE, No. 1, 20 Mys. 312.

Maintenance.

Hindu Law—Decree creating charge on family property—Right to execute against sons of defendants though not actually made parties.

A widow sued two undivided brothers of her husband and their father for maintenance and obtained a decree creating a charge on the family property. The plaintiffs who were the minor sons of one of the brothers sued for a declaration that their 5/18th share in the family properties are free from the charge on the ground that they were not parties to the suit for maintenance.

Held, that the decree could be executed against their shares in the family property. *Dodda Nanjundappa v. Rudramma*, 20 Mys. 245.

MILLER, C.J. and PARAMASIVA IYER, J.

Minor.

Compromise on behalf of a minor without leave—Decree set aside in a subsequent suit—Parties remitted to their original rights—Effect of decree—Restoration of the compromised suit to the file—Jurisdiction of Court. See CIV. PRO. CODE (MYSORE), No. 4, 20 Mys. 263.

Mysore Rules of Practice.

No. 109—Special vakalatnamah to receive money from Court.

If his vakalatnamah contains an express authority to a pleader to draw moneys on his clients' behalf, no separate special power need be produced to enable him to do so. *Gurava Reddi v. Batcha Mia Sahib*, 20 Mys. 262.

MILLER, C.J. and CHANDRASEKHARA AIYAR, J.

Novation.

Deed of hypothecation consolidating and renewing old bond debts, invalid for want of registration—Right to sue on the original bonds.

In a suit to recover money due on three bonds, it was admitted that a hypothecation bond was

Novation—(Concluded).

executed by the debtor in satisfaction of the three prior bond debts, but it was stated that the debtor had denied execution of this deed and left it unregistered. On these admissions in the plaint the Munsif found that the plaintiff had no cause of action on the three bonds since it was admitted that a hypothecation bond evidencing a new contract had come into existence notwithstanding the fact that it was unregistered.

Held, the unregistered document being valueless as a hypothecation, the novation agreed upon was not completed and it was open to plaintiff either to enforce specific performance by way of compulsory registration of the hypothecation deed or to accept a repudiation, put an end to the new agreement, and sue on the original bonds. *Mullingiah v. Chikka*, 20 Mys. 243.

MILLER, C.J. and CHANDRASEKHARA AIYAR, J.

Registration Regulation (I of 1903).

(1) S. 48—Priority — Fraud — Possession—Notice.

A person claiming under a document which has been registered in fraud of a person claiming under an earlier unregistered document, and in collusion with the executant, is not entitled to priority (a).

The right of a person in possession under an oral agreement for sale is saved as against a subsequent purchaser under a registered document by the protection afforded by S. 48 of the Registration Regulation of 1903. *Peer Sab v. Kaday Gauda*, 20 Mys. 306.

CHANDRASEKHARA AIYAR and PARAMASIVA IYER, JJ.

References :—(a) 17 C.W.N. 157 ; 4 B. 126, R.

(2) Ss. 73 and 77 —Right of suit when application under S. 73 is dismissed for default of prosecution—Points for determination in a suit under S. 77.

Where a Sub-Registrar refused to register a will presented for registration under S. 32 of the Registration Regulation, and the District Registrar dismissed for default the application preferred to him under S. 73 of the Regulation.

Held that the applicant was entitled to sue under S. 77 of the Regulation and that questions as to the validity of the will and the method of enforcing its provisions, if valid, were not for determination in that suit. *Vittoba, Rao v. Subramaniappa*, 20 Mys. 301.

MILLER, C.J. and PARAMASIVA IYER, J.

References :—13 O. 264, F. ; 34 A. 165 ; 9 C. 150 ; 24 C. 668 ; 29 A. 284 ; 18 M. 255 ; 19 Mys. C.C.R. 124, R.

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Special vakalatnamah to receive money from Court, when necessary. See MYSORE RULES OF PRACTICE, No. 1, 20 Mys. 262.

Will.

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